DIGEST

CANADIAN CASE LAW

1900-1911

COMPILED BY

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Abbreviations used in this Digest.

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

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VOLUME 2

ICE.

Navigable waters—*Trespass on private waters.*]—An ice company, in harvesting ice from navigable waters at a distance from the shore, may use any reasonable means of conveying it to their ice-houses, and for that purpose may cut a channel through private water lots through which to float the ice. Judgment in 26 A. R. 413, 19 C. L. T. 268, reversed, and that in 29 O. R. 247, 18 C. L. T. 178, restored; Strong, C.J., and Taschereau, J., dissenting. *Macdonald* v. *Lake Simcoe Ice and Cold Storage Co.* 21 C. L. T. 221, 31 S. C. R. 130.

See NEGLIGENCE — WATER AND WATERCOURSES.

ILLEGAL ARREST.

See JUSTICE OF THE PEACE.

ILLEGAL CONTRACT.

See CONTRACT.

ILLEGAL DISTRESS.

Damages — Violation of agreement for suspension — Trespass — Conversion — Measure of damages—Seizure and sale of stock of business—Interference with business —Goodwill, allowance for—Chattel mortgage —Acceleration of payment—Chattel mortgagee distraining as landlord—Appropriation of payments. *Stone* v. *Brooks*, 7 O. W. R. 463, 732.

See CRIMINAL LAW — DISTRESS — LANDLORD AND TENANT—TRIAL.

ILLEGAL EXPENDITURE.

See MUNICIPAL CORPORATIONS—PARLIAMENTARY ELECTIONS.

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ILLEGAL VOTING.

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See CONTRACT—PAYMENT.

ILLEGITIMATE CHILD.

See INFANT.

IMMIGRATION.

Chinese Immigration Act — Breach —Arrest — Personation — False certificate —Habeas corpus. *Rex* v. *Seventeen Chinamen*, 3 E. L. R. 551.

Chinese Immigration Act — *Offence against—Criminal character of same—Committment for trial—Reserved case—Discharge of prisoners—Malicious prosecution—Costs.*]—A number of Chinamen had been clandestinely landed on the shore of Cape Breton. The customs officer at Sydney detailed the defendant to look after the matter, who with the aid of the Sydney police rounded them up and put them in prison. Their names were unknown, and no warrant had been issued. Subsequently a warrant was issued, but no offence having been disclosed, the prisoners were discharged. Another information was then laid, and these men were again put in custody, and the County Judge convicted

them, but the Supreme Court of Nova Scotia discharged the prisoners. Eight of them now brought actions against defendant for false imprisonment. No malicious prosecution was alleged. Damages awarded plaintiffs. *Chen Fun* v. *Campbell*, 7 E. L. R. 147.

Disease — *Prohibition as to immigrants landing—Immigration Act — Amendment of 1902—Proclamation—Effect of—Deportation —Habeas corpus—Jurisdiction of Court.*]— A proclamation was issued and published in the Canada Gazette, empowering the Minister of the Interior, or any officer appointed by him for the purpose, in pursuance of the amendment to the Immigration Act, 1902, c. 14, to prohibit the landing in Canada of any immigrant or other passenger suffering from any loathsome or infectious disease, and who, in the opinion of the Minister, or such officer, should be so prohibited:—*Held*, on appeal (affirming the order of Morrison, J.), that the statute and the proclamation issued thereunder merely authorised the deportation of the diseased person; but did not take away the right of the Court to decide the question of fact on a proper application; and the Judges are bound to inquire into the matter on an application for *habeas corpus*. —Parliament not having made the examination by the immigration officer final, the statute is not to be construed as ousting the jurisdiction of the Court to examine into the legality of the detention on a proper application.—Effect of *Cox* v. *Hakes*, 15 App. Cas. 506, discussed. *Herzoga* v. *Canadian Pacific Ry. Co.*, 12 B. C. R. 454.

Immigrants detained on vessel for deportation — *Habeas corpus — Escape— Liability for penalties.*]—The owners, master and others of a vessel on which immigrants are detained for deportation, who land them and produce them in Court in obedience to a writ of *habeas corpus*, are not liable for the penalties imposed by the Immigration Act, R. S. C. c. 93, s. 66, if, in the interval of the landing, the immigrants, or any of them, escape without their aid or abetting. *Sifton* v. *Balls*, 35 Que. S. C. 259, 6 E. L. R. 222.

"Passenger" — *Resident of Canada* — A resident of Canada, returning from a visit abroad, is not a "passenger" or an immigrant who is subject to the provisions of the Immigration Act. *Re Chin Chee*, 11 B. C. R. 400, 2 W. L. R. 237.

See Aliens—Constitutional Law.

IMMORAL CONSIDERATION.

See Vendor and Purchaser.

IMMORALITY.

See Evidence—Infant—Insurance.

IMPERIAL DEBTORS ACT.

See Judgment Debtor.

IMPORTATION OF GOODS.

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IMPORTING ALIEN LABOURERS.

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IMPOSSIBILITY OF PERFORMANCE.

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See Husband and Wife—Marriage.

IMPRISONMENT.

See Arrest — Bankruptcy and Insolvency — Carriers—Criminal Law—Company — Contempt of Court — False Arrest and Imprisonment — Fisheries — Indian — Infant—Intoxicating Liquors—Judgment Debtor—Justice of the Peace—Liquor Licenses — Malicious Prosecution and Arrest — Municipal Corporations—Seamen's Act.

IMPROVEMENTS.

Allowance for — Mistake—Title—Use and occupation—Interest—Parties. *Chandler* v. *Gibson*, 2 O. W. R. 843, 3 O. W. R. 414.

Claim for — *Bona fides — Notice of title being disputed.*] — Good faith is the essential condition of the right of the possessor of immovable property to claim the value of improvements upon it. When he claims it by plea to a petitory action, it is a good answer that the improvements were made after notice to him by protest that his title was disputed. *Gervais* v. *Benjamin*, 35 Que. S. C. 479.

Crown lands — *Squatter — Sale of rights — Payment for improvements—Set-off of profits—Possession "in good faith."*]—A person in possession of land is not a possessor in good faith, within the meaning of Art. 411, C. C., unless he is in possession *animo domini*. Therefore, a squatter who abandons or sells his rights in a lot which is part of the Crown domain, and who continues to occupy after his purchaser has obtained a title by letters patent from the Crown, is not in possession in good faith, and is not entitled to the issues and profits of the lands. He cannot, therefore, claim from the owner who revendicates it the cost of his improvements unless upon setting off the value of the profits received. *Ellard* v. *Miljour dit Miniquette*, 16 Que. K. B. 545.

Demand of possession — *Subsequent improvements — Mistake of title — Delay in bringing action — Lien.*]—The defendant

and a life tenant of certain lands lived together thereon, the defendant *bona fide* believing that the land was or would be hers on the life tenant's death. After the life tenant's death the defendant continued living on the land and made improvements thereon. About a year and a half after the life tenant's death the defendant was served with a notice demanding possession, and stating that unless possession was given within a reasonable time a writ would be issued. No action was taken upon the demand, and the defendant, who was an illiterate woman, remained in possession, and under such belief of title continued to make improvements; and it was not until some seven years afterwards, when another notice has been served on her, that an action was brought to recover possession, the bulk of the improvements having been made during the period between the two notices:—*Held*, that under the circumstances the defendant was entitled to the value of her improvements. *Corbett* v. *Corbett*, 12 O. L. R. 268, 8 O. W. R. 88.

Lien for — *Purchase money—Occupation rent—Mistake of title.*]—Under the circumstances of this case, the defendants having taken possession of land under an agreement to purchase in fee, with covenants for good title free from incumbrances, from the plaintiff, who claimed under a devise which was construed to be of a life estate only, the defendants were declared to have a lien on the land for lasting improvements made and purchase moneys paid after being charged with a fair occupation rent. *Young* v. *Denike*, 22 C. L. T. 27, 2 O. L. R. 723.

Lien for — *Title—Sale by occupant — Rents and profits—Set-off.*]—The sale of an immovable made by one who occupies it without being the legal owner, gives to the purchaser a title within the meaning of Art. 412, C. C. Therefore, his possession by virtue of such title, if it be in good faith, will assure him, as regards his improvements, the rights contemplated by Art. 417, C. C., and entitle him to the profits which he receives, without set-off against the amount to be paid in respect of improvements: Art. 411, C. C. *St. Lawrence Terminal Co.* v. *Hallé*, 16 Que. K. B. 127.

Mistake of title — Administration proceeding — Life tenant — Belief in ownership in fee simple — Report — Reference back—Inquiry as to improvements — Evidence—Costs. *Re Coulter, Coulter* v. *Coulter*, 10 O. W. R. 342.

See ASSESSMENT AND TAXES—CONTRACT —CROWN LANDS — COVENANT — DOWER— EJECTMENT—LAND ACT — LIMITATION OF ACTIONS—LIEN — MORTGAGE — MUNICIPAL CORPORATIONS—PARENT AND CHILD—PLEADING—PARTITION — RAILWAY—SEIGNIORIAL LANDS—TRUSTS AND TRUSTEES — VENDOR AND PURCHASER — WATER AND WATERCOURSES—WAY—WILL.

IMPROVIDENCE.

See CONTRACT — CROWN — HUSBAND AND WIFE.

INCENDIARISM.

See DEFAMATION.

INCEST.

See CRIMINAL LAW.

INCIDENTAL DEMAND.

See CONTRACT — COSTS — PEREMPTION— PLEADING.

INCOME.

See ASSESSMENT AND TAXES—WILL.

INCOME TAX.

See ASSESSMENT AND TAXES — CONSTITUTIONAL LAW—REVENUE.

INCUMBRANCES.

See VENDOR AND PURCHASER—WILL.

INDECENCY.

See CRIMINAL LAW—PUBLIC MORALS.

INDEMNITY.

Agents by principal — *See* PRINCIPAL AND AGENT.

Appeal by third parties in name of defendants — Security — Bond — Covenant —Form—Construction of order—Amount of indemnity—Costs. *Deseronto Iron Co.* v. *Rathbun Co. of Deseronto*, 3 O. W. R. 697, 4 O. W. R. 44, 6 O. W. R. 688.

Contract — Construction of works for municipal corporation—Liability for injuries to persons—Provisions of contract—Agreement with another contractor — Want of privity—Costs of defending action — Third party. *Gaby* v. *Toronto*, 1 O. W. R. 440, 606, 635, 711.

Death caused by negligence—Electric wires—Joint tort-feasors — Liability of one to the other — Third party proceedings— Findings of jury — Determination of claim for indemnity or relief over. *Wright* v. *Port Hope Electric Co.*, 11 O. W. R. 688.

Enforcement of mortgage—Judgment —Damages — Expenses — Loss by sale of goods by sheriff—Costs—Travelling expenses —Interpleader order. *Boulton* v. *Boulton*, 2 O. W. R. 884, 5 O. W. R. 177.

Implied obligation — Assignment — Right of action — Vendor and purchaser—Parties — Amendment. *Brough* v. *McClelland*, 9 W. L. R. 6.

Right of action en garantie.]—The defendant is not entitled to bring an action *en garantie* (and to obtain a stay of the principal action) where the defendant is himself the principal debtor and the person whom he seeks to charge *en garantie* has engaged to pay the debt for which he is sued. The object of the action *en garantie* is to defend and indemnify; a simple case of *garantie* is where one person is sued for a debt which is not his; he has then the right to call upon the principal debtor to intervene and defend him, and, if the defence is not successful, indemnify him. *Rocher* v. *David*, 3 Que. P. R. 398.

Right of action en garantie.]—Recourse in warranty exists wherever the person sought to be charged as warrantor is, by the effect of an agreement between him and the party so seeking to charge him, bound to protect the latter or indemnify him for the condemnation sought to be obtained against him. *Chenevert* v. *David*, 3 Que. P. R. 201.

Right to — Claim for damages—Third party notice—Appearance—Objection on return of summons for directions. *McFee* v. *Young* (N.W.T.), 1 W. L. R. 383.

See EXECUTORS AND ADMINISTRATORS—PRINCIPAL AND AGENT—RECEIVER—REPLEVIN—WAY.

INDEPENDENT CONTRACTOR.

See CARRIERS — MASTER AND SERVANT—MUNICIPAL CORPORATIONS — NEGLIGENCE—TRESPASS TO LAND — WATER AND WATERCOURSES—WAY.

INDIAN.

Claim for restitution of moneys to trust fund — *Exchequer Court Act, s. 16 (d)—Discretion of Superintendent-General—Jurisdiction of Exchequer Court to interfere—Crown as trustee—Effect of treaties.*] — A claim against the Crown based upon s. 111 of the British North America Act, 1867, and upon Acts of the legislature of the province of Canada and of the Parliament of Canada, is a claim "arising under any law of Canada," within the meaning of clause (d) of s. 16 of the Exchequer Court Act. *Yule* v. *The Queen*, 6 Ex. C. R. 123, 30 S. C. R. 35, referred to. 2. Where the Court has no jurisdiction to grant relief in an action, it has no authority to make a declaration binding the rights of the parties. This rule should be strictly followed in all cases where the jurisdiction of the Court depends upon statute and not upon common law. *Barraclough* v. *Brown*, [1897] A. C. 625, referred to. 3. It does not follow that because the Crown is a trustee the Court has jurisdiction to enforce the trust or to make any declaration as to the rights of the parties interested. That authority, if it exists, must be found in the statutes which give the Court jurisdiction. The real question in such a case is not whether the Crown may or may not be a trustee, but whether the Court has jurisdiction with respect to the execution of the trust. 4. While under the provisions of certain treaties and of certain statutes of the legislature of the province of Canada and of the Parliament of Canada, the Crown stands in the position of trustee for the Indians in respect of certain lands and moneys, such position is not that of an ordinary trustee. The Crown does not personally execute the trust; the Superintendent-General of Indian Affairs having, under the Governor in council, the management and control of such lands and moneys. For the manner in which the affairs of the Indians are administered the Dominion Government and the Superintendent-General are responsible to Parliament, and Parliament alone has authority to review the decision arrived at or the action taken by them. In all such cases the Court has no jurisdiction to review their discretion. Then there is this further difference between the Crown as a trustee and an ordinary trustee, viz., that the Crown is not bound by estoppel, and no *laches* can be imputed to it; neither does it answer for the negligence of its officers. 5. Under the treaty of the 28th February, 1820, there is nothing to prevent the Crown from making provision for the maintenance of the Mississauga Band of Indians out of any capital moneys arising from the sale or leasing or other disposition of surrendered lands. 6. Under treaty No. 19, made on the 28th October, 1818, the Crown's obligation is to pay the Mississaugas of the Credit a fixed annuity of $2,000. So far as this treaty is concerned, the Crown is not a trustee but a debtor; and the right of the Indians to such annuity cannot be impaired by any departmental adjustment of the Indian funds to which the Indians themselves are not parties. *Henry* v. *Rex*, 25 C. L. T. 141, 9 Ex. C. R. 417.

Conviction for selling liquor to — Indian Act — *Mens rea* — Presumption—Evidence. *Rex* v. *Pickard* (Alta.), 7 W. L. R. 797, 14 Can. Crim. Cas. 33.

Conviction for unlawfully practising medicine — *Ontario Medical Act — Application to unenfranchised Indians — Constitutional law — Stated case — R. S. O. 1897 c. 91, s. 5.*]—The defendant, an unenfranchised treaty Indian, residing on a reserve, was convicted for having practised medicine for hire, in Ontario, but not upon the reserve, without being registered pursuant to the provisions of the Ontario Medical Act, R. S. O. 1897 c. 176; and upon a case reserved by the convicting magistrate it was contended that that Act was *ultra vires* of the provincial legislature, because Indians of the class or having the status of the defendant are wards of the Dominion, and subject in all relations of life only to federal legislation, under s. 91 (24) of the British North America Act:—*Held*, that the defendant was subject to the provisions of the Medical Act, and was properly convicted. —Per Osler, J.A.:—Parliament may remove an Indian from the scope of the provincial laws, but to the extent to which it has not done so, he must in his dealings outside the

reserve govern himself by the general law which applies there.—*Semble*, also, per Osler, J.A., that the question was not one proper to be raised by means of a special case stated under R. S. O. 1897 c. 93, s. 5. The Medical Act does not in terms profess to be applicable to Indians, and the question was really whether it could be interpreted as applicable to them, not whether it was *ultra vires* if applicable to them. *Rex* v. *Hill*, 15 O. L. R. 406, 11 O. W. R. 29.

Half-breed — *Indian Act — Band — Repute.*]—The Indian Act, R. S. C. c. 43, defines (s. 2 h) "Indian" as meaning *inter alia* "any male person of Indian blood reputed to have actually belonged to a particular band:"—*Held*, (1) against the contention that "of Indian blood" means of full Indian blood or at least of Indian blood *ex parte paterna* — that a half-breed of Indian blood *ex parte materna* is "of Indian blood." (2) Against the contention that the defendant having been shewn to have actually belonged to a particular band, this disproved, or was insufficient to prove, that he was reputed to belong thereto—that the intention of the Act is to make proof of mere repute sufficient evidence of actual membership in the band. (3) Against the contention that by virtue of s. 11 the mother of the defendant by her marriage to his father, who was a white man, ceased to be an Indian, and that therefore the defendant was not a person of Indian blood — that while the mother lost her character of an Indian by such marriage, except as stated in that section, it did not affect her blood which she transmitted to her son. *Regina* v. *Howson*, 1 Terr. L. R. 492.

Intoxicating liquor — *Sale — Knowledge of licensee—Half-breed.*]—Section 94 of the Indian Act (R. S. C. 1886 c. 43) provides that "Every person who sells, exchanges with, barters, supplies or gives to any Indian or non-treaty Indian, any intoxicant shall on summary conviction be liable to imprisonment for a term not exceeding six months:"—*Held*, following *Regina* v. *Howson*, 1 Terr. L. R. 492, that a half-breed who has "taken treaty" is an Indian within the meaning of the Indian Act. A conviction of a person licensed to sell liquor, for the sale of an intoxicant to such half-breed was, however, quashed, because the licensee did not know and had no means of knowing that the half-breed shared in Indian treaty payments. *Mens rea* must be shewn. *Regina* v. *Mellon*, 22 C. L. T. 343, 5 Terr. L. R. 301.

Sale of intoxicating liquor to—*Quarter-breed alleged to follow Indian life—Indian Act — Mens rea — Conviction — Notice of appeal.*]—A quarter-breed is as much entitled to purchase intoxicating liquor as a white man, provided he does not come within the amendment to the Indian Act by 57 & 58 V. c. 32, s. 6.—The defendant was convicted for selling intoxicating liquor to an Indian, but the evidence shewed that N., the alleged Indian, was a quarter-breed, and there was nothing to shew that the defendant knew or had reason to suspect that N. was reputed to belong to a particular band or followed the Indian mode of life:—*Held*, that the conviction must be quashed.—*Held*, also, that the notice of appeal was sufficient, being in accordance with s. 879 *et seq.* of the Code, which governed in the absence of any provision in that behalf in the Indian Act. *Rex* v. *Hughes*, 12 B. C. R. 290, 4 W. L. R. 431.

Sale of land by — *Prohibition of Indian Act, ss. 99-102—Deed executed before issue of Crown patent — Subsequent deed after patent — Rights and obligations of Indians — Estoppel — Application of Manitoba Estoppel Act to Indians — Manitoba Real Property Act — Caveat.*] — The petitioner, *cavcator*, was a treaty Indian, who before receiving a Crown patent for his land, agreed to sell same to P. He executed a deed in which the grantee instead of being P., was the defendant. After the issue of the patent another deed was delivered to the defendant. The *cavcator* having applied for a certificate of title under the above Real Property Act, *held*, that although an Indian he was a British subject and had a right to sell. The deed was not void as being prohibited by the Indian Act, nor was it procured by fraud:—*Held*, further, that the Estoppel Act applies to the petitioner. Petitioner to have one month to begin an action to establish a vendor's lien for unpaid purchase money and such other relief as he may be advised. *Sanderson* v. *Heap*, 11 W. L. R. 238.

Sale of timber — *Registration—Notice.*]—The locatee of Indian lands is, except as against the Crown, in the same position as if the land had been granted to him by letters patent, and can assign his interest in the land or in the timber. Actual notice of such an assignment, even though the assignment has not been registered in accordance with the provisions of the Indian Act, is sufficient to prevent a subsequent assignee from obtaining priority. Judgment of Ferguson, J., 6 O. L. R. 370, 2 O. W. R. 738, 23 C. L. T. 287, affirmed. *Bridge* v. *Johnston*, 24 C. L. T. 316, 8 O. L. R. 196, 4 O. W. R. 36.

Sale or lease — *Invalidity — Relative, not absolute.*]—The nullity of sales of leases of lands forming part of an Indian reserve, declared by (1 V. c. 34, s. 2 (D.), is only a relative nullity, and can be invoked only by the Indians; those who have bargained with them cannot avail themselves of it. *Boucher* v. *Montour*, 20 Que. S. C. 291, 4 Que. P. R. 175.

Selling liquor to — *Conviction—Appeal —Reduction of term of imprisonment—Absence of prisoner — Discharge — Indian Act.*] — An adjudication of imprisonment made against a prisoner in his absence, by a County Court Judge, on appeal from a summary conviction under the Indian Act, at a time when he was confined in gaol under the conviction appealed against, *held* void and the discharge of the prisoner ordered. *Rex* v. *Johnston*, 1 E. L. R. 163, 41 N. S. R. 105.

Selling liquor to — *Conviction—Jurisdiction of Indian agent — Indian Act — Warrant of commitment.*]—An Indian agent, acting in a magisterial capacity, in committing to gaol a person convicted of selling liquor to an Indian, contrary to the Indian Act, must shew on the warrant of commit-

ment, the district in which he is acting as Indian agent. *Rex* v. *McHugh*, 7 W. L. R. 252, 13 B. C. R. 224.

Status of — *Proof — Indian Act — Execution — Exemption.*]— The status of an Indian as such may be proved by his certificate of birth, his general reputation, his residence in the reserve, or his election as a municipal councillor.—The real and personal property of Indians inside the reserve is exempt from seizure under execution. *Charbonneau* v. *Lorimier*, 8 Que. P. R. 115.

See CONSTITUTIONAL LAW — CRIMINAL LAW — COURTS—EXECUTION—JUSTICE OF THE PEACE.

INDIAN AGENT.

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INDIAN RESERVE.

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INDICTMENT.

See CRIMINAL LAW—POLICE MAGISTRATE—WAY.

INDIGENT DEBTOR.

Order for discharge — Appeal—Constitutional law — Validity of Act for Discharge of Insolvent Debtors, 39 V. (P.E.I.) c. 9—Statutes—Implied repeal. *McKinnon* v. *McDougall*, 3 E. L. R. 573.

See ARREST.

INDIGENT DEBTORS ACT, N.S.

See ARREST—COLLECTION ACT, N.S.

INDIGENT DEBTORS ACT, P.E.I.

See APPEAL.

INDUSTRIAL COMPANY.

See CONSTITUTIONAL LAW.

INDUSTRIAL DESIGN.

See TRADE NAME, TRADE MARK, AND INDUSTRIAL DESIGN.

INDUSTRIAL DISPUTES ACT.

See MASTER AND SERVANT.

INDUSTRIAL DISPUTES INVESTIGATION ACT.

See CONTRACT — CRIMINAL LAW — TRADE UNION.

INDUSTRIAL ESTABLISHMENTS ACT.

Owner of premises — *Lease to another — Defective equipment — Injury to workman — Liability — "Keeps the establishment."*]—The owner of an industrial establishment who makes over to another the exploitation of it, for which purpose the transferee takes care of it and controls it and engages the workmen, is not responsible for accidents in the work occasioned to the latter by the imperfection of the equipment. The obligation created by the Quebec Industrial Establishments Act, of maintaining the premises and plant in the best possible condition for the security of the workmen is not applicable. They are imposed only on him who "keeps the establishment," the only one aimed at in the clause in which the obligation is prescribed. This expression cannot be applied to the owner who, as in this case, gives over to another, by lease, assignment, or otherwise, the exploitation, and, consequently, the care and the control. *Julien* v. *Duprè*, 35 Que. S. C. 412.

See MASTER AND SERVANT.

INDUSTRIAL FARM.

See MUNICIPAL CORPORATIONS.

INDUSTRIAL HOME.

See STATUTES.

INFANT.

Action — *Bartender — Commercant — Exception to the form.*]—A bartender, though he takes the license in his own name, is not a trader (*commercant*), and if a minor, cannot sue, and exception to the form will lie. *Dagenais* v. *Dagenais*, 7 Que. P. R. 32.

Action — *Dismissal — Costs.*]—A minor whose action is dismissed on the ground of his minority may be condemned in costs. *St. Laurent* v. *Fortier*, 26 Que. S. C. 453.

Action — *Trustee of property of — Amendment — Shares saisies-revendiquees—Jurisdiction to decide ownership of, in possession of third person.*]—An action by an infant should be brought in the name of his guardian, and an action brought by a person who alleges himself to be the trustee for the minor of certain property (shares) will be dismissed *sur défense en droit*. A trustee, suing in that capacity, will not be permitted to amend his writ by substituting himself personally as plaintiff, contrary to the affi-

davit on which the *saisie-revendication* has been issued, and after security has been given. There is no jurisdiction to decide the right of ownership and to possession of shares *saisies-revendiquées*, when at the time of seizure these shares were in the possession of a third person. *Binmore* v. *Sovereign Bank of Canada*, 7 Que. P. R. 171.

Action against — *Exception to form—Appointment of tutor—Stay.*] — An action against a minor will be dismissed on exception to the form, and an application *ore tenus* to suspend proceedings pending the appointment of a tutor will not be entertained. *Desjauriers* v. *Farmer*, 6 Que. P. R. 401.

Action against, for price of goods— *Acknowledgment — Ratification — Repudiation—Liability for value of goods — Amendment—Costs.*]—To constitute a ratification, after full age, of a debt contracted during infancy, there must be at least an admission of an existing liability. The meaning of words used in a document signed by the debtor will not be strained so as to defeat the operation of the statute passed in his favour.—In reply to a letter written to an infant, after he had attained full age, and his father, claiming liability against both and demanding payment, the former replied that the plaintiffs had been misinformed as to "my" (the word had originally been "this") account, and asking for an explanation as to why his father's name had been put in "my" letter:—*Held*, that this did not constitute a ratification of the debt: — *Held*, affirming this decision, that the letter relied upon by the plaintiffs as a ratification, after majority, of the defendant's contract made when he was an infant, was not sufficient; but, in this reversing the judgment, that the defendant was liable for the value of the goods which he had in possession at the time he repudiated the contract; and the plaintiffs were allowed to amend by setting up an alternative claim for such value, and to enter judgment for the amount thereof without costs. *Louden Mfg. Co.* v. *Milmine*, 9 O. W. R. 829, 14 O. L. R. 532, 10 O. W. R. 474, 15 O. L. R. 53.

Action by — *Appointment of guardian —Infant living abroad — Cause of action arising in Quebec — Domicil of deceased father of infant — Evidence of.*]—1. Where a minor, through the agency of his guardian, sues for damages for the death of his father by the negligence of the defendants, they cannot, by exception to the form, plead the nullity of the guardianship, because the minor lives in a foreign country with his mother, if it is proved that, at the time of the occurrence, the father was residing in the city of Montreal, had the intention of living there permanently, and of bringing his family there.—2. The declaration of the father of the minor, as to the permanence of his domicil and residence, ought to be accepted. *De Sambor* v. *Montreal Rolling Mills Co.*, 10 Que. P. R. 279.

Action by — *Appointment of guardian —Validity — Exception to form — Plea to merits.*]—Where in an action for damages, the Court has decided, on an exception to the form, that the guardianship of the plaintiff "*ès qualité*" is valid, this question of validity cannot again be raised in pleading to the merits. *De Sambor* v. *Montreal Rolling Mills Co.*, 10 Que. P. R. 286.

Action by — *Procedure — Necessity for tutor — Waiver — Continuance of action after majority — Exception to form.*] — When an action is brought by a minor who comes of age pending suit and before plea filed, the defendant cannot at the hearing on the merits ask for its dismissal on that ground. The provision of law that the actions of minors are brought in the name of their tutors is for the protection of minors, who can cure such a departure from it by continuing the suit after coming of age. At most, a defendant can take advantage of it by exception to the form; it is too late to do so after issue joined on the merits. *Daoust* v. *Daoust*, 28 Que. S. C. 356.

Action by — *Tutor — Damages—Rights of father.*] — See *Hades* v. *Edmundson*, 21 C. L. T. 444.

Action by next friend — *Settlement— —Solicitor's charges — Claim of next friend for board and going security—Claims against solicitors and next friend — Payment into Court — Taxation of bill of costs — Claim of next friend to be tried by action.*]—Plaintiff, when a minor, was injured while in the employ of defendants. An action was entered on behalf of plaintiff, by a next friend, but before trial a settlement was arranged whereby defendants paid to plaintiff's solicitors $800. The solicitors paid the next friend $200 for his services in boarding plaintiff and going security for costs, and the solicitors retained $300 for their services.—Plaintiff brought another action, by another next friend, against his former solicitors and his former next friend, claiming that by the agreement of settlement he was to receive all the money paid over to his former solicitors. Pending decision in the second action a motion was made before Meredith, C.J.C.P., "for an order for direction herein or for such other order as might seem just." Meredith, C.J.C.P., suggested that the matter should stand over until plaintiff came of age. On plaintiff attaining his majority the matter came on before Riddell, J.:—*Held*, that the former next friend should pay into Court forthwith $200 and interest and the former solicitors should pay into Court a further sum of $200 and interest and deliver a bill of costs to be taxed by the local registrar at Hamilton to be dealt with under s. 40 of the Solicitors Act. Money paid into Court to remain there for six weeks to enable the former next friend to take action against plaintiff to establish any claim, and if action is taken, the money to remain in Court until conclusion of that action. *Vano* v. *Can. Coloured Cotton Mills Co.* (1910), 16 O. W. R. 110, 21 O. L. R. 144.

Action of ejectment brought by guardians — *Title of defendant—License of infant — Impugning title of guardians— Probate Court — Jurisdiction.*]—In an action of ejectment the plaintiffs claimed title as the guardians of infants appointed by the Probate Court. At the time the action was brought, the infants, who were each over 14 years of age, were living with the defendant, who occupied the premises in question with

their consent and approval:—*Held*, that the defendant could not set up as a defence that on equitable grounds he was entitled to possession for the infants, as against the plaintiffs, and that the plaintiffs had no title, the Probate Court having acted without jurisdiction in appointing them guardians. *Furlotte* v. *Lapoint*, 3 E. L. R. 116, 38 N. B. R. 140.

Advancement on account of legacy —Executor. *Re Currie*, 1 O. W. R. 9.

Allowance for education — *Advance on property settled in remainder — Ability of parents.*]—An infant entitled to an estate in remainder will not be allowed, even upon the advice of a family council, and with the consent of the executors, to borrow upon the property to which he is entitled in remainder, for the purpose of assisting in defraying the expenses of his education, where it appears that the means of those who are bound by law to provide for his education, are sufficient for that purpose. *Ex p. Barron*, 6 Que. P. R. 126.

Allowance for past maintenance — Exceptional circumstances — Order granted. *Whitelaw, Re* (1910), 1 O. W. N. 851.

Appeal — *Leave — Family council — Will — Legacy — Interim enjoyment — Seduction.*] — Although a guardian cannot, under Art. 306, C. C., appeal from a judgment until he has been authorised by the Judge or the prothonotary upon the advice of the family council, nevertheless, when the guardian has had his appeal ratified by the family council after it has been brought, the Court will permit him to produce the authorisation, but he will have to pay the costs of his petition to be allowed to do so. *Clement* v. *Francis*, 6 L. N. 325, and *Laforce* v. *Town of Sorel*, M. L. R. 6 Que. B. 160, followed.—In this case the grandmother of the infants had bequeathed a sum of money payable to them at majority, and had declared that such sum should be paid to the respondent, their step-father, and be retained by him until the arrival of the time for payment:—*Held*, that the fact that the respondent had seduced one of the infants was not a reason for depriving him of the enjoyment of the sum bequeathed in the interim. *Greenwood* v. *Dent*, 9 Que. Q. B. 11.

Appointment of tutor — *Foreign guardian.*]—A new tutor will not be appointed to movable property in the province of Quebec owned by an infant who resides in the province of Ontario, and who is already provided with a tutor or guardian according to the provisions of Ontario law. *Ex p. Charette*, 8 Que. P. R. 353.

Bastard — *Benefit of child.*]—Application by the mother of a two-year-old illegitimate child for an order awarding the applicant the custody of the child for the purpose of placing it in a charitable institution. The child was at the time of the application in the custody of the father. The mother was admittedly of bad character. The father's reputation was not good, but he was now married to a respectable woman who would care for the child:—*Held*, that it was not for the child's interest to remove her from her present surroundings, as there was no guarantee that the institution would do more than board her, nor that it would continue to do even that for any length of time. *In re Borntilier*, 20 C. L. T. 47.

Bond — *Void or voidable — Ratification — Breach — Damages — Interest.*] — To secure the plaintiff against loss by reason of his purchase, upon the defendant's representations, of 55 shares of company stock at $10 per share, the defendant gave the plaintiff his bond in the penal sum of $1,100, conditioned to indemnify the plaintiff against any loss or damage he might sustain in reference to the stock, and conditioned also that at any time after the date of the bond the defendant should, at the request of the plaintiff, purchase from the plaintiff or find him a cash purchaser for 11 of the 55 shares at $50 per share, less expenses of sale, not to exceed ten per centum. The defendant was an infant when he executed the bond:—*Held*, that the bond was not void *ab initio;* that it was only voidable; and, upon the evidence, that it was adopted and ratified by the defendant after he had attained full age. 2. That the shares held by the plaintiff not being of any value, the plaintiff's damage by reason of the breach of the bond was $495, the price of the 11 shares, less ten per centum. 3. That the recovery was not a debt or liquidated demand, and the plaintiff was not entitled to interest, the amount not having been ascertained until judgment. *Beam* v. *Beatty*, 22 C. L. T. 58, 3 O. L. R. 345, 1 O. W. R. 54.

Bond — *Void or voidable — Ratification* —The bond with a penalty of an infant to indemnify against loss or damage in respect of shares in a company purchased on the faith of representations made by the infant, is void, and not merely voidable, and cannot be adopted and ratified by the obligor after he has attained his majority. Judgment of Ferguson, J., 3 O. L. R. 345, 22 C. L. T. 58, reversed. *Beam* v. *Beatty*, 22 C. L. T. 381, 4 O. L. R. 554, 1 O. W. R. 616.

Breach of promise of marriage — *Liability of father.*]—In an action against the father of a minor daughter, for having caused the minor to break her promise to marry the plaintiff, the latter is not entitled to recover damages against the father, where it appears that it was of her own free will that the girl refused to carry out the proposed marriage, and that the father did nothing to prevent such marriage.—2. Damages cannot be recovered from the father under Art. 1054 of the Civil Code, for the fault of his child, unless such damages have been specially alleged and demanded by the action. *Delage* v. *Normandeau*, 9 Que. Q. B. 93.

Contract — *Appointment of agent — Void appointment incapable of ratification — Specific performance — Damages.*]—Action by infant purchasers by their next friend for specific performance of an agreement to sell land with an alternative claim for damages. The alleged agreement was made by the father for the infant plaintiff:—*Held*, that the action must fail as an infant cannot appoint an agent. A void appointment cannot be ratified. *Johannsson* v. *Gudmundson*, 10 W. L. R. 254.

Appeal from above judgment allowed 11 W. L. R. 176.

Contract — *Bill of sale — Purchase of horse—Necessaries—Repudiation—Estoppel—Costs.*]—The defendant advanced to the plaintiff, who, to his knowledge, was an infant under the age of 21 years, a sum of money to be employed in the purchase of a horse, taking as security for the loan a bill of sale, which was properly executed and filed in the office of the registrar of deeds. The defendant, hearing that the plaintiff was about to sell the horse, took possession under the bill of sale and sold to a third party:—*Held*, that the plaintiff was entitled to recover in an action for conversion; that the repudiation of the bill of sale by the infant avoided it; and that the defendant had no protection under it for the act which he committed; that the ownership of a horse by one in the plaintiff's circumstances did not come within the term "necessaries;" that the fact that the plaintiff stood by and allowed the horse to be sold without objection, did not assist the defendant, as an infant could no more estop himself by conduct of this sort than he could contract.—The trial Judge having deprived the plaintiff of costs, on the ground that he had sworn falsely during the course of the trial, his discretion in this particular was not interfered with. *Meyers* v. *Blackburn*, 38 *S.* S. R. 50.

Contract—*Made by father — Sale of half breed land scrip—Purchase-money received in part by infant—Repudiation during infancy — Conduct after majority not shewing ratification—Action for return of scrip—Failure to return or offer to return money paid—Non-suit.*]—The plaintiff, being a half-breed child of head of family, became entitled to a grant of 240 acres of land, under the provisions of the Dominion Lands Act, R. S. C. 1906, c. 55, and in August, 1901, when she was under 18 years of age, received a certificate shewing that she was so entitled. The father of the plaintiff, in her presence, on the 25th November, 1901, when she was still under 18, sold the certificate or scrip to the defendant. The plaintiff swore that she objected to the sale and expressed her objection to the defendant, but that her father gave the defendant the scrip, and the defendant paid the father money therefor:—*Held*, upon the evidence, that the plaintiff was a willing party to the sale, and received the benefit of at least a portion of the money paid by the defendant; and the defendant became lawfully entitled to the possession of the scrip.—The plaintiff was, however, an infant under the age of 18, and any dealing with her scrip could, on her attaining her majority, be repudiated. Even if over the age of 18 and under 21, she could not dispose of her interest without having been examined as provided by s. 16 of the Half Breeds Act.—The plaintiff attained full age on the 8th November, 1906, and did not make demand for the scrip till the 6th January, 1908; this action for the return of the scrip was begun on the 8th April, 1908:—*Held*, upon the evidence, that the plaintiff repudiated during her infancy, and had done nothing since her majority to avoid her previous avoidance; but she was not entitled to recover in this action, because, having received the greater portion of the purchase-price, she had not returned it or offered to do so; and the plaintiff was nonsuited—the judgment not to have the same effect as a judgment upon the merits for the defendant. *Phillips* v. *Sutherland* (1910), 15 W. L. R. 594. Man. L. R.

Contract — *Sale of goods — Repudiation—Ratification.*]—When an infant has, during his minority, expressly repudiated a contract for the purchase of goods, and abandoned possession, and there is no clear evidence of subsequent ratification after attaining majority:—*Held*, reversing the judgment of Scott, J., 1 Alta. L. R. 11, 7 W. L. R. 199, that the contract is not binding; and the seller can recover neither the price nor the value of the goods. *Louden Manufacturing Co.* v. *Milmine*, 10 O. W. R. 474, 15 O. L. R. 531, distinguished. *Great West Implement Co.* v. *Grams*, 1 Alta. L. R. 411, 8 W. L. R. 160.

Contract — *Services — Desertion of employment — Conviction — Certiorari—Injury to infant by lack of advice when contracting.*]—An infant may make a formal contract for his services without being represented by a guardian, or by his father or mother, and is entitled to relief in such case only upon the ground of prejudice. A demand by the infant for *certiorari* to remove his conviction for deserting his employment will be dismissed unless it is alleged and proved that the infant was injured or prejudiced in making the contract with his employers by the want of proper assistance. *Verrier* v. *Mulvena*, 7 Que. P. R. 414.

Contract to pay for maintenance *of illegitimate child — Representation of infant that he was of full age — Repudiation on ground of infancy—Equitable relief—Estoppel.*]—Action by mother of illegitimate child to recover moneys which defendant, its father, covenanted to pay. Owing to defendant representing that he was over 21 years of age and signing an agreement to support the child an affidavit of affiliation was not filed:—*Held*, that plaintiff cannot recover, defendant being an infant. No equitable relief or estoppel can be set up by plaintiff. *Jewell* v. *Broad* (1909), 14 O. W. R. 289, 19 O. L. R. 1; affirmed 14 O. W. R. 1272.

Curator — *Appointment — Family council.*]—Where a family council has been duly summoned, to advise as to the appointment of a curator to an emancipated minor, to assist her in a suit about to be instituted against her, and the council refuses to tender any advice to the Judge as to the appointment, the Court is bound to appoint a curator, notwithstanding the absence of such advice. *Ex p. Wood*, 24 Que. S. C. 277, 6 Que. P. R. 70.

Custody — *Adoption — Rights of parent — R. S. O. 1897, c. 259, s. 12— "Abandoned" — "Deserted" — Payment for maintenance.*]—The law of this province knows nothing of adoption; and an agreement by parents to deprive themselves of the custody of their child is not legally binding upon them.—By R. S. O. 1897, c. 259, s. 12, where the parent of any child applies to the Court for an order for the production of the child, and the Court is of opinion that the parent has abandoned or deserted the child, or that he has otherwise so conducted himself that the

Court should refuse to enforce his right to the custody of the child, the Court may, in its discretion, decline to make the order. —*Held*, that "abandoned" and "deserted" involve a wilful omission to take charge of the child, or some mode of dealing with it calculated to leave it without proper care; and leaving a child with those who had contracted to take proper care of it could not be called "abandonment" or "desertion," nor could the subsequent act of giving up all claim to the child.—Therefore, where the parents of an infant placed her in charge of a stranger, agreeing to pay for her maintenance, and afterwards signed an agreement to give up all claim to the child, an order was made, upon the father's application for delivery of the child to him, upon an undertaking to pay to the person who had assumed to adopt the child the expenses incurred by that person: R. S. O. 1897, c. 259, s. 12 (2). *Re Davis*, 18 O. L. R. 384, 13 O. W. R. 939.

Custody — Application of father against stranger — Return to *habeas corpus*—Agreement for adoption—Alleged criminal misconduct of father—Moral rehabilitation. *Re Gray* (Sask.), 6 W. L. R. 374, 674.

Custody — *B. C. Children's Protection Act, 1901—Charitable institution—Religious persuasion — Habeas corpus.*]—A magistrate made an order under the above Act directing that the child in question should be placed with an undenominational society in Vancouver. Further evidence having been given before him, he made a second order committing the child to the care of the applicants, a Roman Catholic society who, upon refusal of the first mentioned society to deliver up the child, applied for a *habeas corpus*: — *Held*, that the magistrate had power to make the second order which is merely supplementary, and under the circumstances the applicants are entitled to the child. *Re Howard*, 11 W. L. R. 367.

Custody — *Children's Aid Society — Foster parent — Magistrate's order transferring custody to another society—Failure to notify foster parent — Subsequent proceedings based on order — Habeas corpus— Children's Protection Act, ss. 7 (1), 39.*]— Pursuant to an order made by a police magistrate, under the authority of the Children's Protection Act of British Columbia, an infant was committed to the custody of the Children's Aid Society of Vancouver, and a few months later was placed by that society with P. as her foster parent, pursuant to s. 7 (1) of the Act. More than a year afterwards another society, upon notice to the Children's Aid Society of Vancouver, but without notice to P., applied to the same magistrate and obtained an order for delivery of the custody of the child to that society, under s. 39 of the Act, upon the ground that the child was of a different religion from that of the first society. Upon that application it transpired that the child had been placed in a foster home, but an officer of the first society, who appeared before the magistrate, refused to state where the child was. The second society ascertained later that she was with P., and obtained an order for a writ of *habeas corpus* directed to P., and issued and served the writ. P. made a return to the writ, produced the child, and moved to set aside the order and the writ:—*Held*, that the order and writ, being in aid of the order awarding the custody to the second society, were improvidently issued, because that order was made without notice to P.—The order involved civil consequences of a serious kind to P.; and, although the first society were, when the order was made, the legal guardians of the child, they could not waive or deprive him of his right to be heard.— *Semble*, that under s. 7 of the Act the effect of the contract of *forisfamiliation* was to divest the society of any authority to interfere with P.'s rights in reference to the child, unless, in their opinion, the welfare of the child demanded that it should be withdrawn from his custody.—The order for the issue of the writ and the writ were set aside, and the child returned to the custody of P. *Re Pilkington* (1910), 15 W. L. R. 144.

Custody — Dispute between parents — Welfare of child of tender years — Petition — R. S. O. 1897 c. 168, s. 1 — Custody awarded to mother — Periodical access of father. *Re Keys*, 12 O. W. R. 109, 209.

Custody.]—Father contracting himself out of rights of custody of the children of the marriage. Such agreements are against the policy of the law and will not be enforced. *Barrett* v. *Barrett* (1906), 6 Terr. L. R. 274.

Custody — *Guardianship — Family arrangement — Public policy.*] — Where a widow, whose husband left no estate, agrees to give up her natural right of guardianship over her daughter and transfer the same to the latter's grandfather, who, on his part, agrees to educate her, provide for her afterwards, and allow as full intercourse as possible between her and her mother, the fact that the arrangement includes an allowance to the mother for her maintenance does not necessarily make it void as against public policy; Idington and Duff, JJ., dissenting.— Judgment of the Supreme Court of Nova Scotia, 2 E. L. R. 207, affirmed. *Chisholm* v. *Chisholm*, 40 S. C. R. 115, 5 E. L. R. 71.

Custody — *Habeas corpus — Application by married woman living abroad—Necessity for authorisation by husband.*]—The writ of *habeas corpus*, in a civil matter, in this case the custody and guardianship of an infant, can only be issued when the infant is deprived of its liberty.—A married woman, under the dominion of her husband, living in a foreign country, in the absence of proof of the law of the state where she lives, must be authorised by her husband; if she is not, she will not be heard in Court, and proceedings instituted by her will be set aside; the presumption being that she must be authorised to appear before the Court. *Garcin* v. *Croteau*, 27 Que. S. C. 198.

Custody — *Habeas corpus — Dispute between parents.*]—The interest of an infant of tender years must be the sole guide to the Judge in awarding the custody of the infant on *habeas corpus*.—In this case the father was sued for a separation by his wife on account of ill-treatment, and the child was only 17 months old. The custody was given to the mother. *Leduc* v. *Beauchamp*, 7 Que. P. R. 441.

Custody — *Habeas corpus — Foreign domicil of applicant — Decree of foreign Court.*]—In the case of a minor of tender years, unauthorised removal from legal custody is equivalent to confinement and restraint. The Courts will entertain a petition for *habeas corpus* by a non-domiciled person against persons detaining his child within the jurisdiction, where by the decree of a foreign Court of competent jurisdiction the guardianship and possession of the child have been given to the petitioner, and the Court is otherwise satisfied that the measure is for the future welfare of the child. *In re Lorenz* v. *Lorenz*, 7 Que. P. R. 186.

Custody — *Habeas corpus — Interests of child — Choice of home.*]—The interests of an infant of tender years should be the only guide to a Judge in passing upon the question of custody on a *habeas corpus*, and it is not necessary to allege in the petition the choice of the infant as to a home. *Bleau* v. *Petit*, 6 Que. P. R. 373.

Custody — *Habeas corpus — Removal from legal custody — Interest of child — Rights of parent living apart.*]—The unauthorised removal of a minor of tender years from legal custody is equivalent to confinement and restraint of liberty, and *habeas corpus* will lie to restore it to its proper guardians.—A girl of 9 years of age is too young to exercise a controlling right of choice between her father and mother, who live apart, and it lies within the discretion of the Judge to hand her over to whichever of the parents he thinks best in her interest. *Lorenz* v. *Lorenz*, 28 Que. S. C. 320.

Custody — *Habeas corpus — Restraint on liberty — Costs.*]—A *habeas corpus* will not be granted to a mother who claims an infant who has arrived at years of discretion, and who is in no wise constrained in her liberty. If the respondent, upon such a *habeas corpus*, claims the right to keep the infant, and thus gives ground for believing that the latter is deprived of her liberty, the *habeas corpus* will be quashed but without costs. *Pickering* v. *Caloras*, 7 Que. P. R. 350.

Custody — Issue between parents — Welfare of child — Custody awarded to mother — Terms — Access of father — Costs — Direction for sealing up of papers. *Re Argles*, 10 O. W. R. 801.

Custody—*Order under Children's Protection Act — Application by parent for custody.*]—Where an order was regularly made by a police magistrate, under the Children's Protection Act, for the delivery of an infant into the custody of the Children's Aid Society of Winnipeg, and, pursuant thereto, the society assumed the custody of the child and subsequently delivered the child into the custody of persons who gave the child a "foster home," as authorised by s. 5 of the Act, under a written agreement made as provided therein:—*Held*, that the society was the legal guardian of the child, and, so long as the order remained in force, it was an answer to an application by the parent to obtain the custody of the child; and, upon such an application, the validity of the order could not be questioned. *Re Philp* (1910), 15 W. L. R. 685. Man. L. R.

Custody — Parent's agreement to relinquish custody — Agreement in consideration thereof to pay annual allowance not enforceable. *Chisholm* v. *Chisholm*, 2 E. L. R. 207.

Custody — *Paternal rights — Agreement to surrender — Restoration to father.*]—An agreement to surrender his paternal rights cannot bind or relieve a father.—*The Queen* v. *Barnardo*, 23 Que. B. D. 305, followed.—Upon an application by a father for the custody of his infant son, 11 years of age, nothing was alleged against the applicant beyond the fact that his circumstances, without fault on his part, had caused a separation between the boy and himself; and an order was made for the restoration of the boy to the father by those who had the custody during the separation. *Re Porter* (1910), 15 W. L. R. 228.

Custody — Petition of parents—Dismissal — Special circumstances — Direction for sealing up papers. *Re Pinkney*, 1 O. W. R. 694, 715, 2 O. W. R. 141.

Custody — *Preference — Habeas corpus —Rights of father.*]—Where an intelligent child of 7 years declares a preference for living with its grandfather, the father cannot obtain the custody by means of a writ of *habeas corpus*. *Rousseau* v. *Lapointe*, 8 Que. P. R. 43.

Custody — Right of father — Agreement with relative — Costs. *Re Ogle*, 2 O. W. R. 954.

Custody — Right of father — Agreement with relative — Interests of child—*Habeas corpus* — Application—Costs. *Re Cornyn*, 2 O. W. R. 1156.

Custody — *Rights of father — Fitness —Religious faith—Temporal welfare of child —Abandonment.*]—Upon an application by the father of a girl of 11 years for an order against the maternal grandmother for delivery of custody, it was shewn that the mother of the child was dead, that the child had lived with the grandmother since she was 3 years old, and had been brought up as a Protestant, while the father had become a Roman Catholic and desired to educate the child in that faith:—*Held*, upon the evidence that the applicant was not an unfit person to have the custody of his daughter; that there was no agreement that the child should remain with the grandmother always or until her death, and the father had not abandoned his parental rights; that the child herself had no serious religious convictions; that she would have a better home and a better education in her father's house than with her grandmother; that it would be for her advantage to be brought up in the same home with her only brother; and that no case had been made out which would justify a refusal to give effect to the father's right to the custody of his child.—While the welfare of the infant is in one sense paramount, the paternal right to custody and control is supreme, unless a very extreme case can be made out shewing that it is imperative for the protection of the child that the Court should interfere with that right.—The reluctance of the Court to separate brothers and

sisters is very great.—It is the duty of the Court to enforce the wishes of the father as to the religious education of his children, unless there is strong reason for disregarding them. The Court has jurisdiction to interfere, even against the father's wishes, to prevent the religious convictions of his child being interfered with; but the circumstances must be such as to satisfy the Court that there has been an abandonment or abdication of the paternal right, or at least that the training of the child has imbued it with such deep religious convictions that to disturb them would be clearly dangerous to its moral welfare.—The Children's Protection Act, R. S. O. 1897 c. 259, has no application to the case of a child situated as this one was. Order of Anglin, J., affirmed. *Re Faulds*, 12 O. L. R. 245, 7 O. W. R. 759, 867.

Custody — *Rights of father — Habeas corpus.*]—A writ of *habeas corpus* will not be maintained to permit a father, being without means, to get back his daughter, 14 years of age, who is living with her grandfather, and desires to continue to live with him. *Robert* v. *Véronneau*, 5 Que. P. R. 426.

Custody — Rights of parent — Abandonment — Welfare of children — *Fortisfamiliation* — Discretion of Court. — *Re Longaker* (1908), 12 O. W. R. 1193; affirmed, (1909), 14 O. W. R. 321.

Custody of — Father or mother. *Re Smith*, 1 O. W. R. 55.

Custody of — Father or mother—Action for alimony — Access by father. *Re Gibson*, 1 O. W. R. 58.

Custody of — Parent—Other relatives—Evidence. *Re Gillem*, 1 O. W. R. 37.

Custody of illegitimate child—*Rights of mother — Judicial discretion — Abandonment of child — Agreement.*]—Application by the mother for the custody of an illegitimate child, a boy of 12 years of age. The mother, who was only 17 when the child was born, was unable to support him, and arranged with S. to take the child, and he had been with S. ever since. At the time she gave the child to S. she executed a document which set forth that she "doth hereby give, grant, release, and abandon unto the said party of the second part forever her said male child and all her right and title as the mother of the said child to the custody, control, and possession of said child from henceforth." S. on his part agreed that he would maintain, care for, and educate the child:—*Held*, that the application should be refused. The interest of the child would be better served by leaving him with S. than by handing him over to his mother. The right of the mother to the custody of the child cannot be regarded as an absolute one, and the Court has the full authority to consider the best interests of the child: *Regina* v. *Nash*, 10 Que. R. D. 454; *Barnardo* v. *McHugh*, [1891] A. C. 388. The agreement the mother made with S. to take over the child to him was not one that could be legally enforced against her, even if she had been of age when she executed it: *Andrews* v. *Salt*, L. R. 8 Ch. 622. *Re Slater*, 23 C. L. T. 337, 14 Man. L. R. 523.

Devolution of Estates Act — *Application to dispense with payment into Court.*]—Testator by his will bequeathed $5,000 to his executors for maintenance of his granddaughter, any balance to be paid her at twenty-one. His lands were sold to pay debts, leaving a balance of $2,000 to joint account of executors and official guardian. Executors applied to dispense with payment into Court. No order made, money being now practically in hands of official guardian. *Re White, Re McGrady*, 12 O. W. R. 1161.

Emancipation — *Family council.*] — When it does not appear that the emancipation of a minor for the present would be of any practical benefit to him, such emancipation, granted by a family council out of Court, will be set aside. *Ex. p. Désy*, 8 Que. P. R. 347.

Examination for discovery — *Discretion of examiner — Capacity of infant.*]—An infant suing by a next friend may in the absence of special incapacity, be examined for discovery. *Arnold* v. *Playter*, 14 P. R. 398, approved. An order for the examination of an infant for discovery should not give to the examiner a discretion to determine the capacity of the infant; the proper manner of raising any question as to the capacity of the infant is by motion to set aside the appointment, or, if there is no time for that, then upon the motion to commit for non-attendance, so that the question of capacity may be considered by the Court itself. *Fleet* v. *Coulter*, 23 C. L. T. 43, 4 O. L. R. 714, 1 O. W. R. 775.

Filiation order — Imprisonment for failure to obey — Form of commitment — Ambiguity. *Rex* v. *Duff*, 1 E. L. R. 320.

Fund — *Payment into Court — Trustee — Discretion.*]—The defendant, having in her hands a fund to the benefit of which the plaintiff, an infant, was entitled, asserted that, by the terms of the trust upon which she held it, she had a discretion as to the application of it for the benefit of the plaintiff. She nevertheless paid the money into a bank to her own credit as trustee for the plaintiff, and agreed that she would not use it except for his benefit, and would pay it to him at majority:—*Held*, that the defendant was a mere trustee for the plaintiff without the discretion which she contended for; and a summary order, made before delivery of statement of claim in an action to recover the fund and for an injunction, requiring the defendant to pay the fund into Court, and thereupon perpetually staying the action, was affirmed. *In re Humphries, Mortimer* v. *Humphries*, 18 P. R. 289, 18 C. L. T. 382, approved. *Whitewood* v. *Whitewood*, 20 C. L. T. 254, 19 P. R. 183.

Gift of property subject to charge —*Tutor of infants — Retrocession of donor — Hypothecation — Invalidity — Rights of creditor.*]—R. gave his property to his son on condition that he would pay the donor's then existing debts. The donee died shortly afterwards, leaving a widow and two children (minors). The widow and children went to the United States to live. A tutor *ad hoc* was appointed to the children, and he

retroceded the property to the donor, who borrowed $500 from the plaintiff, hypothecating the property as security. The widow of the donee remarried, and she and her husband took possession of the property as tutors of the children. The donor subsequently died, and the plaintiff sued the donee's children as represented by their tutors, to recover the $500 with interest:—*Held*, that the retrocession of the property of the minors to the donor and its hypothecation by him were illegal. 2. The donee's minor children were not liable to the plaintiff for the repayment of his loan to the donor. 3. The payment of the $500 to the donor did not enrich the minors, but simply operated a change in their creditor. 4. The plaintiff's remedy was an action against the representatives of the donor, and an attachment in the hands of the defendants, as the tutors of the children, of what they might owe to the donor, who paid debts for which they were liable. *Beaumont* v. *Lamonde*, 23 Que. S. C. 129.

Guardian — *Appointment of — Property — Person.*]—A tutor *aux biens* is similar to a tutor *ad hoc*, and cannot be appointed unless there is a tutor to the person of the infant. *Cullen* v. *Daly*, 9 Que. P. R. 403.

Guardian — *Family council — Domicil — Territorial jurisdiction of Superior Court — Resignation — Discharge — Procedure — Action — Petition.*]—The domicil of the guardianship being considered as unchangeable during the whole course of the guardianship, a meeting of the family council to settle certain differences between the guardian and the infants must be held in the district where the guardianship was created, and not in the district in which the guardian lives.—2. The guardian having entered on his office cannot voluntarily and upon his own initiative resign by offering to do so before the family council, even if the council is of opinion that another member of the family is better qualified to fulfil the duties of the guardianship.—3. A guardian having entered on his office may demand his discharge by means of a simple petition.—4. A demand for revocation of the guardianship must be made by action and not by petition. *Aubin* v. *St. Onge*, 10 Que. P. R. 13.

Guardian — *Infant residing abroad — Property in Quebec — Action against infant — Service of process — Pro-tutor — Petition to set aside appointment.*]— A tutor may be appointed for minors domiciled in the province of Ontario by a proceeding taken in the province of Quebec, if they have property in the latter province.—A guardianship of property or special guardianship will not be created simply for the purpose of suing a minor, when there is already a tutor appointed, seeing that it is always upon the tutor, properly speaking, and not upon the pro-tutor, that process in the action must be served.—One who has been thus appointed guardian of the property of infants may refuse to accept the office and apply to set aside the proceedings by a simple petition, without recourse to an appeal. *Boucher* v. *Boucher*, 34 Que. S. C. 215, 9 Que. P. R. 296.

Guardian — *Married woman.*]—A married woman will not be appointed sole guardian of the person and estate of an infant. *Re Freeze*, 26 C. L. T. 385, 3 N. B. Eq. 172.

Guardian — *Parent — Foriafamiliation —Interest of infant.*]—The guardianship of an infant of 8 years of age will be awarded to his father, where he is a sober man, has employment, and is capable of bringing up the child well; and this even when the father has previously abandoned the guardianship to a third person, who is a drunkard, a quarreller, and leading a scandalous life. *Proulx* v. *Proulx*, 10 Que. P. R. 331.

Guardian — *Petition to obtain possession of the effects — Opposition not yet decided — C. P. 624.*]—The guardian is not obliged to represent the effects seized during the time an opposition is still undecided, and a petition on his part to obtain possession of the effects will not be granted. *Lavergure* v. *Guertin* (1910), 11 Que. P. R. 293.

Guardian — *Removal — Grounds.*]—If on any ground, a tutor can be deprived, even temporarily, of the guardianship of his wards, it will only be for grave reasons. *Fitz Allan* v. *Reintord*, 5 Que. P. R. 387.

Guardian — *Removal.*]—It is a ground for the removal of the guardian of the persons of infant children that he has removed out of the jurisdiction of the Court. *In re Lawton Infants*, 3 N. B. Eq. 279, 1 E. L. R. 201.

Guardian — *Removal — Superior Court —Territorial jurisdiction — Domicil of guardian.*]—Where the tutor of an infant has his domicil in a district different from that in which the ward resides with his mother, she being invested with the parental authority over the infant and having re-married, the Court of the district in which the tutor resides is competent to appoint a tutor in his place, he having reached the age of 70 years; Art. 274, C. C. *Lacasse* v. *Hardy*, 34 Que. S. C. 247.

Guardianship — *Administration by the guardian — Inability of the guardian to take his ward's goods at a rental.*]—The law forbidding a guardian from buying or taking his ward's goods at a rental is absolute. Hence the appointment of a guardian "*ad hoc*" on the advice of the head of the family and his acceptation by the *prothonotaire* to effectuate the renting to the guardian of his ward's real estate and the lease made in consequence, are all stamped with a radical defect. *Bélanger* v. *Beauchamp*, 36 Que. S. C. 1.

Habeas corpus — *Confinement in industrial school — Jurisdiction — Recorder—Mayor.*]—*Habeas corpus* will lie to set at liberty an infant detained in an industrial school, when the sentence of confinement pronounced by the recorder has not been requested by the mayor, as required by Art. 3140, R. S. Q. *Avon* v. *Les Dames de l'Asile du Bon Pasteur*, 7 Que. P. R. 207.

Habeas corpus — *Paternal authority—Confinement.*]—An infant has a right to petition for *habeas corpus*, where his liberty

is restrained. — Paternal authority over a child as to discipline and the choice of a school or institution in which to educate, or even temporarily confine, the child, is absolute; and the Court will not interfere by *habeas corpus* on the child's behalf. *Macdonald* v. *Macdonald*, 14 Que. K. B. 330.

Illegitimate child under seven years —*Custody — Rights of mother — Rights of father — Welfare of infant.*]—The putative father of an illegitimate boy, in whose custody the child was, who was under seven years of age, was allowed to retain the boy on an application for his possession by the boy's mother. *Re Bestwick & Austin*, 11 W. L. R. 73.

Interest in land under will—*Approval by Court of settlement.*]—Under G.'s will R. was to have the use of a certain room and to have his residence remain a home for her until she married. The administrator of the devisee of the land on which the residence was situate agreed to pay $800 for a release. The adults interested in the estate approved. A Court order was issued approving on behalf of the infant, and reciting the adults' consent. *Re Bastedo*, 12 O. W. R. 1087.

Judgment by default against—*Execution — False imprisonment — Contract of sale — Passing of property — Trespass.*]—An execution issued out of a magistrate's court on a judgment by default against an infant on his promissory note is a good answer to an action for false imprisonment under the execution.—An infant can not maintain trespass for taking property held by him under a contract of sale with the defendant, which stipulated that the property should not pass until payment, where there has been a default in payment of part of the purchase money. *McIlaw* v. *Fisk*, 38 N. B. R. 354, 4 E. L. R. 542.

Lease — *Repudiation at majority—Partition — Parties — Tenant in common — Mesne profits — Damages.*]—The plaintiff, while an infant, joined with an adult brother and sister in a lease to the defendants of a park property, of which all three were tenants in common, for a period of ten years. The defendant pulled down some old buildings, put up pavilions, made roads and paths, turned it into a pleasure ground, ran a branch of their electric railway into it, and brought crowds of people there. During the term the plaintiff came of age, and at once repudiated the lease, refusing to be bound by it, and effected a partition with the other two tenants in common of the land, to which the defendants were not parties. In an action to recover possession of the plaintiff's part of the land under the partition; for a declaration that the partition was binding, or for a new partition between him and the company; for a declaration that the lease was not binding on him, and that he had been excluded from possession; and for *mesne* profits and damages:—*Held*, that the partition made could not be declared binding on the company, who were not parties to it. —*Held*, also, that the brother and sister were not necessary parties to any new partition between the plaintiff and the company.—*Held*, also, on the evidence, that the company's conduct in the use of the park was practically an exclusion of the plaintiff from any use he might make of it, and that he was entitled to recover *mesne* profits from the time he became of age, and damages; and a partition was ordered between him and the company for the residue of the term. Judgment of Meredith, C.J., 1 O. W. R. 25, reversed. *Munro* v. *Toronto Ry. Co.*, 22 C. L. T. 231, 4 O. L. R. 36, 1 O. W. R. 316, 313, 2 O. W. R. 207, 3 O. W. R. 14, 299, 4 O. W. R. 392.

Legacy — *Payment at age of 18—Payment into Court — Payment out—Discharge —Official guardian.*] — Notwithstanding a direction in a will that a legacy is to be paid to a legatee when she reaches the age of eighteen, the executor is not bound, in the absence of a provision that the infant's discharge shall be sufficient, to pay the legacy to her upon her attaining that age; but there is no reason for applying the rule where the legacy is in the hands of the Court, no discharge being in that case required; and in a proper case an order will be made for payment out to the infant upon her attaining that age, with the privity of the official guardian. *Re Robertson*, 17 O. L. R. 568, 13 O. W. R. 208.

Legacy — Payment into Court—Surrogate guardian. *Re Laughlin*, 2 O. W. R. 1140.

Liability to indemnity — Next friend — Improvident litigation — Ratification. *Macnee* v. *Rose*, 1 O. W. R. 173.

Loan to — *Debt to tutor—Authorisation —Nullity.*]—A contract of loan to minors for the purpose of paying a debt due by them to their tutor, effected with the authorisation of the prothonotary, and on the petition of the tutor, is null and void. *Hyde* v. *Mount*, 28 Que. S. C. 385.

Maintenance — *Absence of express provision for—Infants entitled to share in residue in addition to specific legacies—Setting apart sum to answer legacies—Quantum of allowance for maintenance — Whole interest or part.*]—Legacies of $4,000 were given to each of the testator's infant sons, Mowat and Ross McIntyre, to carry interest from the death of the testator for the purposes of their maintenance, and in directing the retention and setting apart by the executors of $8,000 to provide for the payment of $4,000 each to the infants when they attain the age of 25 years, and 10 per cent. of the residue of the testator's estate, Street, J.:—*Held*, 3 O. W. R. 258, 7 O. L. R. 548, that the legacies carried interest from the testator's death for the purpose of maintenance. There was no express provision for the maintenance of the two infants during their minority. But the appellants contend that the other devises and bequests in favour of the infants contained in the will are a sufficient provision for their maintenance. — *Held*, the rule is that when a legacy is given to a minor by a parent or by a person in *loco parentis*, payable at a future period, if no other provision is made for maintenance, interest will be allowed for that purpose, even though by the terms of the will the legacy is contingent on the legatee living to

the period mentioned for payment of the legacy. The gift of an immediate share in the residue indicates a fund or source from which maintenance was derivable, but not in such form as to preclude recourse for maintenance to the interest upon the legacies. But it should be taken into consideration in dealing with the allowance to be made for maintenance out of the interest of the legacies, having regard to their shares of the residue and the income derivable therefrom, they are entitled to have recourse to interest on their legacies, but only to that extent. It follows that the order was proper at the time it was made, and that the whole sum of $8,000 must be set apart to provide maintenance, if necessary. But that sum was manifestly arrived at without reference to the income from the infants' shares in the residue; and the question of the proper amount to be allowed, having regard to such shares and the time when they were ascertained, should be now settled by the Master unless otherwise agreed upon. *Re McIntyre, McIntyre* v. *London & Western Trust Co.*, 5 O. W. R. 137, 6 O. L. R. 408.

Marriage — *Pleading.*] — An infant emancipated by marriage has the right to appear in Court, either as a plaintiff or defendant, without the intervention of a guardian, in a personal action.—2. The defendant pleading his minority, it is proper for the plaintiff to reply the emancipation. *Cloutier* v. *Cloutier*, 2 Que. P. R. 397.

Married woman — *Party to action — Authorisation — Husband — Curator.*] — An infant, being a married woman, may appear in Court in a personal action (*et mobilière*), without other assistance and authorisation than that of her husband, made a party for that purpose, and has no need of the assistance of a curator. *Galerneau* v. *Bertrand*, 20 Que. S. C. 283.

Money in Court — *Application for payment out for maintenance—Facts to be shewn—Persons to be notified—Petition.*]—The administrator of an estate in distributing it paid into Court $500, the share of an infant, one of the next-of-kin of intestate. The infant now applied for an amount to be paid out necessary for her support and maintenance, she being in ill-health and unable to work:—*Held*, that the application could be maintained if brought in proper way by petition duly verified, setting out amount in Court, in what way she is next-of-kin, the administrator, father or mother or relatives should be notified, and circumstances of father and mother if any. *Re Green*, 9 W. L. R. 630.

Moneys intrusted to paramour — *Presumption — Gift — Undue influence — Avails of prostitution.*]—The plaintiff, an infant, who was living with the defendant as his mistress, handed him certain moneys (said to be the avails of prostitution) part of which he invested in the purchase of a hotel, without the knowledge and consent of the plaintiff, who alleged that the plaintiff was a trustee for her:—*Held*, that, as the plaintiff was an infant, she could recover the moneys handed by her to the defendant; there was no presumption of a gift; the Court would presume undue influence on the part of the defendant; it was immaterial how the moneys were made. *Desaulniers* v. *Johnston* (1909), 15 W. L. R. 20.

Mortgage — *Voidable contract — Repudiation of — What amounts to—Infants' Contracts Act.*]—*Held*, that a mortgage executed by an infant before the passing of the Infants' Contracts Act is not void but voidable, and if the infant wishes to avoid it he must expressly repudiate it within a reasonable time after coming of age. R., in 1896, being then an infant, executed a mortgage in favour of S., the plaintiff. R. came of age on the 27th January, 1900, and at that time, on account of default having been made in the payment of the loan, S. was proceeding to sell under power of sale in the mortgage. R.'s solicitors on the 13th February, 1900, wrote S., saying that no valid mortgage had ever been executed by R., and threatening proceedings to protect their client's interest, and on the 2nd March they began an action on behalf of R. against S. for a declaration that the mortgage was null and void and an injunction restraining the sale. On cross-examination on an affidavit made by R. in support of a motion for an interim injunction, he said in substance that the reason he did not pay was because he couldn't, and that he had never repudiated his contract, and in October, 1900, he discontinued his action. On the 2nd November, 1900, S. commenced his foreclosure action, and in defence R. pleaded infancy:—*Held*, that the solicitor's letter and the writ in *Russell* v. *Saunders* did not constitute a repudiation, as they were qualified by R.'s statement that he did not intend to repudiate. *Saunders* v. *Russell*, 23 C. L. T. 56, 9 B. C. R. 321.

Mortgage of lands — *Sanction of Court — Replacing buildings destroyed by fire — Benefit of infant — Safeguards.*] — Executors allowed to mortgage property in which an infant was interested to replace buildings destroyed by fire. Expenditure to be with privity of official guardian. *Re Moffat*, 13 O. W. R. 1071.

Next friend—*Action in formâ pauperis —Rule 231—Practice—Official guardian — Costs.*]—An application on behalf of an infant to permit him to sue by a next friend *in formâ pauperis* was refused.—The infant's disability to sue without either a *prochein amy* or next friend has never been removed. He is still incapable of bringing an action without the assistance of some person who may be responsible to the Court for the propriety of the suit in its institution and progress.—By Rule 231, an infant may now sue as plaintiff by his next friend: that is an adoption of the rule of equity before the Judicature Act.—The provision of the Imperial Act, 15 & 16 Vict. c. 86, that, before the name of a person is used as next friend, he shall sign an authority to the solicitor, bringing the action, and the same shall be filed in the office where the proceedings are commenced, is in force in Manitoba. —An infant cannot sue *in formâ pauperis* by a next friend, unless it is shewn that he cannot procure as next friend a person who is willing to assume responsibility as to costs, and unless the proposed next friend is also a pauper.—*Lindsay* v. *Tyrell*, 24 Beav. 124,

explained.—The applicant's counsel requested that the Official Guardian be appointed to sue on behalf of the infant. By the King's Bench Act, s. 82 (a), the Official Guardian, besides acting as guardian *ad litem* for infants, under Rules of Court and other orders, is to perform such other duties as the Court or a Judge may from time to time direct:—*Held*, that if the Court has power to direct the Official Guardian to bring an action on behalf of an unfriended infant, the power should be very sparingly used: a successful defendant could not be compelled to pay the costs of the unsuccessful next friend, in addition to bearing his own costs. The Official Guardian could not be appointed without his consent to assume the ordinary responsibility attaching to the position of next friend. One of the objects of having a next friend is to give security to the defendant for costs. *Re Sturgeon* (1911), 16 W. L. R. 415, Man. L. R.

Next friend—Amendment—Costs—Solicitor. *Henderson* v. *Button*, 2 O. W. R. 653.

Next friend—*Father out of jurisdiction —Security for costs—New next friend.*]—Motion by defendants to stay the action until the plaintiff should name a next friend in the jurisdiction or give security for costs. The plaintiff sued by his father as next friend; both resided in the province of Quebec, as appeared by endorsement on the writ of summons:—*Held*, defendants entitled to their order. The next friend of an infant plaintiff stands in the same position as any other litigant. Any indulgence is given to the infant and not to the next friend.—If, for any reason, the infant's father does not wish to give security, and no other person can be found in the jurisdiction willing to act, then, as was said in *Taylor* v. *Wood*, 14 P. R. at p. 456, the Court has power to appoint the official guardian to act as next friend in the case of commendable litigation. The only thing that looks the other way is the remark of Meredith, J., in *Scott* v. *Niagara Navigation Co.*, 15 P. R. at p. 455. That, however, does not seem intended to be a positive expression of opinion on the point now under consideration. . . . The order should go that some other next friend be appointed resident in Ontario, unless the father gives the usual security for costs. *Wolfain* v. *Waterloo Mfg. Co.*, 4 O. W. R. 147, 25 C. L. T. 45, 8 O. L. R. 620.

Next friend — Married woman—Practice. *Booth* v. *Toronto Gen. Hospital* (1909), 14 O. W. R. 87, 128.

Parent — *Habeas corpus.*] — However clear may be the right of a father to the control and custody of his minor child, such right cannot, where its enforcement is not essential to the securing of the liberty of such minor child, be enforced by a writ of *habeas corpus*. *Re Vautrin & Dupuis*, 3 Que. P. R. 232.

Parent — *Religious faith of — Conduct —Estoppel.*]—The order of Townshend, J., 19 C. L. T. 364, was reversed on appeal; Ritchie, J., dissenting:—*Held*, that the father had been guilty of no conduct which should deprive him of the comfort of his daughter's companionship and the direction of her education. *Re Marshall*, 20 C. L. T. 136, 33 N. S. R. 104.

Parents — *Separation of — Access — Proceeding for leave—Second petition—New facts.*]—When, in an action *en séparation de corps*, the judgment granting the separation has given the custody of the children to the wife, the husband may, upon a mere petition, and without the issue of a writ of summons, obtain leave to visit his children from time to time and to care for their education if necessary.—2. The dismissal of a former petition for the same relief does not prevent the husband from presenting a new petition based upon new facts. *Delisle* v. *Pillet*, 17 Que. S. C. 75.

Partition or sale of lands—Rights of guardian—Discretion of Court—Interest of infants—Lease of lands—Proper conditions and restrictions. *Badge* v. *Badge*, 3 O. W. R. 230.

Party to action — *Costs.*] — Upon exception *à la forme* by the defendant alleging his infancy, time will be given to the plaintiff to procure the naming of a guardian for the defendant; the costs of the exception will be reserved. *Garcau* v. *Denis*, 2 Que. P. R. 389.

Party to action — *Trader.*]—Where an infant is a carter, and owns his own horse and cart, and himself delivers goods, he is a trader, and may properly be sued. *Lachance* v. *Painchaud*, 8 Que. P. R. 370.

Person in loco parentis — *Bigamy.*] —A girl aged fourteen was taken by a Refuge Home from the custody of a person standing in *loco parentis* who was proved to be leading a bigamous life:—*Held*, in *habeas corpus* proceedings, that such person had lost his right to the custody of the infant. *Re Soy King*, 7 B. C. R. 291.

Promissory note given for first premium for insurance on infant's life—Action by insurance company—Ontario Insurance Act, s. 150, s.-s. 6. *Federal Life Insurance Co.* v. *Hewitt*, 9 O. W. R. 857.

Ratification after full age — *Knowledge of non-liability at time of ratification.*] —Action on a bill of exchange for goods supplied defendant in his business as a trader. Defendant pleaded infancy. Plaintiffs replied a written ratification by defendant after attaining his majority:—*Held*, to be an absolute, not a conditional ratification, and it is immaterial that defendant was unaware he was not legally liable on his original promise. Judgment for plaintiffs. *Lynch* v. *Ellis*, 7 E. L. R. 14.

Sale of land — *Petition for — Forum— Territorial jurisdiction.*]—When property bequeathed to infants is situated in one district and the infants live in another district, a petition for authority to sell such property should be presented to the Superior Court of the district in which the infants live. *Ex p. Sasseville*, 8 Que. P. R. 368.

Sale of lands — *Requisites — Price.*]—Upon an application in Chambers to sell the lands of an infant, the character of the lands sought to be sold and their value should be clearly put before the Judge on affidavit, and no matter how seemingly good a proposed

sale may be, it should be shewn that the lands have been open to competition among prospective buyers in the vicinity of the lands before an order to sell to an individual will be granted. *Re Donkin*, 20 C. L. T. 353.

Subscription for shares — *Lesion—Rescission—Means of infant.*]—A subscription by a minor to the capital of a joint stock company, however flourishing, is annullable for lesion, if the payments that may be required under it exceed the means of the subscriber. *Bernard* v. *Harteau & Co.*, 30 Que. S. C. 184.

Tort — *Contributory negligence.*]—A boy of eleven years of age and of sufficient intelligence, in the estimation of the Court, to understand the probable consequences of his actions, is liable for contributory negligence in the case of an accident, while attempting to board a tramway car as a trespasser and in disobedience to orders of the school-masters in charge of him. *Normand* v. *Hull Electric Co.*, 35 Que. S. C. 329.

Tutor — *Appointment of — Pleading—Exception.*]—In an action brought by a tutor, *ex-qualité*, the fact that the plaintiff has not been regularly appointed tutor to the minor whom he assumes to represent, must not necessarily be pleaded by exception to the form, but may be set up in a plea to the merits. *Dini* v. *Canadian Construction Co.*, 5 Que. P. R. 447.

Tutor — *Removal — Grounds — Insolvency — Immorality — Action — Interim order—Costs.*]—1. Insolvency is not a sufficient ground for the removal of a father from the office of tutor to his minor children, more especially where it is not established that his insolvency is the result of misconduct, dishonesty, or incapacity.—2. A person cannot be deprived of the tutorship of his children on the ground of immorality unless it be notorious, that is to say, the acts with which the tutor is reproached must be known to a large number of persons, and be the subject of common talk. However opposed to the principles of morality the conduct of a tutor may be, he cannot be removed from office so long as the knowledge of his conduct is restricted to his private circle.—3. During the pendency of an action to remove a tutor from the tutorship of his children, he is entitled to retain the administration of the person and property of the minors, and he can only be dispossessed thereby by an order made by the Court under the provisions of Art. 289, C. C.—4. Where the subrogate tutor is in good faith in bringing an action for the removal of the tutor, he will not, if successful, be condemned personally to costs. *St. Pierre* v. *Tucker*, 18 Que. S. C. 451.

Tutor ad hoc — *Place of appointment.*]—If an infant has interests opposed to those of his tutor, a tutor *ad hoc* may be appointed in the district in which the property of the infant is situated, and in which the original tutor was appointed, and this may be done although the tutor and the infant have gone to live elsewhere. *Frappier* v. *Birabin*, 6 Que. P. R. 102.

Tutor of — *Removal — Procedure — Necessity for action.*]—A demand for the removal of the tutor of an infant can only be made by action in the ordinary form, commencing with a writ of summons in the name of the sovereign. *Ex p. McNicol*, 24 Que. S. C. 170.

Tutors of children have the right to superintend their education and may sue to recover maintenance due them. *Picard* v. *Gadoury* (1900), 38 Que. S. C. 65.

INFANTS' RELIEF ACT.

See CONSTITUTIONAL LAW—STATUTES.

INFECTIOUS DISEASES.

See PUBLIC HEALTH ACT.

INFERIOR COURTS.

See COURTS.

INFORMATION.

See ARREST — COSTS — CRIMINAL LAW — INTOXICATING LIQUORS — JUSTICE OF THE PEACE — MUNICIPAL CORPORATIONS —POLICE MAGISTRATE.

INFORMATION OF INTRUSION.

See CROWN.

INFORMER.

See DENTISTRY.

INJUNCTION.

Absence of notice to defendant — *Motion to dissolve injunction — Grounds available—Inscription for hearing with action.*]—Where the defendant has not received notice of the presentation of a petition demanding the issue of an order for an interlocutory injunction, he may, after the issue of such order, make available as against the issue thereof all the grounds upon which he could have set up if he had received notice of the presentation of the petition; Art. 966, —A party cannot inscribe for hearing at the same time the principal action and a motion made under Art. 996, C. P. C. *Cushing* v. *Montreal*, 8 Que. P. R. 55.

Action to set aside settlement — *Right to injunction—Form of order—Scope —Parties—Costs. Clinton* v. *Sellars* (Alta.), 6 W. L. R. 788.

Action to restrain municipal corporation from paving a street — *Petition for — Required number and property value — Signatures of petitioners questioned as to authority to sign petition—Can. Mun. Act (1903), s. 277, 9 Edw. VII. c. 73, s. 35.*]—In November, 1909, the defendants' city engineer recommended an asphalt pavement for College St., between Manning Ave. and Dovercourt Rd., Toronto. On 20th December, 1909, a petition was deposited with city clerk asking for an asphalt block pavement instead. On 14th January, 1910, the city clerk certified that said petition was signed by two-thirds in number, who represented at least one-half the value of property on said street. The city authorities proceeded to let the contract for the asphalt block pavement to John McGuire. Then plaintiff property owners, on said street, brought action to restrain the city and McGuire from proceeding with the construction of said pavement.—Clute, J., *held*, that the proceedings by the city were regular, the required majority and value had been complied with and the action should be dismissed with costs. *Brundle* v. *Toronto* (1910), 16 O. W. R. 953, 2 O. W. N. 35.

Amendment to prayer after proof and hearing—*C. P. 105, 117, 123, 522.*]—When it contains the necessary averments, the prayer of a petition for injunction, joined to a writ of summons in place of a declaration, may be amended. *Bourgeois* v. *Gouin* (1911), 17 R. L. n. s. 278.

Application for interim order restraining municipal corporation from levying taxes — *Right to recover amount if paid under protest.*]—Plaintiffs applied for an interim injunction to restrain defendants from levying for 1908 business tax. Injunction refused, as plaintiffs should have paid under protest. *Dom. Ex. Co.* v. *Brandon* (1909), 12 W. L. R. 498.

Application before action — *Concurrent issue of writs—Grounds for injunction — Breach of contract — Illegal clauses — Agreement to use only certain machines—Monopoly.*]—It is sufficient to issue the writ of interlocutory injunction at the time the action is begun; therefore the petition may be presented before the issue of the writ of summons, provided that the Court, in granting the injunction, is satisfied that the writ is issued, and that it will be served at the same time as the injunction.—The admission by a party that he has violated certain clauses of his contract, giving for an excuse that the clauses are illegal, constitutes a *prima facie* case for an interlocutory injunction; the Court not being bound, at this preliminary stage, to enquire into the legality or illegality of these clauses.—In a commercial contract it is lawful to impose certain restrictions upon individual liberty, for example, to use only certain machines, to the exclusion of all others, and such restrictions cannot be interpreted as interfering with freedom of trade, even when they have the effect of creating a monopoly in favour of him who imposes them. *United Shoe Machinery Co.* v. *Burnet*, 27 Que. S. C. 200.

Assignment for benefit of creditors —*Prejudice of creditor — Varying order— Title of cause.*]—Where an *ex parte* injunction order restraining a trader, who had obtained goods from the plaintiffs under an agreement that the property therein was to remain in them, with liberty to them to take possession, from, *inter alia*, making an assignment for the general benefit of his creditors, it was ordered to be varied in that respect. It is not a ground for setting aside the service of an *ex parte* injunction order that the order is not intituled in the cause, where the defendant has not been misled. *Gault Bros. Co.* v. *Morrell*, 25 C. L. T. 89, 3 N. B. Eq. 123.

Attorney-General — *Public rights — Coal Mines Regulation Act—Employment of aliens.*]—*Held*, on a motion by the Attorney-General for an injunction to restrain a colliery company from employing Chinamen below ground in contravention of Rule 34, s. 82, of the Coal Mines Regulation Act (amended), that the matter was not one affecting the public or likely to affect the public to such an extent as to call for the granting of an injunction. *Atty.-Gen. for B. C.* v. *Wellington Colliery Co.*, 10 B. C. R. 397.

Balance of convenience — Restraint of trade. *Covert* v. *Lewis*, 1 E. L. R. 319.

Breach of contract — Ability of defendant to respond in damages — Affidavit sworn before issue of writ of summons—Dissolution of injunction. *Northern Construction Co.* v. *Swanson*, 8 O. W. R. 267.

Breach of covenant — *Restraint of trade—Partnership.*]— An interlocutory injunction will be granted at the instance of a partner who has purchased the business of his co-partner, to restrain the latter from violating a stipulation in the agreement of sale whereby the vendor agreed not to enter the same business during some years to come, even if there is a specific penalty mentioned for each contravention. *Davis* v. *Nadel*, 8 Que. P. R. 422.

Building wharf — Mandatory order. *Huntley* v. *Jeffers*, 1 E. L. R. 385, 434.

Chattel mortgage — Sale of goods — Misrepresentations — Breach of warranty. *Rogers* v. *Lavin*, 5 O. W. R. 492.

Continuance — Balance of convenience —Affidavits sworn before issue of writ of summons. *Calverley* v. *Lamb*, 9 O. W. R. 926.

Contract — *Enforcing obligations of—Penalty.*]—In a case where the parties are bound by a contract, an interlocutory injunction may be granted only for the purpose of ordering that a party obligated by the contract shall do exactly what he is under obligation to do by the contract, and refrain from doing that which he is thereby forbidden to do.—Therefore, if an actor has agreed not to sign, during the year following the expiration of his engagement to play upon another stage, under penalty of a forfeiture, there is no ground for granting an interlocutory injunction restraining him from acting upon another stage after he has signed an engagement contrary to his promise. *La Société Anonyme des Théatres* v. *Lombard*, 7 Que. P. R. 262.

Contract — *Prima facie* right—Mining operations — Interference — Threats — Dissolution of injunction obtained *ex parte*. *Lawson* v. *Crawford*, 10 O. W. R. 692, 871.

Contract — Restraining payment of money — Dissolving injunction — Costs — Indemnity. *Townshend* v. *Coleman*, 2 E. L. R. 276.

Contract — *Stipulation as to damages—Agreement in restraint of trade.*]—An interlocutory injunction will not be granted when the parties by a clause of the agreement between them have stipulated that a certain amount of damages will be payable in case of violation thereof. An agreement not to do business, unreasonable as to space, restrictive of trade, and of personal liberty, is null and void in law, and cannot be legally enforced. *Hamilton Powder Co.* v. *Johnson*, 7 Que. P. R. 236.

Contract to play hockey — *Breach of contract — Damages — C. P.* 957.] — Reversing Bruneau, J. The breach of a contract to render personal services to another will not be enjoined except when the services are of such a special, unique or unusual character that their loss cannot be reasonably compensated for in damages.—So an injunction will not be granted against a hockey player for breach of contract, if he is not a player of such prominence that he could not be replaced by other players equally as expert in hockey as himself. *Pitu & L'Association Athlétique d'Amateurs Nationale* (1910), 11 Que. P. R. 336.

Contract to sell shares. *McComb* v. *Beck* (1910), 1 O. W. N. 623.

Costs — *Municipal corporation—Illegal purchase of land.*] — Action by a ratepayer of a city for an injunction restraining the corporation from entering into a certain agreement for the lease and purchase of land for a hay market. In 1898 the lessor, C., loased the land to the city for ten years; subsequently he offered to cancel the lease and make a new one on certain terms; and, on receipt of the amounts named in the lease, he proposed to convey the land to the city in fee. This offer was accepted, and the matter referred to the city solicitors; after it had been so referred the solicitors were advised that certain ratepayers objected to the proposed arrangement and intended to attack the transaction as illegal. C. then wrote the solicitors a letter with an alteration of the terms proposed. After the submission of this proposal by C., and before its consideration by the city council, this action was commenced, and a motion made for an interlocutory injunction. This motion was several times adjourned, and while it was pending C.'s latest proposal was submitted to the council and rejected. After the last adjournment, and before the motion finally came on for hearing, a new arrangement was entered into, so far varying the original proposition that the injunction was not pressed for, and, by agreement, the only question submitted was that of the costs of the action and motion:—*Held*, that the defendants should pay the costs of the action and the motion. *Shrimpton* v. *Winnipeg*, 20 C. L. T. 248.

Damages — *Review — Appeal.*]—Under the new Code of Civil Procedure the writ of injunction can no longer be granted upon a principal demand; the proceeding to obtain it is accessory to a principal action, and conservatory in its nature.—2. It is granted by the Judge only to prevent the destruction of property or other rights which the plaintiff claims in his action, but never in an action for damages.—*Semble*, that the legal remedy, when a motion to dissolve an injunction for default of notice to the defendant has been dismissed, is not review but appeal to the Court of Queen's Bench. *Mc Arthur* v. *Coupal*, 16 Que. S. C. 521.

Debtor disposing of property—*Status of creditor — Verdict for damages—Fraud.*] —The plaintiff in an action of *tort* who has recovered a verdict, the entry whereon of judgment has been stayed, is not a creditor of the defendant, much less a judgment creditor, and is not entitled to have the defendant enjoined from disposing of his property, even where the plaintiff shews upon affidavit the intent of the defendant to defraud the plaintiff and to leave the country with the proceeds of the sale of property. *Burdett* v. *Fader*, 24 C. L. T. 14, 127, 6 O. L. R. 532, 7 O. L. R. 72, 3 O. W. R. 289.

Discretion — *Balance of convenience—Contract — Damages.*]—An agreement not to sign an engagement for the exercise of one's art or profession (in this case that of comedian) is distinct from one not to exercise such art or profession. A violation of it by the signing of an engagement does not afford ground for an interlocutory injunction, where nothing can hinder such violation taking place, and the remedy of the bargainee is in damages. *La Société Anonyme des Théatres* v. *Lombard*, 27 Que. S. C. 476. (See the next case.)

Discretion — *Balance of convenience—Contract — Damages.*]—An injunction is a provisional proceedings and accessory to the principal action, which it is in the discretionary power of the Judge to grant or refuse according to circumstances. In the exercise of this power regard must be had to the inconveniences which may result from it to one or more of the parties, and even third persons, and when the issue of the injunction may cause more harm to one of these than the refusal of it to the plaintiff, the motion will be refused. *La Société Anonyme des Théatres* v. *Lombard*, 15 Que. K. B. 267.

Discretionary order — *Reversal on appeal — Supreme Court of Canada.*]—Although the granting of an order for injunction, under Art. 957 of the Code of Civil Procedure of Quebec, is an act dependent on the exercise of judicial discretion, the Supreme Court of Canada, on appeal, reversed the order, on the ground that it had been improperly made, as the evidence shewed that the plaintiff could otherwise have obtained such full and complete remedy as he was entitled to under the circumstances of the case.—Davies and Idington, JJ., dissenting, were of opinion that the order had been properly granted. *Chicoutimi Pulp Co.* v. *Price*, 27 C. L. T. 656, 39 S. C. R. 81.

Discretionary power to issue interlocutory order for purpose of preserving rights of parties is a prerogative of the Courts in Quebec which has always existed, even under French regime; the common law was not changed by the statute respecting injunctions. *Edwards* v. *Ste Marie du Monnoir* (1910), 12 Que. P. R. 24.

Disobedience to judgment during the appeal.]—When plaintiff has obtained the injunction asked for, and an appeal is pending, he cannot ask for a new interlocutory injunction, if the defendant infringes or refuses to obey the judgment, pending the appeal; his remedy is pointed out in article 971 C. P. *Standard Sanitary Mfg. Co.* v. *Standard Ideal Co.*, 11 Que. P. R. 100.

Disposition of property — Status of plaintiff — Creditor — Verdict for damages —Judgment stayed. *Burdett* v. *Fader*, 2 O. W. R. 942, 6 O. L. R. 532.

Dissolution — *False documents—Petition — Rescission of order dissolving.*] — When an interim injunction has been dissolved upon documents the falsity of which has since been discovered, a petition demanding the setting aside of the order dissolving the injunction will be granted, and the parties will be remitted to the position in which they were before the fact which gave rise to the petition. *Yaphe* v. *Can. Pac. Ry. Co.*, 8 Que. P. R. 383.

Electric poles and wires — Placing in public highway of town — Dangerous proximity to poles and wires already in position —Leakage of current — Commercial necessity — Approval of town council — Power and authority — Status — Interference with property of other electric companies. *Can. Pac. Ry. Co.* v. *Falls Power Co.*, 10 O. W. R. 983, 1125.

Executors — *Shares in hands of — Restraining transfer of.*] — An interlocutory injunction will be granted to prevent testamentary executors domiciled out of the province from transferring certain shares, at a time when a seizure of the same shares under a judgment against the testator, as well as an attachment against the executors, has just been set aside. *Bowie* v. *Crawford*, 7 Que. P. R. 1.

Ex parte — *Application to dissolve.*] — Plaintiff and defendants are adjoining owners. Defendants erected a steam factory close to wall of plaintiff's dwelling house. Plaintiff complained that the smoke, soot and cinders from the factory, and the noise, tremor, and vibration caused by working of machinery, disturbed him and his family in the comfortable enjoyment of his dwelling; that the boiler in respondents' factory was placed very close to plaintiff's wall, that it was a second-hand boiler worked at a high pressure, and was unsafe and liable to explode and cause great damage to his dwelling house and the inmates of it, and obtained an injunction. Defendants denied the nuisance, and set up a prescriptive right to an easement. Defendants also claimed that plaintiff in his application for injunction omitted to state facts which should have been stated, and denied plaintiff's statement that the boiler was second-hand and unsafe, and asked to have injunction dissolved:—*Held*, (Peters, M.R.), that there was sufficient ground for granting the injunction, and that the proper course is not to dissolve it but to continue it until the hearing or further order on the plaintiff undertaking to abide by any order this Court may make as to damages in case the Court shall hereafter be of opinion that defendants have sustained any damage by reason of this injunction, which the plaintiff ought to pay. *Alley* v. *Duchemin* (1878), 2 P. E. I. R. 206.

Ex parte application — *Suppression of facts — Interpleader — Affidavit negativing collusion.*]—The rule that on an application for an *ex parte* injunction order a full and truthful disclosure must be made of all material facts, must be strictly observed.—Where, in an interpleader suit, an *ex parte* injunction order was dissolved for suppression of material facts, leave was granted to move again for the order, together with the right to file an affidavit denying collusion. *Can. Pac. Ry. Co.* v. *Vason*, 2 E. L. R. 498, 3 N. B. Eq. 476.

Expropriation of land — Compensation — Tenant for years. *Campbell* v. *Hamilton Cataract & Power Co.*, 5 O. W. R. 60.

Fraudulent transfer of property.]—Where a debtor fraudulently transferred property the Court enjoined further transfers until a creditor could obtain judgment and attack the conveyance. *Fairchild* v. *Elastic* (1909) 2 Alta. L. R. 115.

Impeaching bill of sale.]—Action to set aside a bill of sale and for an injunction, the action being brought under above Acts. There were no allegations that there were other creditors than plaintiff, therefore action can not be brought under Preferential Assignment Act (Sask.), or 13 Eliz. c. 5. Plaintiff was a simple contract creditor. Injunction dissolved. *Laukin* v. *Walker* (1909), 12 W. L. R. 320.

Ineffectiveness.]—A petition for an interlocutory injunction to restrain the defendants from doing certain construction work will be refused, if the work is finished at the time of the service of the petition upon the defendants. *Riopelle* v. *Altman*, 9 Que. P. R. 80.

Infringement of municipal by-law *after its approval by ratepayers—Contractors brought into the suit—C. P.* 957.]—An interlocutory injunction will be granted to stop the execution of a contract given out by a municipal council for the sum of $50,100, when a by-law for the purpose, approved by the ratepayers, only provided for an expenditure of $50,000. Upon the petition for an injunction, leave will be granted to call into the case the contractors to whom the contract was let. *Lacroix* v. *Cartierville* (1910), 12 Que. P. R. 119.

Inscription in review — *Judgment ordering defendant to plead to the merits—C. P. 52a, 467.*]—An interlocutory judgment whereby the defendant is ordered to plead to the merits of the action although an exception to the form is still pending, does not

rogue within any of the cases mentioned in Art. 52a, C. P., and cannot be inscribed in review. *Serling* v. *Levine*, 11 Que. P. R. 144.

Interference with ancient lights — Erection of building — Speedy trial. *London & Canadian Loan & Agency Co.* v. *National Club*, 8 O. W. R. 291.

Interim — Motion for — To restrain defendants from disclosing formulæ for proprietary medicines — Enlarged before trial Judge — No adjudication upon merits. *Groh* v. *Turner* (1910), 17 O. W. R. 101, 2 O. W. N. 359.

Interim—*Restraining barber from carrying on his business — Inconvenience of parties.*]—Teetzel, J., *held*, that where it appears that the inconvenience seems to be equally divided as between the parties the Court should not grant an injunction. — *Dwyre* v. *Ottawa* (1898), 24 A. R. 121 at 130, followed. *Sexton* v. *Brockenshire* (1911), 18 O. W. R. 640, 2 O. W. N. 800.

Interim injunction — Absence of irreparable injury — Dissolution — Convenience—University federation. *Trinity College* v. *Macklem*, 2 O. W. R. 809.

Interim injunction — *Breach of contract to sell goods to plaintiff only—Remedy in damages.*]—A contract recited that the plaintiff, in conjunction with others, was forming a company to be incorporated, and that the plaintiff was desirous of purchasing bricks for the benefit of the proposed company, and set out the intention of the plaintiff to assign all his interest in the contract to the company upon its incorporation, and stipulated that, upon such assignment, the company should be substituted for the plaintiff in the contract, and the evidence shewed that the defendants did not intend to enter into such an agreement for the benefit of the plaintiff and his associates personally, but that the formation of the company and its interest in the proposed purchases were material parts of the arrangements. The statement of claim in each case alleged that, relying upon the contract and upon the supply of bricks under it, the plaintiff, together with others, entered into a number of building contracts requiring the use of bricks, that the plaintiff would require for the purposes of his business during the present year all the bricks called for by the said contract, that the plaintiff and the company were tendering for and expected to obtain a large number of other building contracts requiring bricks, that the plaintiff expected to sell bricks to other builders at a profit, and that, unless the defendants supplied the bricks called for by the contract, it would be impossible for the plaintiff to get bricks in time to carry out these contracts, or to complete the works in the manner and within the time mentioned in said contracts. The evidence adduced supported these statements in the main, but did not shew that the contracts referred to had been made for the benefit or on behalf of the company or that the company had acquired any interest or incurred any liability in respect of them; — *Held*, that the plaintiff should, under the circumstances, be left to his claim for damages, if any, arising from the alleged breach of the contract, and that interim injunctions should be dissolved. *Cass* v. *Couture*, *Cass* v. *McCutcheon*, 23 C. L. T. 249, 14 Man. L. R. 458.

Interim injunction — Completion of elevator — Delivery of possession—Rights of parties. *Jamieson* v. *MacKenzie, Mann & Co.*, 1 O. W. R. 555.

Interim injunction — *Condition — Security — Time.*]—Where a party has obtained an interlocutory injunction on condition of furnishing security, the Court may by a subsequent judgment fix a time within which security must be furnished under penalty of the dissolution of the injunction granted. *Moore* v. *Bullock*, 5 Que. P. R. 464.

Interim injunction — Contract—Timber. *Northern Lumber Co.* v. *Milne* (1910), 1 O. W. N. 130.

Interim injunction — *Cutting timber on disputed land — Finding by jury in replevin action.*]—An *ex parte* injunction to restrain the defendants from cutting timber and removing timber already cut, on lands, the title to which was claimed by the plaintiff and defendants by possession, was dissolved, where a jury in an action of replevin by the plaintiff to recover timber cut by the defendants on the land, had found in their favour, though a motion for a new trial was undisposed of. *Wood* v. *Leblanc*, 23 C. L. T. 157, 2 N. B. Eq. 427.

Interim injunction — Dealing with shares — Dissolving. *Wright* v. *Roweau*, 2 O. W. R. 120.

Interim injunction — *Dissolution before hearing — Assessment of damages.*] — Where an *ex parte* injunction was dissolved before the hearing of the suit which was for a declaration of title to land, the Court postponed assessing the defendant's damages upon the plaintiff's undertaking given on obtaining the injunction, to the hearing of the suit. *McLellan* v. *Turner*, 23 C. L. T. 208.

Interim injunction — Newspaper—Advertisement — Trade union — Preponderance of convenience. *Dixon* v. *Globe Printing Co.*, 2 O. W. R. 726.

Interim injunction — Order to continue. *Colborne* v. *Giroux* (1910), 1 O. W. N. 1083.

Interim injunction — *Railway — Expropriation — Crossing line of another company — Appeal — Questions for trial.*] — On the application of the plaintiffs, who alleged *inter alia* that the defendants' railway was not commenced within two years, that no map or plan and profile of the whole line of railway had been prepared and deposited in the department of the Minister of Railways, and that the work being done by the defendants was not authorised and was not being prosecuted in good faith under their charter, but was really for the benefit of the Great Northern Railway Company, so that it might extend its railway system, which lies south of the international boundary, into British Columbia, injunctions were granted

restraining until the trial of the action the defendants from continuing in possession and proceeding with the expropriation of the land of the plaintiff hotel company, and also from taking any proceedings toward effecting the proposed crossing of the right of way of the plaintiff railway company. Motions to dissolve the injunctions were refused. The full Court (Irving, J., dissenting) dismissed an appeal on the ground that there were several points of importance which should be decided at the trial. *Yale Hotel Co.* v. *Vancouver, Victoria & Eastern Rw. & Navigation Co., Grand Forks & Kettle River Rw. Co.* v. *Vancouver, Victoria & Eastern Rw. & Navigation Co.*, 9 B. C. R. 66.

Interim injunction — *Refusal — Discretion — Appeal.*]—Although the Court of King's Bench sitting in appeal has power to overrule the discretion exercised by the Court of first instance in refusing a petition for an interim injunction, it is a power which will be used only in an extreme case, where the right of the petitioner is clear and unmistakable, and where there has been manifest error in refusing his application. *South Shore Rw. Co.* v. *Grand Trunk Rw. Co.*, 12 Que. K. B. 28.

Interim injunction — *Rule as to granting — Facts in dispute — Partnership — Receiver.*]—On a motion for an interlocutory injunction to restrain defendant from disposing of assets of an alleged partnership between him and the plaintiff to carry on a business previously conducted by the defendant, and for a receiver, the plaintiff alleged that books of account were opened up, and a bank account kept, in the firm's name; that bill heads with the name of the firm, and names of the plaintiff and defendant thereon, were used, and a circular under the firm's name distributed by the defendant, announcing that the plaintiff was associated in the business. The defendant denied that a partnership was formed, and alleged that it was contingent upon the plaintiff paying into the business a sum of money equal to the value of the defendant's stock-in-trade on hand; that this had never been done; that the plaintiff was employed at a weekly salary; and that the bill heads were ordered by the plaintiff without authority, and their use only permitted after his assurance that he would shortly purchase an interest in the business. These allegations were denied by the plaintiff:—*Held*, that the motion should be granted. On a motion for an interlocutory injunction, the Court should be satisfied that there is a serious question to be determined, and that under the facts there is a probability that the plaintiff will be held entitled to relief. *Burden* v. *Howard*, 2 N. B. Eq. 461.

Interim injunction — *Threatened injury to property — Discretion — Affidavits in reply — Non-disclosure of material facts — Offer — Costs.*]—1. When evidence is given to the satisfaction of the Judge that there is a strong probability of injury to the plaintiff's building by the continuance of blasting operations for the loosening of frozen earth on adjoining land, it is proper, on motion to continue an *ex parte* injunction, to grant an interlocutory injunction restraining the contractor until the hearing of the action from carrying on such blasting in such a manner as to injure the plaintiff's building, although there is no proof that any actual injury to such building has already resulted. *Fletcher* v. *Bealey*, 28 Ch. D. 688, and *Attorney-General* v. *Manchester*, [1893] 2 Ch. 87, followed. 2. There is a discretion in the Judge on the hearing of such a motion to allow affidavits in reply which contain statements going merely to strengthen the original case; and, when an opportunity is given to the defence to answer the affidavits in reply, the full Court on appeal will not interfere with such discretion. *Peacock* v. *Harper*, 7 Ch. D. 648, followed. 3. The non-disclosure of material facts on the application for an *ex parte* injunction for a limited time, although a ground for discharging it, will not necessarily disentitle the plaintiffs to succeed on a motion to continue the expiring injunction when both sides present their cases fully, and the Court is not bound to specifically discharge the interim injunction or to award costs to the defendants. 4. An offer or suggestion on the part of the plaintiffs, before commencing the action, to accept a bond to secure them against damages caused by the operations complained of, even if distinctly proved, would not necessarily preclude them from claiming an injunction afterwards, though it would be a fact to be taken into consideration in determining whether a remedy by action for damages would not be adequate. *Wood* v. *Sutcliffe*, 2 Sim. N. S. 168, distinguished. 5. Costs of appeal were ordered to be paid by the appellant in any event. *Miller* v. *Campbell*, 23 C. L. T. 223, 14 Man. L. R. 437.

Interim on ex parte application — Motion to continue to trial—Writ of summons not served—Not obligatory upon plaintiff—Order granted restraining sheriff from selling under execution—Interpleader issue to determine ownership of goods. *Nipissing Coca Cola Bottling Works* v. *Wisse* (1911), 18 O. W. R. 270, 2 O. W. N. 677.

Interim order — *Action to set aside fraudulent conveyance — Execution creditor —Right to injunction — Form of order — Scope — Parties — Costs.*]—The Court has power to grant an interim injunction, *quia timet*, in a fraudulent conveyance action brought by an execution creditor.—An interlocutory injunction order will only be granted over an "interim;" and an order final in form and effect, though reserving liberty to the defendant to move to vacate it, will be set aside or varied.—Where persons not parties to the action are enjoined, as an auxiliary remedy to the injunction against the defendant, the defendant cannot object merely on the ground that they are not parties.—The Court will not by injunction tie up more property than actually necessary for the plaintiff's protection.—A defendant succeeding in substantially varying an *ex parte* order on motion to set it aside, will be given costs of the motion in any event. *Clinton* v. *Sellars*, 6 W. L. R. 788, 1 Alta. L. R. 129.

Interim order — *Costs — Municipal corporation — Illegal purchase of land.*]—The council of a city having by resolution proposed to enter into a contract of purchase of certain land to be paid for in five yearly instalments, notwithstanding the provisions of s. 396 of the Municipal Act, R. S. M.

c. 100, this action was brought by a ratepayer and a motion made for an injunction to prevent the proposed purchase. After several adjournments of the motion, and before it finally came on for hearing, a new arrangement was entered into so far varying the original proposition that the injunction was not pressed for on that argument, and the only question for decision was as to the disposition of the costs:—*Held*, following *Hoole* v. *Great Western Ry. Co.*, L. R. 3 c. 262, that a suit or an injunction was proper in such a case, and that the defendants should pay the costs. It is not necessary that such a suit should be brought in the name of the Attorney-General. *Smith* v. *Raleigh*, 3 O. R. 465, and *Wallace* v. *Orangeville*, 5 O. R. 37, followed. *Shrimpton* v. *Winnipeg*, 2 C. L. T. 248, 13 Man. L. R. 211.

Interim order — *Dissolution for default of security.*]—An interlocutory injunction, subject to the giving of security within a certain delay, will be dissolved on motion if such security is not given. *Moon* v. *Bullock*, 6 Que. P. R. 59.

Interim order — Incorporated society —Qualification of officers — Refusal to enjoin council from acting — Discretion—Appeal. *Sutherland* v. *Grand Council of Provincial Workmen's Association*, 6 E. L. R. 45.

Interim order — *Issue before writ of summons — Restraining adoption of municipal by-law.*]—It is not necessary that a writ of summons should be issued before an interlocutory injunction is applied for; it is sufficient if it issues after the injunction order has been signed, for the two may be served at the same time.—*Quære*, whether an interlocutory injunction may be issued against a municipal corporation to restrain it from proceeding to adopt a by-law. *Wilder* v. *Quebec*, 25 Que. S. C. 128.

Interim order — *Municipal by-law — Enforcement.*]—An interlocutory injunction will be granted to restrain the enforcement of municipal by-laws which are seriously contested in a cause actually pending in Court. *Jodoin* v. *Belœil*, 6 Que. P. R. 430.

Interim order — Municipal corporation — Contract — Comparative convenience. *Slater* v. *Niagara Falls*, 4 O. W. R. 242.

Interim order — *Possession of land — Claim of lien.*]—An interlocutory injunction will not be granted, in the course of an action, in order to put the plaintiff in possession of property on which the defendant is about to erect buildings for the plaintiff, if the possession of the land, as to which the defendant alleges a right of retention, is one of the objects of the litigation. *Canada Radiator Co.* v. *Société Anonyme de Construction*, 6 Que. P. R. 354.

Interim order — *Restraining debtor from transferring his property before judgment — Pleading — Statement of claim — Amendment — Fraudulent conveyance — Parties — Fraudulent grantor — Costs — Appeal.*]—The plaintiffs, not being judgment creditors, obtained, in an action to set aside alleged fraudulent conveyances of his property by the defendant W. to his wife, an interim injunction to prevent further transfers of the property by either defendant:—*Held*, that the injunction should be dissolved, because the statement of claim contained no distinct allegation that the grantor was indebted to the plaintiffs at the time of the alleged fraudulent conveyance. — Leave to amend the statement of claim was granted; but, as it contained no sufficient allegation of the indebtedness of the grantor to the plaintiffs, nor any claim for an order against him for payment, and it could not, therefore, be determined, until after the amendments were made, what relief would be claimed against the alleged fraudulent grantor, which might make him a proper party, or whether he would or would not be retained as a party.—*Held*, that the plaintiffs should be ordered to pay the defendants' costs of the motion for injunction and of the appeal forthwith. *Traders Bank* v. *Wright*, 8 W. L. R. 105, 208, 380, 17 Man. L. R. 614.

Interim order — *Undertaking as to damages — Non-resident plaintiff — Responsible person in jurisdiction — Practice.*] — *Held*, that an applicant for an interlocutory injunction must in all cases, as a condition of obtaining the injunction, give an undertaking to be answerable in damages, and when the party so applying is a non-resident, such undertaking must be given by his solicitor personally, or by some responsible person within the jurisdiction. *Kent* v. *Clarke*, 8 W. L. R. 617, 1 Sask. L. R. 146.

Interim order — User of right of way — Balance of convenience. *Hopkins* v. *Anderson*, 4 O. W. R. 118.

Interim order made ex parte — *Enforcing obedience to — Contempt of Court.*] —An injunction order made *ex parte* by a local Judge must be obeyed until set aside, and if disobeyed the defendant will be committed for contempt of Court. *Leberry* v. *Braden*, 7 B. C. R. 403.

Interlocutory injunction — *Acquiescence by petitioner in acts complained of— Damages caused by the injunction — C. P. 957.*]—An interlocutory injunction will be refused if it is established that the petitioner acquiesced in the doing of acts of the nature of those which he seeks to prevent.—Such an injunction will not be granted either if it is of such a nature that it will cause serious damage to the public and to certain adjoining municipalities, and if it is not proved that the petitioner will suffer some injury if the application for the injunction is refused. *Montreal* v. *Montreal St. Ry. Co.*, 11 Que. P. R. 142.

Interlocutory injunction granted restraining blasting operations which caused rocks, etc., to be hurled on applicant's property. *Rheaume* v. *Stuart* (1910), 11 Que. P. R. 434.

Interlocutory injunction — *Neighbouring building — Middle wall — C. P. 957.*]—An interlocutory injunction will not be granted to prevent the respondent from building on his own land, and from putting one-half of a middle wall upon his neigh-

bour's property, upon the ground that he is encroaching, more particularly when there has never been a legal boundary between the two properties. *Ravicot* v. *Maher*, 11 Que. P. R. 208.

Irreparable injury — *Company — Sale of property by directors.*]—A writ of injunction is an exceptional proceeding, an extreme remedy, which will be granted only in case of urgency, where it offers the only means of preventing a serious or irreparable injury. Consequently, when the directors of an industrial company take proceedings, in pursuance of resolutions of the shareholders adopted at a general meeting, to sell the property of the company, the motion of a shareholder opposing the resolution for an injunction to prevent them from doing so, and which does not come within the above conditions, will be dismissed. *Plamondon* v. *Blouin*, 28 Que. S. C. 140.

Issue of a writ of interlocutory injunction will be ordered to prevent a public corporation from overriding the law to the injury of the ratepayers. *St. Denis* v. *Catholic School Comrs.* (1910), 12 Que. P. R. 112.

Landlord and tenant — *Repairs by landlord — Interference with tenant's occupancy.*]—A landlord, who, during the term of the tenancy, makes considerable repairs to the property leased, which interfere with the occupancy of the tenant, may be restrained by an interlocutory injunction. *Haycock* v. *Pacaud*, 7 Que. P. R. 249.

Landlord and tenant — *Stopping of work commenced by landlord — City by-law — Suspension of injunction.*]—Where works are commenced by a proprietor on premises leased, and subsequently stopped by injunction at the lessee's request, the injunction may be suspended if it is proved that the city, in virtue of its by-laws, would be obliged to terminate the work itself, if it remained unfinished. *Haycock* v. *Pacaud*, 7 Que. P. R. 270.

Lease — *Quia timet action — Supporting affidavits — Probability of damage — Legitimate business.*] — The defendant L. held certain premises under a lease granted by the plaintiff N. to one W. and assigned by W. to L. The lease contained express covenants, but nothing in reference to its assignment, or to the use of the premises, with the exception of the word "office" used in the description, which was as follows: "All that certain office situate on the ground floor of her brick building on the east side of Main street, in the said town of Woodstock, and the office in the said building fronting on the south side of Regent street, in the said town, also the lower part of the shed in the rear of the said office," etc. W. was an attorney, and occupied the premises as an office. L. was a retail meat and fish dealer, and proposed to carry on this business in the premises:—*Held*, that there was no implied covenant in the lease restricting the lessee to the use of the premises as an office, as it was not necessary to carry out any obvious intention of the parties; and that the word "office" in the lease was used merely as a means of identifying the premises included in the demise. — *Held*, that, as no actual damage had been shewn the action was in the nature of a *quia timet* action; and that, as the defendant was carrying on a legitimate business, and there was no probability of any immediate or irreparable damage to the plaintiff arising, the application for an injunction must be dismissed. *Aveces* v. *Lilley*, 4 N. B. Eq. 194, 6 E. L. R. 215.

Master and servant — *Trade combination—Illegal acts of strikers—Scope of injunction.*]—An interim injunction restraining the defendants (striking plumbers) from interfering in any manner with the non-striking workmen employed by the plaintiffs (master plumbers) should be continued to the hearing, if the affidavits shew that the defendants have endeavoured to induce the employees of the plaintiffs to break their contracts with them; and have entered into a conspiracy and combination to induce such employees to leave the plaintiff's employ, and to prevent other workmen from entering into such employment, and have annoyed some of the plaintiffs' workmen who did not join the strike. Such an injunction, however, should contain the words, "except for the purpose of obtaining and communicating information," in the clause forbidding generally the besetting of the plaintiffs' premises. *Cutler* v. *Osborne*, 5 W. L. R. 14, 16 Man. L. R. 395.

Mining operations — Injury to neighbouring claim. *Gallagher* v. *Bonanza Creek Gold Mining Co.* (Y.T.), 6 W. L. R. 142.

Moneys withdrawn from business—Deposit by stranger—Claim of right—Restraint on alienation pending action. *Beaird* v. *Carter*, 3 O. W. R. 70.

Motion for — Restraining erection of school house within 100 yards of plaintiff's residence—Undertaking to proceed to speedy trial—If defendants proceed—At their own risk—Costs in cause unless otherwise ordered by trial Judge. *Logan* v. *Grantham S. S.* (No. 2) (1910), 17 O. W. R. 553.

Motion for, before appearance — Necessity for leave of Court—Notice of motion—Order lii., Rules S. 9. *Farquharson* v. *Sydney*, 40 N. S. R. 617.

Motion to continue until trial — *Injunction dissolved.*]—Motion by plaintiff to continue injunction restraining defendants from selling Gillette Safety Razor, at less than $5, and Gillette Safety Razor blades at less than $1 per dozen, until trial:—*Held*, that on the evidence proof failed as to the terms by which the companies who first sold to defendants had acquired or had sold the goods, and similarly there was proof that no stipulation was made on the purchase of goods by defendants. The injunction should not be continued. Such stringent relief should be only given in a case clear in point of law, and only doubtful on the facts. Injunction dissolved. Costs in the cause. *Gillette* v. *Rea* (1910), 15 O. W. R. 345.

Motion to continue until trial — *Land Titles Act (Sask.)*]—Motion by plaintiff to continue an interim injunction. The interim order directed service of notice of

motion to continue:—*Held*, that it need not be by summons and notice was proper. It was urged that the *ex parte* injunction had been improperly granted, it having been withheld that plaintiff had registered a *caveat* against the property in question. The injunction would have been granted even if the Court had been informed of the *caveat*. It was prudent to obtain the injunction to preserve the vendor's lien; a *lis pendens* would have been of no use. *Bashford* v. *Batt* (1909), 12 W. L. R. 428.

Motion to continue until trial — Restraining arbitration on expropriation proceedings—London Water Commission—Contract with individual for purchase of property sought to be expropriated—Arbitration proceedings brought by municipality to aid contractor to acquire title — Order granted. *Gerry* v. *London Water Commissioners* (1911), 19 O. W. R. 64, 2 O. W. N. 1016.

Motion to dissolve — *Necessity for.*]— Where an interim injunction is granted to a day certain, and a motion to continue is necessary to extend it beyond such day, a motion to dissolve is improper, except where it is desired to get rid of the interim order before the day named. *McCuaig* v. *Conmee*, 20 C. L. T. 14, 19 P. R. 45.

Motion to restrain defendant from parting with his property refused as plaintiff had no judgment and no right to execution—Plaintiff's intention to appeal to Supreme Court of Canada. *Lamont* v. *Wenger* (1909), 14 O. W. R. 1037, 1 O. W. N. 209. See S. C. 14 O. W. R. 984.

Municipal corporation—Action against, by ratepayer — *Locus standi* — Census enumeration — License commissioners—Parties. *Humphries* v. *Arthur*, 3 O. W. R. 153.

Nuisance — *Injunction to restrain — Breach—Motion to commit.*]—An injunction had been granted restraining defendants from using their factory so as to cause noise and vibration to be felt in complainant's house which adjoined the factory. Defendants then removed their machinery to a building 20 feet from the factory, leaving the steam engine in the factory, and by a shaft 35 feet long running underground connected the machinery with the engine and continued to use the factory, causing noise and vibration similar to those they were enjoined not to cause. Complainant moved to commit them for breach of the injunction.—Ordered, Peters, M.R., that defendants stand committed, but on their paying complainant the costs of the motion within six days after taxing the warrant of commitment to be suspended until the further order of the Court. *Alley* v. *Buchemin* (1880), 2 P. E. I. R. 369.

Object of suit attained — *Discontinuance — Costs — Expense of complying with order.*]—A plaintiff, in an action of damages for a wrongful publication against the author of it, who obtains an interim injunction ordering the publisher, *mis en cause*, but not as a joint tort-feasor, to suppress the publication, and who, having attained his object by the execution of the order, discontinues his suit and pays the costs, is further liable to the publisher for the expense of so complying with the injunction. *Bell Telephone Co.* v. *Canada Asbestos Co.*, 29 Que. S. C. 104.

Obstruction of river — *Removal—Dismissal of suit — Costs — Assessment of damages—Remedy at law.*]— The plaintiff was prevented from driving his lumber down a tributary of the Saint John river by the closing of the passage by a pier and boom erected by the defendant in connection with his saw mill, and by logs of the defendant. The defendant was the owner of both sides of the river. The suit was for a mandatory injunction to compel the removal of the pier, booms, and logs so as to open up and to keep open a passage for the plaintiff's lumber, and for an assessment of damages. The bill was filed and motion heard on the 23rd May, two days before the passage had been opened:—*Held*, that the injunction in respect of future obstruction should be refused, and the plaintiff left to recover his damages, if any, in an action at law, but that the bill should be dismissed without costs; the plaintiff to have costs of obtaining and serving an interim injunction obtained in the matter. *Watson* v. *Patterson*, 23 C. L. T. 268.

Parties — *Action — Practice.*]—1. Injunction proceedings can be taken against parties to a suit only.—2. Such suit may be instituted simultaneously with the application for the injunction.—3. The service of a petition of notice of any kind, without a writ, does not suffice to constitute the person upon whom such service is made a party to a suit. *Paradis* v. *Paradis*, 19 Que. S. C. 375.

Patents for invention — *Action for infringement of patents and breach of contract —Invalidity of patents — License — Interim injunction.*]—Plaintiff moved for interim injunction to restrain defendants from infringing plaintiff's patents for certain inventions relating to the manufacture of glucose, maltose, modified starch, etc. Motion enlarged before trial Judge as evidence was of technical character and so conflicting as not to justify issuing an interim injunction. *Durgea* v. *Kaufman* (1910), 16 O. W. R. 809, 1 O. W. N. 1127.

Payment of money to debtor — *Request for assignment—Attachment of debts.*]—Where a creditor suspects that a certain sum of money due to his debtor (who has refused to assign for benefit of creditors) will, if paid to the latter, be placed where creditors cannot get at it, he is not entitled to a judgment restraining the person who owes the debtor from paying to him and the debtor from receiving; his only remedy is by garnishing proceedings. *Bowker* v. *Lynn*, 17 Que. S. C. 320.

Peremptory writ — *Petition — Trial —Patent for invention.*]—A petition for a peremptory injunction cannot be heard before the regular and ordinary trial of the action, and cannot be the subject of a special early hearing, even in an action for the infringement of a patent. *Consolidated Car Heating Co.* v. *Caine*, 2 Que. P. R. 401.

Personal services—*No injunction to restrain.*]—Injunction, like any other remedy borrowed from foreign systems of law, is

subject to the fundamental rules of the civil law, and particularly to the rule that no one can be compelled to do or not to do something. Hence, it does not lie to prevent one who has hired his services to another, even by an exclusive agreement, from hiring them to a third party. Under Art. 1065 C. C., the violation of such an obligation only gives rise to an action in damages. *Pitre* v. *National Amateur Athletic Assoc*, (1910), 20 Que. K. B. 41.

Petition — *Amendment.*]—Under Arts. 988 and 980 a writ of injunction can issue only upon a petition supported by affidavit, but that does not prevent the petition being amended after the issue of the writ under Art. 513; at all events in cases where the effect is not to contradict or withdraw any of the allegations of the petition upon which the order for the issue of the writ was based. And in a case where the amendment was supported by affidavit, a motion to set it aside was refused. *Royal Electric Co.* v. *Morrice*, 2 Que. P. R. 563.

Petition — *Municipal corporations — Resolution — Final judgment — Separate hearing.*]—An interlocutory injunction was issued upon a petition made as an incident in a pending cause, whereby the annulment of certain resolutions of the police committee and of the council of the defendant city corporation was prayed for—the petition, besides praying for an interlocutory injunction, praying also for the annulment of said resolutions:—*Held*, that under Art. 968, C. P., the conclusions of a petition for injunction, other than those upon which the interlocutory injunction issues, are to be adjudicated upon by the final judgment which at the same time adjudicates upon the merits of the action. Therefore an inscription for proof and final hearing on the merits of the petition for injunction separately from the main action is irregular, and will be rejected on motion. *Martin* v. *City of Montreal*, 17 Que. S. C. 95, 2 Que. P. R. 475.

Practice — *Ontario Rule 57.*] — As interim injunction had expired, motion to continue refused. *Reith* v. *Rainy River* (1909), 14 O. W. R. 530.

Preservation of rights — *Change in premises.*]—The object of an interim injunction is to maintain the *status quo* between parties until it shall be otherwise ordered by the Court; no provision of the law authorises the issue of an injunction to change the condition of the premises occupied by the parties. *Houle* v. *Beaumier*, 9 Que. P. R. 110.

President of a mining company *elected at annual meeting — Directors removed the president and elected defendant in his stead.*]—Plaintiff had been elected president of Peterson Lake Silver Cobalt Mining Co., Limited, at the annual meeting, and subsequently by vote of the directors removed and the defendant elected in his stead. Then this motion was made to restrain defendant from acting or assuming to act as president of the company, until the next annual meeting:—*Held*, that the motion should stand for hearing as a by-law of the company seemed to give the directors power to remove officers of the company. *Steindler* v. *Maclaren* (1909), 14 O. W. R. 647.

Prevent transfer of property.]—The Court will not, at the instance of a non-judgment creditor, interfere by injunction to prevent a transfer of property by debtor. *Fairchild* v. *Elmslie* (1909), 2 Alb. L. R. 115.

Prohibition by-law — *Publication of the requisition — Delays — Interested parties—C. P. 957; R. S. O. (1888), 1098, 1099.*]—A demand for an interlocutory injunction to restrain a municipal corporation from holding a public meeting to consider a by-law imposing prohibition for irregularities must be directed against the corporation and its secretary treasurer, and not against the signers of the requisition.—An interested party may ask for that interlocutory injunction before the vote is taken on that prohibition by-law.—The publication of the requisition and of the notice asking for a prohibition by-law must cover four full weeks; the publishing of it once a week upon any day of the week during four consecutive weeks is insufficient. *Moir* v. *Huntingdon* (1910), 11 Que. P. R. 319.

Railway — *Order of Board of Railway Commissioners—Supreme Court—Co-ordinate jurisdiction—Appeal—Stay of proceedings.*]—In an action by a municipality for an injunction against a railway company to restrain the latter from closing up or interfering with a certain road, it developed that the Board of Railway Commissioners had made an order authorising the railway company to divert a portion of the said road and construct their line between certain points of such diversion. The trial Judge decided that the municipality could maintain such an action only by the Attorney-General as plaintiff:—*Held*, on appeal, while the Court had jurisdiction to grant all proper relief, the Board of Railway Commissioners having dealt with the matter, the plaintiffs should apply to the Board for relief, as they had complete control over their order. *Delta* v. *Vancouver, Victoria & Eastern Ry. & Navigation Co.*, 14 B. C. R. 83, 9 W. L. R. 236, 467, 8 Can. Ry. Cas. 362.

Affirmed 11 W. L. R. 208.

Receiver — *Balance of convenience — Company.*]—An application to continue until trial an interim injunction granted *ex parte*, and to appoint a permanent receiver, was dismissed, where the plaintiff's right of action was not entirely free from doubt, and it appeared that the injury that would be occasioned to the defendants by the granting of the injunction and the appointment of a receiver, if the plaintiff ultimately failed, would be very great, while that which would result to the plaintiff by its refusal, if he ultimately succeeded, would be comparatively small. Application of this principle to an incorporated company. *Reynolds* v. *Urquhart*, 5 T. L. R. 413.

Removal of sand from bed of river *—Subsidence of bank—Private rights—Convenience of public.*]—Inconvenience to the public cannot be set up as against private rights, and where it is shewn that the removal of sand from the bed of a river oppo-

site the plaintiff's property has caused a subsidence of the bank, and, if continued, is likely to cause irreparable damage, an injunction should be granted to stop the dredging, notwithstanding affidavits shewing that contractors and the public would suffer loss and inconvenience if the sand could no longer be procured from that source for building purposes. *Patton* v. *Pioneer Navigation & Sand Co.*, 5 W. L. R. 40, 16 Man. L. R. 433.

Repetition of slander — *Public entertainment — Imputation of murder.*] — Injunction granted until the trial to restrain the defendants, who professed to be mind-readers, from pretending to give information at their public entertainments as to the cause of the death of the plaintiff's husband, intimating as they had done at such entertainments, that he met with his death at the hands of a supposed friend, and thereby suggesting the idea that his late partner and the plaintiff were concerned in the matter. *Monson* v. *Tussaud*, [1894] 1 Q. B. 671, referred to. *Quirk* v. *Dudley*, 22 C. L. T. 388, 4 O. L. R. 532, 1 O. W. R. 637.

Restrain defendants dealing with notes or proceeds thereof — *Payment into Court—Rule 1096.*]—Payment into Court under Rule 1096 was refused where defendant C. held proceeds of a note which she had cashed, as it could not be said any sum would assuredly go to plaintiff or that the case would probably result in plaintiff's favour so as to warrant transfer of money from defendant to the Court. *McDonald* v. *Curran*, 13 O. W. R. 272.

Restraining civic committee from enquiring as to whether an employee of a municipal corporation was a Free Mason. *Fortier* v. *Guerin* (1910), 12 Que. P. R. 108.

Restraining disposition of property before judgment — *Extending statutory remedies — Fraudulent disposition of property.*]—*Semble, per* Richardson and Wetmore, JJ. (Rouleau, J., *dissentiente*), that a plaintiff is not entitled before judgment to an interim injunction to restrain a disposition of property by a defendant. To obtain any relief of that nature before judgment, a plaintiff must make out a case within the statutory provisions dealing with garnishee and attachment proceedings:—*Held*, by the Court, that in this case the material was in any event insufficient, and that no injunction should be granted upon it. *Pacific Investment Co.* v. *Swan*, 3 Terr. L. R. 125; 20 C. L. T. 152.

Restraining public corporation *from performing its works.*]—An injunction will not lie to restrain a public corporation, such as the Harbour Commissioners of Montreal, from carrying on statutory works in discharge of their trust, even though such works should interfere with, or obstruct, the operations of a public utility (*i.e.*, drainage), by the municipality in which they are performed. More particularly will such be the case, if it be made to appear that any immediate danger of ill consequences is obviated by the consent of the commissioners to allow the municipality to operate the utility (*i.e.*, to extend its sewers), through their works, in any manner approved of by their engineers. *Maisonneuve* v. *Harbour Comrs. of Montreal* (1910), 39 Que. S. C. 36.

Restraining seizure of company's plant for taxes—*Payment into Court—Statement of claim—Costs.*]—Middleton, J., granted order continuing an interim injunction restraining town from seizing company's plant for taxes. Company to pay into Court $4,591.36 as evidence of *bona fide* and deliver statement of claim within two weeks. Costs in the cause, unless otherwise ordered by trial Judge. *Ont. & Minnesota Power Co.* v. *Ft. Frances* (1911), 18 O. W. R. 514.

Return of — *Acceleration.*]—Unless in extraordinary circumstances a motion for the return of a writ of injunction before the day fixed will not be granted. *Tétrault* v. *Wickham*, 6 Que. P. R. 157.

Right of plaintiff — *Irreparable injury.*]—An interlocutory injunction will not be granted when serious questions are raised in regard to the validity of the plaintiff's asserted rights, and when the sale of the goods complained of will not inflict such injury as cannot be cured by a final judgment. *Canadian Newspaper Syndicate* v. *Montreal News Co.*, 9 Que. P. R. 78.

Right of property in gravel taken from bed of stream — *Ownership of Crown — Possession — Labour expended in removing gravel — Jus tertii — Severance from realty.*]—Plaintiffs, concrete manufacturers, purchased from A., who operated a gold dredge on the Saskatchewan River, the gravel washed in passing through the dredge. The defendants sought to take some of this gravel and plaintiffs applied for an injunction:—*Held*, that they cannot succeed, they not having possession, the gravel belonging to the Crown. *Edmonton* v. *Cristall* (1909), 12 W. L. R. 562.

Right to — *Contract — Municipal corporations — Street railways — Performance of work — Irreparable injury — Malice.*]—1. Where one of two parties to a contract is doing a thing which, by the terms of the contract, he has specially reserved the right to do, the other party to the contract is not entitled to an injunction to restrain the doing of the thing, on the ground that the work is proceeding in a way which inflicts more damage than would be caused if another method, more expensive, had been adopted. So, in the present case, the defendants, who had granted certain powers to the plaintiffs, but had reserved the right to take possession of the streets when necessary for road operations, were not bound to adopt a more lengthy and expensive though less injurious method of performing the work. — 2. In order to obtain an injunction in such circumstances, where there had been no invasion of a legal or equitable right, it must be established that irreparable injury will be caused if an injunction be not granted. — 3. A temporary interruption of traffic and an injurious method of removing the rails, causing a damage in the nature of a pecuniary loss, do not constitute an irreparable injury. — 4. Although difficulties had existed between the parties, and the defendant might have de-

rived satisfaction from the thought that the exercise of their rights would cause the plaintiffs damage, yet malice alone does not open any right of action, where, as here, there was a real intention to accomplish the work, and the defendants were acting within their right. *Montreal Park & Island Ry. Co.* v. *St. Louis*, 17 Que. S. C. 545.

Sale by sheriff — Withdrawal by execution creditor. *Silver* v. *Rudolf*, 1 E. L. R. 138.

Sale of goods — *Condition — Breach.*]—An interlocutory injunction will be granted to enforce an agreement whereby the respondent purchased certain goods at a specified price, which agreement he deliberately violated. *Ozone Co.* v. *Lyons*, 7 Que. P. R. 65.

Sale of land — Promissory notes given for purchase money — Claim by plaintiff—Injunction to restrain defendants from dealing with notes or proceeds of sale of notes—Payment into Court—Rule 1096—Scope of. *McDonald* v. *Curran*, 13 O. W. R. 272.

Sale of property — *Rescission of contract — Misrepresentation.*]—Where a party contracts to purchase property and pays an instalment and afterwards repudiates the contract and sues for rescission, the Court has no jurisdiction to restrain by interim injunction the vendor, who accepted the repudiation and re-took his property, from dealing with it as he sees fit. *Christie* v. *Fraser*, 24 C. L. T. 257, 10 B. C. R. 291.

Security — *Alteration in terms—Jurisdiction of Judge—Proceedings before another Judge.*]—A Judge who has granted an interlocutory injunction in the terms of Art. 957, C.P. remains seised of the motion until the security preliminary to its enforcement is furnished. He may, consequently, suspend its operation, hear the parties anew, allow the matter to be contested, and revoke the order. Proceedings taken before one Judge may be continued before another. *Wampole* v. *Lyons*, 14 Que. K. B. 53.

Sheriff's title — Adverse claimant — Balance of convenience. *Kaulbach* v. *Boylan*, 1 E. L. R. 136.

Special remedy.]—A writ of injunction will not be granted when the law provides a special remedy for the grievances complained of. *Beauregard* v. *Roxton Falls*, 6 Que. P. R. 155.

Stay of proceedings — *Security for costs.*]—An order for security for costs made pursuant to Rule 1139, and issued according to Form 95, has the effect of staying all further proceedings until security is given; and while such an order stands, it is not competent for the plaintiff to proceed with a pending motion for an injunction against the defendant who has obtained the stay, but such motion should be enlarged till the security is perfected. *Weekes* v. *Underfeed Stoker Co.*, 21 C. L. T. 24, 19 P. R. 290.

Substantial damage — *Mandatory injunction.*]—Where a trespass is being continued, and substantial damage is being caused, the Court will generally interfere to restrain the further commission of the trespass, and may grant a mandatory injunction. *Smith* v. *Public Parks Board of Portage La Prairie*, 1 Man. L. R. 249, 1 W. L. R. 237.

Substitution by trader, *or his servants, of a product other than the one asked for by consumers—C. C. 1054, C. P. 957 et seq.*] —The wilful substitution by a trader, or his servants, of a product other than the one asked for by consumers, constitutes an illegal act, for which such trader is responsible toward the manufacturer of the product which had been asked for by such consumers. —Under such circumstances, the Court will maintain and declare peremptory an injunction, enjoining such trader from selling or offering for sale any such product, as being the product of plaintiff's manufacture, and will condemn such trader to pay damages and costs. *Borril Ltd.* v. *Metrakos* (1909), 17 R. de J. 32.

Testimonials to employer and employee — *Publication in changed form — Property in and control by employer.*]—It is not every breach or violation or good faith or departure from honourable dealing which can call forth the powers of equity to make redress; there must be disclosed some case of civil property which the Court is bound to protect before the publication of private papers will be enjoined.—The plaintiff, an expert, was a superintendent of the defendants' manufactory of pipe organs for several years, during which time two commendatory testimonials had been given, one that "the builders (defendants) and Mr. Charles S. Warren (plaintiff) have every reason to congratulate themselves," and the other addressed to the plaintiff by name, wherein he was congratulated on having "solved the problem of a thoroughly satisfactory electro-pneumatic action."—After he had left the defendants' employ and started business for himself, the defendants published an advertising pamphlet containing the testimonials, omitting all reference to the plaintiff or to his name. In an action for an injunction to restrain the publication of the testimonials in a mutilated form:—*Held*, that, as between the superintendent and the company whose agent or employee he was, the testimonials were the property in possession of the company, who had the right to control their publication, and that right continued after the plaintiff left their employment, in the absence of any restriction imposed by the writers. *Howard* v. *Gunn*, 32 Beav. 462, followed. *Warren* v. *Karn Co.*, 10 O. W. R. 516, 15 O. L. R. 115.

Time for service — *Costs.*]—A party who, upon petition, has obtained leave to issue a writ of injunction, has the same time to serve the writ as if he had obtained it *de plano*.—Before launching a motion for adjudication upon the costs reserved on a petition for a writ of injunction, the defendant should proceed under Art. 150, C. P., to compel the plaintiff to serve the injunction. *Gauvreau* v. *Hauterive*, 7 Que. P. R. 483.

Title to land — *Two parties claimed same land — One by paper title—Other by equitable title and notice to other claimant—Statute of Frauds.*]—Plaintiff had paper title to certain lands. Defendant claimed same

lands by possession and purchase, but admitted mistakes in her conveyances, and also claimed plaintiff had notice of her equitable title and possession. Defendant had built on lands in question, and on what was called a "park reserve" according to the registered plan.—At trial Mulock, C.J.Ex.D., *held*, defendant had made out a case and dismissed plaintiff's action for injunction to restrain defendant from building on said lands to her detriment.—Divisional Court *held* (1909), 14 O. W. R. 710, 19 O. L. R. 471, that above judgment should be reversed and declared plaintiff entitled to said lands, but the injunction was suspended for one year to enable defendant to remove obstructions complained of.—Court of Appeal affirmed judgment of Divisional Court.—*Mykel* v. *Doyle*, 45 U. C. R. 65, followed. *Ihde* v. *Starr* (1910), 16 O. W. R. 473, 21 O. L. R. 407, 1 O. W. N. 909.

Trespass — *Supreme Court in Equity Act, Can. Stat.* N. B. (1903), *ch. 112, s. 34.*] —Motion to continue an injunction restraining defendant from trespassing and cutting down and carrying away timber from plaintiff's land. The dispute was *bonâ fide* as to who owned the land. Motion refused, plaintiff left to his remedy at law. Section 34 does not apply. *Godard* v. *Godard*, 8 E. L. R. 73.

Undertaking as to damages — *Order for assessment.*]—Claims for small damages by some defendants ordered to be included in an order for assessment of damages by other defendants under an undertaking given on obtaining an interlocutory injunction, where they arose from the restraint of acts which the injunction was obtained to prevent the doing of. *Wood* v. *Leblanc*, 25 C. L. T. 90, 3 N. B. Eq. 116.

Undertaking to speed trial — Breach of. *Clarry* v. *Brodie*, 1 O. W. R. 387.

Waterworks.]—Order granted, restraining defendants from constructing or operating a rival system of water works within certain area, and, for removal of water pipes laid by them within that area, and for $86 damages. *Verrett* v. *Aqueduc de la Jeune-Lorette* (1909), 42 S. C. R. 156.

When granted — *Irreparable wrong — Remedy in damages—Landlord and tenant.*] —There is no ground for the issue of a writ of injunction except when the wrong caused to the party claiming it is serious and irreparable and when such party has no other remedy in law to obtain reparation.—2. The lessee of part of a building, who complains that the owner in altering another part of the building troubles him in his enjoyment, has a remedy in damages against him, as well in virtue of the relationship of landlord and tenant as of the relationship between neighbours, and in consequence he has no right to a writ of injunction. *Poulos* v. *Scroggie*, 6 Que. P. R. 1.

Writ of summons need not be issued before applying for interlocutory injunction. *Rheaume* v. *Stuart* (1910), 11 Que. P. R. 434.

See Appeal — Arbitration and Award —Bankruptcy and Insolvency — Bills of Sale and Chattel Mortgages—Club—Conspiracy — Constitutional Law —Contempt of Court — Contract — Copyright —Costs — Courts—Covenant — Damages —Easement — Landlord and Tenant — Limitation of Actions — Mines and Minerals — Nova Scotia Provincial Exhibition — Nuisance — Parties — Patent for Invention — Peremption — Pleading —Restraint of Trade—Schools — Street Railways—Substitution.

INMATE OF BAWDY HOUSE.

See Criminal Law.

INNKEEPER.

Boarding-house charges, which Art. 2262 C. C. declares are prescribed by one year, refer to the price for accommodation furnished by boarding-house keepers earning their livelihood as such. Hence, a claim for such charges, when preferred by any one else, is not subject to the above mentioned rule. *Bonin* v. *Duchesne* (1911), 39 Que. S. C. 433, 17 R. de J. 69.

Fire Escape Act — *Neglect to comply with — Injury to guest — Rescue of another —Volenti non fit injuria — Contributory negligence — Jury.*]—Where a guest in a burning hotel is injured in consequence of the proprietor having failed to provide the means of fire escape required by the Fire Escape Act, an action for damages will lie against the proprietor, notwithstanding that a penalty is imposed for breach of the statutory duty. *Groves* v. *Lord Wimborne*, [1898] 2 Q. B. 402, applied. The defence arising from the maxim *volenti non fit injuria* (the guest being aware of the lack of means of fire escape and having made no objection) is not applicable where the injury arises from a breach of a statutory duty. *Baddeley* v. *Earl Granville*, 19 Q. B. D. 423, applied. The fact that the guest delayed his exit in order to rescue a fellow-guest and thereby lost his own chance of getting out safely, is not as a matter of law "contributory negligence;" whether the plaintiff did anything which a person of ordinary care and skill would not have done in the circumstances, or omitted to do anything which a person of ordinary care and skill would have done, and thereby contributed to the accident, was for the jury to decide. *Love* v. *New Fairview Corporation*, 24 C. L. T. 259, 10 B. C. R. 539.

Lease and hire of rooms in hotel— Breach of contract—Mixed contract—Partly civil and partly commercial — Rejection of oral evidence. *Pellerin* v. *Vincent*, 4 E. L. R. 249.

Liability for effects of guest—Commencement of relationship — Negligence — Notice — Special place provided for leaving effects. *Fraser* v. *McGibbon*, 10 O. W. R. 54.

Lien — *Detention of goods—Strangers.*] —An innkeeper has, by virtue of Art. 1816a, C. C., a right to retention only in respect

of the goods belonging to his guest, and not in respect of goods belonging to third persons whom his guest has brought into the inn. *Taylor* v. *O'Brien*, 24 Que. S. C. 407.

Lien — *Expenses and advances — Commercial traveller — Samples of employer — Pledge.*]—The lien which the law gives an innkeeper on the goods of his lodgers is to be interpreted strictly, and the Judge cannot enlarge it even for equitable causes. An innkeeper cannot hold the goods of guests as security for medical expenses and advances of money made by him to his guest to enable him to continue his journey. A commercial traveller cannot pledge his employer's samples as security for his personal debt. *Gilmour* v. *Snow*, 27 Que. S. C. 39.

Lien on goods of guest for board — *Detention of goods—Dispute as to amount owing.*]—Action for damages for detention of goods. On the evidence it was found that plaintiff was indebted to defendant for $7.40 board. Defendant had detained goods brought to his house by plaintiff amounting to between $1,000 and $1,500:—*Held*, that defendant had lien on all these goods for the board. There is no such thing as excessive detention. *Newman* v. *Whitehead*, 9 W. L. R. 688, 2 Sask. L. R. 11.

Loss of guest's property — *Deposit of traveller — Negligence — Damages.*]—A person who prolongs his stay at a hotel and remains for a month or more, is a traveller within the meaning of Art. 1233 (4), C. C. and can prove by witnesses that he left his luggage in the hotel. He can do this also by clause 1 of the same article, because a hotel keeper is a tradesman (commercant), and the deposit of luggage a matter relating to trade. A hotelkeeper who places the luggage of a traveller in a baggage room, which is not under lock and key and open and accessible to every one at all times, is guilty of negligence within the second exception of Art. 1815, C. C. The loss of luggage, in these circumstances, renders him liable not only for the $200 mentioned in that article, but for the full value. Judgment in *Greene* v. *Windsor Hotel Co.*, *Q. R.* 26 S. C. 97, affirmed. *Windsor Hotel Co.* v. *Greene*, 14 Que. K. B. 56.

Loss of guest's property — *Negligence —Contributory negligence.*]—On the plaintiff's arrival at Winnipeg, he delivered some luggage to the driver of a transfer company, to be taken to the defendants' hotel, to which the plaintiff walked, and at which he registered and was assigned a room, to which he took his valise. The driver brought the luggage to the hotel and left it in the hall with other luggage, but in a place not visible from the office, and informed the clerk in the office that he had done so. The hotel was crowded, the city was unusually full of visitors, persons going to and from the hotel bar passed the place where the parcels were, and it was not in a safe place for unwatched luggage to be left in. The plaintiff noticed his parcels there about 11 o'clock the same night, but did not remove them or draw the attention of the hotel servants to them. The next day he noticed that the parcels were not in the hall, but said nothing about it until the third day, when he asked for the parcels. They could not then be found, and the presumption was that they had been stolen. Neither the defendants nor any of their servants had paid any attention to the parcels or moved them in any way:—*Held, per* Richards, J., that the parcels got into the custody of the defendants when the driver who brought them reported to the hotel clerk that he had done so; that the plaintiff was justified in assuming, when he saw the parcels in the hall, that they were being cared for by the defendants, and that, when he missed them the next day, he had a right to suppose that they had been put into the defendants' baggage room; and that he had not been guilty of such negligence as to disentitle him to recover their value from the defendants. *Per* Perdue, J., that the plaintiff was guilty of such gross negligence, in the circumstances, in not calling the attention of the hotel keepers to his parcels, when he saw them lying in the hall, and taking no steps to have them removed to a safer place, as to relieve defendants from their common law liability as innkeepers. The Court being equally divided, the defendants' appeal from the verdict and judgment of a County Court in favour of the plaintiff was dismissed without costs. *Barrie* v. *Wright*, 15 Man. L. R. 196, 1 W. L. R. 412.

Room rent—*Several liability of tenants —C. C., 1816a.*] — When several persons jointly rent a room for a single determined sum per month, without specifying any joint and several liability, nevertheless the lessor is not bound to accept the share of the rent of one of the roomers.—The lessor of a room has the right to retain possession of the clothing and personal effects belonging to his tenant and found in the room to secure payment of his rent and he may prevent the tenant from removing them. *Ouellette* v. *Ducharme* (1910), 17 R. L. n. s. 1.

See BAILMENT — CARRIERS — INTOXICATING LIQUORS—LANDLORD AND TENANT.

INLAND REVENUE ACT.

See REVENUE.

INNUENDO.

See DEFAMATION.

INQUEST.

See CRIMINAL LAW—INJUNCTION.

INSANITY.

See LUNATIC.

INSCRIPTION

See APPEAL — NOTICE OF INSCRIPTION — PLEADING—TRIAL.

INSOLVENCY.

See BANKRUPTCY AND INSOLVENCY — COMPANY.

INSOLVENT DEBTORS ACT, P.E.I.

See CONSTITUTIONAL LAW.

INSPECTION OF

Customers' Accounts. *See* BANKS AND BANKING.

Documents. *See* DISCOVERY.

Goods. *See* SALE OF GOODS.

Mines. *See* MINES AND MINERALS.

Negligence. *See* STATUTES.

Premises. *See* DISCOVERY—LANDLORD AND TENANT.

INSPECTOR.

See BANKRUPTCY AND INSOLVENCY — ELECTIONS — INTOXICATING LIQUOR.

INSPECTOR OF HIGHWAYS.

See MUNICIPAL CORPORATIONS.

INSTALMENTS.

See VENDOR AND PURCHASER.

INSURANCE.

1. ACCIDENT.

"Accidental" death — Onus—Finding of jury — Notice and particulars of death—Waiver. *Fowlie* v. *Ocean Accident and Guarantee Co.*, 1 O. W. R. 252, 4 O. L. R. 146.

Action on policy—Application for policy —Untrue statement by insured — Findings of jury — No finding as to materiality — New trial — Costs. *Thomson* v. *Maryland Casualty Co.*, 8 O. W. R. 598.

Application — *Beneficiary not named in policy—Right to proceeds—Accident policy—Act for benefit of wives and children.*]— Where, through error, and unknown to the insured, the beneficiary mentioned in the application for insurance is not named in the policy, he is, nevertheless, entitled to the benefit of the insurance; Davies and Mills, JJ., dissenting. *Per* Sedgewick, J.—The New Brunswick Act for securing to wives and children the benefits of life insurance (55 V. c. 25) applies to accident insurance, as well as to life. *Cornwall* v. *Halifax Banking Co.*, 22 C. L. T. 390, 32 S. C. R. 442.

Baggageman — *Conditions in policy — Hazardous occupation — Voluntary exposure to danger.*]—An accident policy issued to M., who was insured as a baggageman on a railway, contained the following conditions: "If the insured is injured in any occupation or exposure classed by this company as more hazardous than that stated in said application, his insurance shall only be for such sums as the premium paid by him will purchase at the rates fixed for such increased hazard. (There was no classification of "exposure" by the company.) This insurance does not cover death resulting from voluntary exposure to unnecessary danger." M. was killed while coupling cars, a duty generally performed by a brakesman, whose occupation was classed by the company as more hazardous than that of a baggageman: —*Held*, affirming the judgment of the Court of Appeal, 2 O. L. R. 521, 21 C. L. T. 553, which sustained the judgment for the plaintiff at the trial, 32 O. R. 284, 21 C. L. T. 76, that, as he was only performing an isolated act of coupling cars, the insured was not injured in an occupation classed as more hazardous under the first of the above conditions. *Held*, also, that as the evidence shewed that the insured was in the habit of coupling cars frequently, and therefore would not consider the operation dangerous, there was no "voluntary exposure to unnecessary danger" within the meaning of the second condition. *McNevin* v. *Can. Rw. Acc. Ins. Co.*, 22 C. L. T. 223, 32 S. C. R. 194.

Beneficiary — *Application — Incomplete gift — Trust — Act to secure to wives and children the benefit of life insurance — Declaration.*]—C. made a written application to an accident insurance company for $2,000 accident insurance, the policy "to be payable in case of death by accident under the provisions thereof to M.," wife of the deceased. The company issued its policy, payable to the representatives or assigns of the assured. M.'s name was not mentioned in the policy, neither was there anything in it to indicate in any way her as a beneficiary. M., as administratrix of C., brought an action on the policy for the recovery of the $2,000. The action was afterwards settled by the company paying the $1,000 now in dispute to the administratrix in discharge of the policy. On an application to pass the administratrix's accounts before the Judge of Probate, it was contended on behalf of the creditors of C.

that the administratrix should account for the $1,000 as assets of the estate, and on behalf of M., that she was the sole beneficiary under the policy, and the money formed no part of C.'s estate. It appeared that it was not the practice of the company in a case of this kind, notwithstanding the terms of the application, to issue a policy payable to the beneficiary named therein, but they held themselves bound, in case of death, to pay the amount due to the beneficiary named in the application. It also appeared that C. told M. that the policy was payable to her, and he gave it to her when he took it out. The Judge held that the money paid under the policy belonged to the estate of C. From this decision the administratrix appealed:—*Held*, that there was no complete gift *inter vivos* of the policy and fund to M. from her husband; and the intended gift being purely voluntary and incomplete, the Court would not complete it, and there was no trust created and declared in her favour. Apart from 58 V. c. 25, no interest would pass to M., even had she been named in the policy as beneficiary, merely by reason of that fact, and if C. wished such interest to pass he must have left the money to her by will or settled it upon her during his life. The Act 58 V. c. 25, for securing to wives and children the benefit of life insurance, does not apply to accident insurance. The application can not be said to be a declaration under the Act, as under s. 6 the policy must be in existence before there can be a declaration affecting it. *Cornwall* v. *Halifax Banking Co.*, 35 N. B. R. 398.

Commercial traveller — *Brakesman—Temporary engagement in a more hazardous employment — Condition — Amount payable.*]—A policy of accident insurance described the insured as a commercial traveller, and contained a condition that if he met with an accident while "temporarily or permanently engaged in any occupation . . . classed by the company as more hazardous than that in which he is insured," the amount payable should be what the premium paid by him would entitle him to be insured for under such more dangerous classification. The insured applied for employment as a railway brakesman, and while taking the usual trial trip prior to engagement (in which, however, he worked gratuitously as a brakesman), he was killed, apparently by being run over by a train:—*Held*, that the case fell within the above condition, and the amount payable was limited accordingly. *Nevin* v. *Can. Rld. Acc. Ins. Co.* (1900-2), 32 O. R. 281, 2 O. L. R. 531, 32 S. C. R. 194, considered and distinguished. Judgment of Chute, J., reversed. *Stanford* v. *Imperial Guarantee & Acc. Ins. Co. of Canada* (1908), 18 O. L. R. 562, 12 O. W. R. 1289, 13 O. W. R. 1171.

Condition limiting time for proofs *of loss — Requirement of immediate notice —Foreign administrator — Relief from forfeiture — Jurisdiction — Judicature Act — R. S. O. 1897 c. 51, s. 57, s.-s. 3.*]—A condition in a personal accident insurance policy provided that "immediate written notice with full particulars and full name and address of insured is to be given to the company at Toronto of any accident and injury for which claim is made. Unless affirmative proof of death, loss of limb, or sight, or duration of disability, and their being the proximate result of external violent and accidental means, is so furnished within thirteen months from the time of such accident, no claim based thereon shall be valid.—An appeal from the judgment of Boyd, C., at the trial (11 O. W. R. 363, *post* 21, in favour of the plaintiff, the administrator of the insured, for the amount of the policy, was allowed, where, although written notice of the killing of the insured by a railway train and the time when and the place where he was killed was given as required by the above condition, affirmative proof of death and of its being the proximate result of external violent and accidental means within thirteen months from the time of the accident was not furnished as required by the same condition:—*Held*, by Moss, C.J.O., and Meredith, J.A., that the notice and proof required in this condition were two separate and distinct things, and, although proof may amount to notice, mere notice is not proof.—The condition was reasonable, and neither under s. 57, s.-s. 3, of the Judicature Act, R. S. O. 1897 c. 51, which empowers the High Court to relieve against penalties and forfeitures, nor otherwise, was there power to relieve against the consequences of non-compliance with its provisions.—Per Boyd, C., and Moss, C.J.O.:—If a foreign administrator of a deceased person brings action in this province for money to which the latter was entitled, and pending proceedings obtains ancillary letters here, the title thus obtained relates back to the issue of the writ and supports the action. — Per Boyd, C.:—"Immediate notice" in the above condition means reasonably expeditious notice. *Bass* v. *Bass, of Can. Guarantee & Acc. Ins. Co.*, 17 O. L. R. 462, 11 O. W. R. 363, 12 O. W. R. 980.

Condition of policy — *Notice — Tender before action — Waiver.*]—The condition of a policy insuring H. against death by accident required that notice of death should be given to the company within ten days thereafter, and it was provided that if the insured met his death while under the influence of intoxicating liquor the company should be liable only for one-tenth of the amount of the insurance. The insured disappeared on the 21st of November, 1908. When last seen on the evening of that day he was apparently under the influence of intoxicants, and, on 3rd April, 1909, his dead body was found in the river in an advanced state of decomposition, death having been, in all probability, caused by drowning. After the finding of the body the plaintiff gave notice of death to the company and furnished proof as required. The company refused payment and, before action, tendered the plaintiff one-tenth of the amount of the insurance payable under the policy as full settlement therefor. The company pleaded this tender in their defence to the action and made proof thereof at the trial:—*Held*, that the tender made by the company was a waiver of the condition requiring notice within ten days of death and also an admission of liability by the company; and, Anglin, J. dissenting, that, as the company had failed to shew that the deceased came to his death while under the influence of intoxicating liquor, the plaintiff was entitled to recover the full amount of the insurance. Judgment appealed from, 20 Man.

R. 69. W. L. R. , affirmed. *Can. Rw. Acc. Ins. Co.* v. *Haines* (1911), 44 S. C. R. 386.

Construction of policy—*Contract for one year — Continuation or renewal—Period of grace — Ontario Insurance Act, s. 148 (1)—Authority of agent.*]—Section 148 (1) of the Insurance Act, R. S. O. 1897, c. 203, is not applicable to a contract of insurance which the assured has no right to continue or renew without the consent of the insurers; it merely makes uniform and extends the commonly contracted-for grace given to the assured to renew, after forfeiture or default, a contact renewable, or not, at his will.—In this case a policy of accident insurance was considered, having regard to its provisions, to be a contract for one year only, and one which could be continued or renewed only by mutual consent; and it was *held*, that there was no such continuation or renewal, although the agent of the insurers had, after the expiry of the year, and after an accident had happened to the assured, from the effects of which he died two weeks later, accepted from the assured a promissory note for the renewal premium and delivered to him or the beneficiary a renewal receipt which had been intrusted to the agent by the insurers, but not for such purpose. *Carpenter* v. *Can. Rw. Acc. Ins. Co.*, 18 O. L. R. 388, 13 O. W. R. 821.

Death of assured by drowning — *Proof of condition of assured—Influence of intoxicating liquors—Onus—Notice of death —Condition precedent—Knowledge of death not acquired till after time for giving notice expired—Payment of money into Court—Admission of cause of action—Waiver.*]—One of the terms of an accident insurance policy was that, if the assured met death while under the influence of intoxicating liquor, the claimant should be entitled only to one-tenth of the amount of the insurance. The evidence was that on the day when the assured was last seen alive he was helplessly drunk, between 7 and 8 o'clock in the evening, but at the moment when last seen, about 9, he had become considerably more sober, though still noticeably under the influence of intoxicating liquor. There was nothing to shew the exact time when he met his death. Six months after the day when he was last seen, his dead body was found in the Red river, and the inference was that he had been accidentally drowned, and probably on that day:—*Held*, *per* Richards, J.A., in an action by the administrato of the estate of the deceased upon the policy, that, while the onus was on the defendants to prove a defence based on the above term of the policy, that onus was discharged by the evidence given; and the finding of the trial Judge, who tried the action without a jury, should, on that issue, be reversed—the facts not being in dispute and the appellate Court being in as good a position as the trial Judge to form an opinion thereon. — *Condeau* v. *American Accident Co.*, 25 S. W. R. 6, distinguished.—*Per* Perdue, J.A., that the trial Judge properly found that the onus had not been satisfied.—Condition 6, which by the policy was made a condition precedent to the right to recovery, required written notice of the death, with particulars, to be given to the defendants within 10 days thereof; "and any failure to give such notice and particulars shall invalidate and render void all claims under this policy." The plaintiff and beneficiary had no knowledge of the death till the discovery of the body, 6 months afterwards:—*Held*, per Richards and Perdue, JJ.A., that the notice was a sufficient compliance with the condition.—*Cassel* v. *Lancashire and Yorkshire Accident Insurance Co.*, 1 Times L. R. 495, distinguished. —*Trippe* v. *Provident Fund Society*, 140 N. Y. 23, approved and followed.—*Per* Cameron, J.A., agreeing with the trial Judge, that the defence of want of notice must prevail in the absence of countervailing c nsiderations. —The defendants, however, paid 1 and paid into Court one-tenth of th mount of the policy:—*Held*, *per* Howell, C.J.A., Perdue and Cameron, JJ.A. (Richards, J.A., expressing no opinion), that this must be considered an admission of the cause of action and a waiver of the omission to give the notices required by the policy.—Judgment of Mathers, J., 13 W. L. R. 709, reversed, and judgment to be entered for the plaintiff for the full amount of the insurance. *Haines* v. *Can. Rw. Accident Ins. Co.* (1910), 15 W. L. R. 300, 20 Man. L. R. 69.

Death of insured.]—Beneficiary wrongly named in policy — No person by name in policy — Payment into Court by insurance company — Application for payment out by person intended as beneficiary — Evidence— Beneficiary known by nickname as used in policy — No doubt as to who was intended —Application granted — Costs out of fund. *Re Moran* (1910), 17 O. W. R. 578, 2 O. W. N. 293.

Disability — "*Immediately disable*" — *Causation or time — Notice of accident — Condition precedent.*] — An accident policy issued to the plaintiff contained a contract that "if accidental injuries shall immediately, continuously, and wholly disable" the assured, the defendants would pay a weekly allowance. The plaintiff was injured by accident within the meaning of the policy, but did not become wholly disabled from the effect of such accident until three months afterwards, when he notified the defendants, the insurers:—*Held*, that the word "immediately" in the contract had relation to causation and not to time, and that the plaintiff was entitled to recover. *Williams* v. *Preferred Mutual Accident Assn.*, 91 Ga. 698, and *Merrill* v. *Travellers Ins. Co.*, 91 Wis. 329, distinguished. The policy also contained a condition that written notice must be immediately given to the company at the office in Montreal, and "that if in any other respect the conditions of this insurance are disregarded all rights hereunder are forfeited to the corporation."—*Held*, that the giving of notice forthwith was not thereby made a condition precedent to the right of recovery on the policy. *Shera* v. *Ocean Acc. & Guarantee Corp.*, 21 C. L. T. 138, 32 O. R. 411.

"External, violent and accidental means" — *Death by drowning—"Contra proferentem."*]—British Columbia Full Court dismissed an appeal from judgment at trial in favour of plaintiff in an action on an accident policy. Deceased while fishing fell, no

one being present, in shallow water, and was drowned. The jury found deceased had been rendered unconscious by a fall, therefore through accidental means and not by a fit. *Contra proferentem* applies. *Young* v. *Maryland*, 10 W. L. R. 8.

"Immediate notice."]—A condition in an accident insurance policy was that, in the event of injury, immediate notice should be given in writing, and failure to give such notice should invalidate all claims:—*Held*, that a notice two months after the accident was sufficient where it was given as soon as serious injury from the accident was apprehended.—*Held*, also, that the notice given was, under the circumstances, sufficient, although written notice was not actually served upon the insurers. *Warne* v. *London Guarantee & Accident Co.*, 20 C. L. T. 227.

Information withheld by insured — *Previous insurance—Cancellation or surrender — Facts material to risk—Jury — Misdirection.*]—A policy of accident insurance was issued upon an application containing a warranty that the applicant had not withheld any information which was calculated to influence the decision of the directors as to the applicant's eligibility for insurance, and also a warranty that no application ever made by the applicant for accident insurance had been declined, and no accident policy issued to him had been cancelled by any company. The plaintiff had effected previous insurance, which, on a settlement of a disputed claim, was put an end to during its currency with the consent of the plaintiff, but at the request of the company, the unearned premiums being returned:—*Held*, that the proper question for the jury was whether the withholding of this information was in fact material, and it was misdirection to tell the jury that they were to consider whether the plaintiff believed it material; that the putting an end to the policy with the consent of the plaintiff was a surrender and not a cancellation, and was not a breach of the warranty that no policy issued to him had ever been cancelled. *Smith* v. *Dom. of Can. Acc. Ins. Co.*, 36 N. B. R. 309.

Injury from being thrown down by dog—Consequent death—Right to recover on policy. *O'Brien* v. *Canada Atlantic Ry. Co.*, 4 E. L. R. 231.

Locomotive engineer — *Total and permanent loss of sight — Practical blindness—Rules of benefit society.*]—Plaintiff held an accident policy in defendant society. His eyesight was badly injured, practically a loss of sight so far as being an engineer. Defendant's rules required a total and permanent loss of sight, and refused to allow plaintiff's claim:—*Held*, that however much plaintiff might be hampered by the loss of vision, yet he was not totally and permanently blind, and while it was a hard case on plaintiff, yet the Court could not make bad law to help him out. Action dismissed with costs. *Copeland* v. *Locomotive Engineers' Ins. Assoc.* (1910), 16 O. W. R. 739, 1 O. W. N. 1089.

Married woman—*Absence of authorisation — Void contract — Action on, by husband — Terms of policy.*]—A contract of insurance against accidents by a married woman, even one who has no community of property with her husband, must be authorised by the husband, and if such authorisation is wanting the contract is absolutely void: Arts. 177, 183, C. C. 2. Therefore, the husband cannot bring an action founded upon such contract of insurance. 3. In this case the policy of insurance upon which the action was brought, stipulated that the insurance company should pay an indemnity only in case of the assured sustaining bodily injury accidentally and involuntarily while travelling by land or water. The assured was injured in her own house:—*Held*, that the accident did not fall within the scope of the policy, and therefore there was no right of action. *Transit Ins. Co.* v. *Plamondon*, 13 Que. K. B. 223.

Master and servant — *Contract.*] — McK. was in the employment of the respondents when they announced to their workmen that henceforth they would have them insured against accidents to the amount of $1,000 in case of death, adding: "This gives each employee protection against accident while at work or otherwise engaged." The respondents deducted from the wages of their men ten cents a week as premium, and made a contract of insurance with a company, the policy stipulating for immunity from liability in the case of wilful and wanton exposure to unnecessary danger. While McK. was thus in the employment of the respondents, he was one day passing through a street where two live electric wires were lying on the ground, and, having some knowledge of electric currents, he thought he could move the wires in such a way as to prevent danger to passers-by, and, in spite of warnings from by-standers, he seized the two wires, and was killed by the shock:—*Held*, that the heirs of McK., in spite of his imprudence, were entitled to receive the insurance moneys, the contract applying to every accident happening while the employee was at work or while he was otherwise occupied.—2. The respondents, in imposing this contract upon their employees, did not act as agents of the insurance company with which they had insured, and they could not set up against McK.'s representatives the conditions of nullity contained in the policy.—3. This contract of insurance was an accessory of the contract of hiring, and did not fall within the prohibition of the general Insurance Act of Canada, 49 V. c. 24. *McKenzie* v. *Garth*, 9 Que. Q. B. 224.

Misrepresentations—*Quality of assured — Weekly earnings — Period of disability —False statement — Estoppel — Pleading — Amendment.*] — Action on an accident insurance policy: — *Held*, no misrepresentation as to assured's quality or weekly earnings.—*Held*, further, that plaintiff justified in claiming for past disability on an entire claim. Judgment for plaintiff for amount claimed. *Cels* v. *Railway*, 11 W. L. R. 706.

Payment of premiums — *Presumption —Date of payment — Receipts intrusted to agent—Agent accountable to insurers—Prescription — Pleading — Delay for payment.*] —An insurance company who intrust their receipts for premiums to an agent with whom they have a running account, is presumed

to have received the premiums at the time they are due, whatever be the date at which the assured has paid the agent.—2. The stipulation in a policy that the assurance shall be prescribed at the expiration of a fixed period is a modification of the contract which must be specially pleaded in an action for the insurance money, in default of which it will not be regarded.—3. Where the policy, in addition to the stipulation as to prescription, contains another stipulation in favour of the insurers of a delay for payment, it is not until the expiration of that delay that the period of prescription begins to run. *Lachapelle* v. *Dom. of Can. Guarantee & Acc, Ins. Co.*, 33 Que. S. C. 228.

Policy—*Construction*—"*Riding*" *in public conveyance.*]—A person who is injured while getting into a public conveyance, after he has got upon the step or platform, but before the vehicle has begun to move, is "riding as a passenger on a public conveyance" within the meaning of a clause in an accident insurance policy containing those words. *Powis* v. *Ont. Acc. Ins. Co.*, 21 C. L. T. 164, 1 O. L. R. 54.

Policy—*R. S. O. 1897, c. 203, ss. 148 (2), 159—Construction of statute*—"*Happening of the event insured against*"—*Commencement of action—Leave given by Judge after lapse of time, nunc pro tunc—Condition precedent* — *Pleading* — *Evidence* — *Verdict of jury* — *Beneficiary.*]—An action brought by the widow of a deceased person, on an accident insurance policy issued to him by the defendants, was commenced more than one year, but less than one year and six months, after his death, without the leave required by the Ontario Insurance Act, s. 148 (2). Leave was, however, granted by the trial Judge after the expiry of 18 months from the death, the order being dated *nunc pro tunc* as if made on the date of the commencement of the action:—*Held*, (1) that the words "happening of the event insured against," in the statute, had reference to the death of the person insured, and not to the accident which caused his death, and, consequently, the time within which the action should be brought began to run at the date of his death.—2. The trial Judge has no jurisdiction to give leave to the plaintiff to commence her action by his order made at the trial, as it was then more than 18 months after the death, and the plaintiff's action failed because it was not begun in time.—There was a direct conflict in the evidence as to whether deceased died from disease, as alleged by the defendants, or from the result of the injury he received, and there was also a question as to whether the plaintiff's own evidence did not support the conclusion that the injury was sustained by the deceased while lifting, in which case it would not be covered by the policy. There was other evidence, however, tending to explain this circumstance, and to establish that the injury was caused, not by lifting, but by slipping, and the jury found in favour of the plaintiff on the questions submitted to them on these points:—*Held*, that the case was properly left to the jury, and that where there is evidence on both sides properly submitted to the jury, the verdict of the jury, once found, ought to stand.—*Commissioner for Railways* v. *Brown*, 13 App. Cas. 133, followed. — *Held*, also, that the defendants were not bound to plead the failure of the plaintiff to comply with the condition of the policy requiring the action to be brought within three months from the time when the right of action accrued, as it was by the terms of the policy a condition "precedent to the right of the insured to recover" thereunder, and the onus lay upon the plaintiff to shew that her action was brought in time.—*Home Life Association of Canada* v. *Randall*, 30 S. C. R. 97, followed.—Judgment of Clute, J., including his order extending the time for bringing the action, reversed. *Atkinson* v. *Dom. of Can. Guarantee & Acc. Co.*, 16 O. L. R. 619, 11 O. W. R. 449.

Policy issued to "traveller" — Accidental death of insured while acting as brakesman — "Occupation or exposure to danger" classed as more hazardous—Provisions of policy—"Temporarily or permanently engaged"—Isolated act of hazardous character — Onus — Evidence — Insurance Act, s. 153 (1). *Stanford* v. *Imperial Guarantee & Acc. Ins. Co.*, 12 O. W. R. 1289.

Proofs of loss—*Sufficiency of*—*Waiver*—*Death by accident* — *Finding of jury* — *Vagueness of.*]—Proofs of loss were furnished within the time limited by an accident policy, without any objection being then taken to their sufficiency, or further proofs asked for, the refusal to pay being based on the contention that the circumstances surrounding the death of the insured brought it within a clause of the policy providing against liability where the death was by suicide, duelling, etc., or from natural causes; objection to the sufficiency of the proofs having been taken for the first time in the statement of defence delivered a couple of years afterwards:—*Held*, that the proofs as furnished were sufficient; but, in any event objection as to their sufficiency, or the right to call for further proofs, was waived. By the policy, the death was required to be by accidental bodily injury, caused by violent external means; while by s. 152 of the Insurance Act, R. S. O. c. 203, which is to be read with the policy, "accident" is defined as any bodily injury occasioned by external force or agency, and happening without the direct intent of the person injured, or happening as the direct result of his intentional act, such act not amounting to violent or negligent exposure to unnecessary danger. The finding of the jury was that there was no evidence to satisfy them that the deceased came to his death by his own hand, but that he came to his death by external injury unknown to them:—*Held*, that the finding was too vague to be construed as a finding of accidental death; and a new trial was directed. *Fowlie* v. *Ocean Acc. & Guarantee Corp.*, 22 C. L. T. 280, 4 O. L. R. 146. Affirmed 33 S. C. R. 253.

Right to indemnity — Assignment — Payment of premium. *Corstine* v. *Accident Guarantee Co. of Canada*, 3 E. L. R. 497.

Settlement for short period following accident.]—Plaintiff sustained injuries which he thought were merely temporal and accepted $125 in settlement in full of his claim against defendant company under a certain policy of accident insurance. More serious results developed after settlement and

plaintiff brought action to set aside above settlement and claimed payment of $300 per year during his lifetime, or in the alternative $2,000 for permanent disability. Clute, J., 13 O. W. R. 1072, *held*, that defendants were liable to pay indemnity for subsequent illness notwithstanding receipt, and gave judgment in favour of plaintiff for $1,200 and costs. Court of Appeal *held* (Meredith, J.A., dissenting), that the defendants' liability upon the policy was limited to one claim for one accident. Appeal allowed and action dismissed. Judgment of Clute, J., reversed. *Kent v. Ocean Acc. & Guarantee Corp.* (1910), 15 O. W. R. 177, 20 O. L. R. 226.

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2. Benefit Society.

Appropriation of funds — *Remuneration of officers—Retrospective remuneration—34 V. c. 98, s. 3 (O.)*]—The Act of incorporation of a charitable society provided that the corporation might assign to any of its officers such remuneration as they might deem requisite:—*Held*, that a grant by the shareholders at an annual meeting to the treasurer of a sum of money as remuneration of his services during the past 30 years was *intra vires* under the above section. *Bartram* v. *Birtwhistle*, 15 O. L. R. 634, 11 O. W. R. 315.

Beneficiaries — Alteration in certificate —Payment into Court — Issue — Plaintiff in. *Re Miller*, 4 O. W. R. 423.

Beneficiaries — Conditions imposed by will—Notice to society—Payment into Court — Reduced amount — Ascertainment. *Re Parish*, 4 O. W. R. 425.

Beneficiaries — Executors — Payment into Court. *Re Tidey*, 4 O. W. R. 422.

Beneficiary — *Designation — Alteration —Privileged class.*]—The designation of a beneficiary in an Ontario contract of insurance can be revoked and the benefit diverted to another only within the limits laid down by the Ontario Insurance Act, R. S. O. 1897, c. 203, s. 151, even though the original designation of the beneficiary be expressly made subject to power of revocation and substitution reversed, and to the by-laws of the insurers, which permit the desired change. Thus, in such a case, the attempted diversion of the benefit from a beneficiary of the privileged class, to a beneficiary not of that class, was held invalid by reason of s.-s. 3 of s. 151. *Lints* v. *Lints*, 23 C. L. T. 242, 6 O. L. R. 100.

Beneficiary — *Supposed wife — "Dependent"—Effect of payment into Court.*]—The plaintiff was the wife of Philip Crosby, deceased, having been married in 1860. In 1886 the deceased went through a second ceremony of marriage with the defendant, who did not know that she was marrying a man whose wife was living. In 1900 the deceased made an endorsement on his certificate of insurance in a benevolent society, revoking his former direction as to payment, and directed payment to be made to "Mary Ball, otherwise known as Mary Crosby." The defendant was the holder of the certificate, and claimed the money as a "dependent" of deceased:—*Held*, that the defendant, having lived with the deceased, believing herself to be his wife, and being supported by him, was, under one of the rules of the society, No. 174, entitled to the fund as a "dependent" of the deceased:—*Held*, also, that although the society had not stood upon their strict rights, but had paid the money into Court to be dealt with by the Court, that fact did not affect the rights of the parties, which must be determined according to law, and not *ex aquo et bono*. *Crosby v. Ball*, 22 C. L. T. 324, 4 O. L. R. 496, 1 O. W. R. 545.

Beneficiary certificate — *Alteration of constitution — Retroactivity — Internal appeals — Domestic person—Waiver—Cheque —Estoppel.*]—Action on a beneficiary certificate dated the 19th October, 1896, issued by the defendants, who were incorporated under the Benevolent Societies Act, R. S. O. 1877, c. 167, to the plaintiff, conditioned, *inter alia*, that he should comply with the constitution, rules, or orders governing, "or that might thereafter be enacted by the defendants to govern, the Order and its benefit funds," and by which the defendants agreed that, on the plaintiff attaining the age of 70, which he had done, they would pay out of the total disability fund, "in accordance with the laws governing such fund," sums not exceeding a certain amount:—*Held*, that the constitution of the defendants having been duly altered in 1900 in respect to a beneficiary claiming on the ground of having attained the age of 70 years, from what it was in 1896, when the plaintiff's certificate was issued, in such a way as to diminish the amount the plaintiff was entitled to, he was nevertheless bound by the alteration, and could only recover in accordance with it:—*Held*, also, that the plaintiff was not bound before action to exhaust the intricate series of appeals within the society provided for by the rules, for, under R. S. O. 1897, c. 203, s. 80, every lawful claim against an insurance corporation under an insurance contract shall become legally payable 60 days after proper proofs of loss, and any rules, conditions, or stipulations to the contrary shall, as against the assured, be void:—*Held*, also, that defendants have waived a requirement of their constitution that the insured should sign an acceptance:—*Held*, also, that plaintiff was not estopped from insisting that the whole of the benefit was due, by reason of having accepted a cheque expressed to be for the full amount of the first instalment. *Doidge* v. *Royal Templars of Temperance*, 22 C. L. T. 321, 4 O. L. R. 423, 1 O. W. R. 485.

Beneficiary certificate — *Designation of beneficiaries — Endorsement — Will — Infant children of assured.*]—A benefit society issued a beneficiary certificate payable to the wife of the assured at his death; she died, and he then (in 1895) endorsed on the certificate a direction that payment was to be made "to my children as directed by my will." The day before his death (in 1902) the assured made a will by which he directed that the whole of his estate should be divided amongst his children—there being both adult and infant children—in equal shares, but made no reference whatever to the benefit

certificate or to the moneys payable thereunder:—*Held*, that the infant children of the assured were entitled to the whole of the moneys, by virtue of the amendment made to the Insurance Act, R. S. O. 1897, c. 203, s. 151, s.-s. (6), by 1 Edw. VII. c. 21, s. 2, s.-s. (7). *Re Snyder*, 22 C. L. T. 299, 4 O. L. R. 320, 1 O. W. R. 461.

By-laws — *Appointment of beneficiary.*]—A contract of life insurance arising out of membership in a foreign mutual benefit association is governed by the by-laws of the association, not incompatible with or contrary to the laws of this province, which are embodied in it. So, when the by-laws provide that the insurance is to be paid at death to the beneficiary or beneficiaries appointed by the member insured, from a stated category of relatives, and in case of no appointment, or of one that fails through the predecease of the appointee, then the amount shall be paid to his widow, the latter is entitled to it, to the exclusion of the testamentary or legal heirs of the member, even though, during life, he had revoked a former appointment of his wife as beneficiary. *Chevalier* v. *Catholic Mutual Benefit Association*, 29 Que. S. C. 399.

By-laws and regulations — *Transfers between lodges—Member in good standing—Regularity of affiliation—Payment of dues and assessments—Evidence—Presumption — Waiver.*]—Where the constitution of a benefit association provides that members shall not be transferred from one lodge to another unless all dues and assessments have been paid, up to and including those for the month in which the application for affiliation is made, the fact that, upon such an application, a member was transferred from one lodge to another involves the presumption as against the association that the transfer was regularly made when the member was in good standing and in accordance with the regulations. *A. O. U. W.* v. *Turner* (1910), 44 S. C. R. 145.

Certificate—Disposition by will — Identification of certificate — Residuary estate—"Including." *Re Harkness*, 4 O. W. R. 533.

Certificate — *Legal heirs designated by will—Election.*]—A certificate issued by a benevolent society to a married woman on the 25th October, 1892, provided that the benefit was to be payable to her "legal heirs as designated by her will." She died on the 14th November, 1892, leaving her husband and three children her surviving. By her will, dated the 30th September, 1892, she gave specific properties and legacies to her husband and each of her three children by name, the insurance to her executors "for the purpose of paying thereout all debts due by me," and the residue to her children:—*Held*, that the bequest of the insurance money to the executors was inoperative; that it was payable to the three children as "legal heirs designated by will;" and that the children were not bound to elect between the benefits specifically given to them and the insurance money. *Griffin* v. *Howes*, 23 C. L. T. 169, 5 O. L. R. 439, 2 O. W. R. 293.

Certificate payable to "heirs" — Rights of widow—60 V. c. 36, s. 1, s.-s. 40 —Retroactivity. *Re Sons of England Benefit Society and Courtice*, 3 O. W. R. 680.

Expulsion of member—*Good cause.*]—A resolution of a benevolent society decreeing the expulsion of a member who has sued the society before a civil Court, instead of submitting his grievance to an arbitration tribunal established by the rules of the society, is not contrary to public order, nor oppressive, nor unreasonable, and the expulsion is valid. *St. Joseph de St. Hyacinthe Union* v. *Cabana*, 10 Que. K. B. 324.

Fraternal society — *Beneficiary certificate — Insanity — Total disability — Non-payment of dues — Suspension.*] — The failure of a member of a fraternal society to comply with the conditions of the constitution, even if arising from his insanity, and his subsequent suspension for non-payment of dues, are fundamental objections to any right to recover under his certificate of insurance. In this case everything required to have been done by the member could have been done by a member of his family, on his behalf, the constitution making express provisions for such cases. The failure to avail themselves of this provision of the constitution is a complete bar to any right of action they might have had against the society. *McCuaig* v. *Independent Order of Foresters* (1909), 14 O. W. R. 935, 1 O. W. N. 166.

Friendly society — *Registration — Certificate — Beneficiary — Change by will — Rules — Conflict with Insurance Act.*] — "The Catholic Order of Foresters" were incorporated in the State of Illinois, and had branches in Ontario, and in 1892 became registered as a friendly society in Ontario under the provisions of the Insurance Corporations Act, 1892, and had since kept their registry in force as a friendly society, and had not at any time been registered as an insurance company. A member of one of the Ontario branches was the holder of a certificate of the society, whereby they promised to pay to the defendant, a brother of the holder, $1,000, upon satisfactory proof of his death. The holder was resident in Ontario; the application for the certificates was made in Ontario; and the certificate was delivered in Ontario. The holder made a will whereby he bequeathed the certificate to the wife of one of the plaintiffs, naming the plaintiffs executors:—*Held*, that the Order were legally entitled to do business in Ontario; that the certificate in question was a "contract of insurance" within the meaning of the Ontario Insurance Act, R. S. O. c. 203; that the rules of the Order, so far as they were inconsistent with the provisions of the Act, were modified and controlled by such provisions; and, therefore, the benefits of the certificate passed, by virtue of the will to the legatee, although the rules of the Order provided that no will should be permitted to control. *In re Harrison*, 31 O. R. 314, followed, *Gillie* v. *Young*, 21 C. L. T. 165, 1 O. L. R. 368.

Investigation of claim — *Physician gave certificate — Cause alcoholism — Not allowed by lodge — Action to recover benefit — Evidence — Erroneous certificate — Jurisdiction of Court to interfere with society*

officials.]—Plaintiff was taken ill, and claimed sick benefits from defendants. They investigated the claim and refused to allow it, as the medical officer certified that plaintiff's illness was due to alcoholism. Plaintiff was examined by another physician, who certified that his illness was due to another cause, and not due to alcoholism. Defendants still refused to allow the plaintiff's claim. Plaintiff brought action in County Court and recovered $100 and costs. Divisional Court *held*, that the Courts have no jurisdiction as to this claim to warrant the judgment of the County Court, and dismissed the action. *Thompson* v. *Court Harmony* (1910), 16 O. W. R. 330, 21 O. L. R. 303, 1 O. W. N. 870.

Life Insurance Act, R. S. M. 1902. c. 83 — *Appropriation of insurance benefit by will.*]—The destination of a benefit in the nature of life insurance conferred by membership in a benevolent society is to be determined solely by a consideration of the rules and regulations of the society, and, when such rules and regulations make full and explicit provisions as to the destination of such benefit, the insurance is not subject to the Life Insurance Act, R. S. M. 1902 c. 83.—*Re Anderson*, 16 Man. L. R. 177, followed.—The testator's beneficiary certificate in the Canadian Order of Chosen Friends was expressed to be payable to his wife in the manner and subject to the conditions set forth in the laws governing the life insurance fund. Those laws prevented a member divesting the benefit to any one not related to or dependent upon him unless there were no such person, and provided that, in case of the prior death of the beneficiary, "and no further or other disposition be made thereof," the benefit should go to the surviving children of the deceased member in equal shares:—*Held*, that it was not competent to the testator to divert by his will the benefit to his executors as part of his estate, although they were to take it in trust for the children, and that the proceeds should go to the children free from the claims of creditors of the deceased. *Re Drysdale Estate*, 18 Man. L. R. 644, 10 W. L. R. 642.

Misstatement of age—*Rules regulating mode and amount of payment.*]—A benevolent society's certificate provided for payment to the plaintiff, upon his total disability or upon his attaining the age of seventy years, out of the total disability fund, in accordance with the laws governing the fund, sums not exceeding in the aggregate $1,000. In his application, upon which it was declared the certificate was founded, the plaintiff gave his age as fifty-four, when it was in fact fifty-five, the latter age being within the age allowed for entrance, and the assessments and fees chargeable being the same for both ages. The plaintiff attained the age of seventy on the 10th December, 1898, and brought this action on the 15th May, 1909, asking for payment of $1,000. The jury found that the plaintiff's age was not material to the contract, and that the statement as to age was made in good faith and without any intention to deceive:—*Held*, that the certificate was binding, and that the plaintiff was entitled to payment thereunder upon in fact attaining the age of seventy, but that the "laws governing the fund" applied though not set out, and that under them the plaintiff was entitled at the time of action brought only to a benefit of $225. *Hargrove* v. *Royal Templars of Temperance*, 21 C. L. T. 372, 2 O. L. R. 79. Appeal refused, 22 C. L. T. I. 31 S. C. R. 385. See also S. C. 2 O. L. R. 126, 21 C. L. T. 432.

Organization — *Grand and subordinate lodges—Relief fund—Constitution and laws—Life insurance—Use of name of society—Carrying on business—Incorporation — Injunction—Counterclaim.*] — Up to the year 1904, the plaintiff Grand Lodge of the Ancient Order of United Workmen of Manitoba and the North-West Territories, which had been incorporated under that name in the year 1893, under the laws of the province of Manitoba, had been carrying on the business of life insurance amongst its members, in subordination to and under a charter granted to it by the defendant Supreme Lodge of the same order, which had its headquarters in Texas. In that year the plaintiff Grand Lodge refused any longer to be subject to the jurisdiction of the Supreme Lodge, or to levy or remit to the latter the special assessment demanded by it for a guarantee fund created for the purpose of meeting any excess over estimated death losses that might occur in any of the jurisdictions under the Supreme Lodge. In 1905 the Supreme Lodge suspended the plaintiff Grand Lodge, and organized a new Grand Lodge for Manitoba, Saskatchewan, and Alberta, with subordinate lodges, all working in harmony with and under the control and supervision of the Supreme Lodge, and all using the words "Ancient Order of United Workmen" as part of their names. These newly created bodies at once commenced and thereafter carried on the business of fraternal life insurance in the same way as it had been carried on by the plaintiff Grand Lodge. They issued circulars and sent them to the members of the plaintiff Grand Lodge who still adhered to it, as well as to other persons, and carried on an active propaganda in opposition to the plaintiffs:— *Held*, (1) that the plaintiff Grand Lodge was not entitled to an injunction restraining the defendants from using the name "Ancient Order of United Workmen" in Manitoba and the North-West Territories, or from carrying on business there in the name of the Supreme Lodge, A. O. U. W., or from collecting any money for life insurance from the members of the plaintiff Grand Lodge, or from soliciting such members to join or contract with the defendant Supreme Lodge or any of its subordinate lodges.—(2) Although the plaintiff Grand Lodge had for a number of years levied and collected special assessments for the general guarantee fund created by the Supreme Lodge as above mentioned, and had voluntarily remitted some of these moneys to the treasurer of the Supreme Lodge, yet the evidence failed to shew that there was any contractual relationship existing between the two bodies by which the former was under any legal obligation to pay over to the latter any of the money raised by these assessments which had not been already paid over.— (3) The defendant Supreme Lodge was not entitled to an injunction forbidding the plaintiff, its members, servants, or agents, to use the name "Ancient Order of United Workmen," as the plaintiff Grand Lodge had been legally incorporated in 1893,

with the knowledge and consent of the Supreme Lodge, and had issued a great many beneficiary certificates for life insurance, a great proportion of which were still in force. The Supreme Lodge incurred no liability under these certificates, and to restrain the plaintiff from the use of its own name would be practically to nullify the powers conferred upon it by the provincial laws for the benefit of a foreign corporation not even licensed to do business in Manitoba. *Grand Lodge of Ancient Order of United Workmen* v. *Supreme Lodge of Ancient Order of United Workmen*, 6 W. L. R. 445, 17 Man. L. R. 360.

Police benefit fund—*Pension—Right to —Forum — Police commissioners—Injury in the execution of duty.*]—By rule 32 of the rules and regulations of a police benefit fund, it was provided that where a member "in the execution of duty" received such injury as "in the opinion of the police commissioners" permanently incapacitated him from service in the police force, he should receive a pension as therein provided. The plaintiff, a policeman, while vaulting over a wooden horse in a gymnasium, this being part of a manual exercise prescribed, received an injury whereby he alleged he was permanently incapacitated from further service in the force, and so entitled to such pension, and brought an action therefor:—*Held*, that the injury was one sustained by the policeman in the execution of duty, but whether the permanent incapacity was the result of such injury was a matter for the consideration of the police commissioners, and the action was not maintainable. *Gummerson* v. *Toronto Police Benefit Fund*, 11 O. L. R. 194, 5 O. W. R. 581, 6 O. W. R. 517.

Police pension society—*Judicial duties of directors—Rights of members—Claim under the rules by policeman obliged to resign —Procedure on inquiry.*]—The rules of the respondent police pension society provided that every application for a pension should be fully gone into by the board of directors, and in particular that any member entitled thereto, who is dismissed from the police force or is obliged to resign, shall have his case considered by the board and his right thereto determined by a majority:—On the application for a pension by the appellant, who had been obliged to resign, the board, without any judicial inquiry into the circumstances, resolved to refuse the claim, "seeing that he was obliged to tender his resignation":—*Held*, in an action by the appellant in effect to compel a due administration of the pension fund, that this resolution was void and of no effect. The tender of resignation gave him the right to appeal to the board, and to have his claim as affected thereby duly considered and determined. It did not by itself forfeit rights acquired by length of service and regular contribution to the pension fund. Case remitted to the Superior Court, with declarations directed to secure to the appellant a due consideration and determination thereof by a differently constituted board. *La Pointe* v. *Montreal Police Assoc.*, [1906] A. C. 535, 16 Que. K. B. 38.

Rights of members—*Action to establish — Domestic forum — Submission to jurisdiction.*]—An action to establish the right of a person to membership in a benefit society will not be entertained by the Court, even where the society submits to the jurisdiction, until the remedies provided by the constitution of the society have been exhausted.—A dispute arose as to the plaintiff's right to continue to be a member of the defendant society, and a body of officials of the society decided against him; the plaintiff, instead of appealing to the Grand Lodge, as permitted by the constitution (by which he was admittedly bound), brought an action against the society. The action was dismissed, but without costs and without prejudice to any other action being brought after the remedies provided by the constitution should be exhausted. *Zilliax* v. *Independent Order of Foresters*, 8 O. W. R. 631, 13 O. L. R. 155.

Rules — *Construction — Participation of member in benefits.*]—The 12th rule or by-law of the relief society established in connection with the mines of the Dominion Coal Co., provided that "no member shall participate in the benefits of the society until two full months after the date of his first payment":—*Held*, that a member was absolutely excluded from any participation in the benefits of the society in case of illness or accident happening within the period of two months, and that the right to participate only began in cases where the inability to work was due to causes arising after the lapse of the two months. *McDonald* v. *Dominion Coal Co.'s Relief Fund*, 36 N. S. R. 15.

Rules of society—*Membership in good standing in primary lodge.*]—Action to recover amount of benefit certificate issued by defendants to the deceased. All assessments had been paid, but he was not, as required by certificate, in good standing at his decease in Loyal Orange Association:—*Held*, therefore, that plaintiff could not recover. R. S. O. 1897, c. 203, s. 165 in addition not apply. *McKechnie* v. *Orange Lodge*, 13 O. W. R. 413, 18 O. L. R 555.

Sick benefits — *Majority vote—Condition precedent — Gratuity.*] — The plaintiff sued the defendants for sick benefits, being a member of the association in good standing, and producing the certificate of a physician as to his illness. By s. 1, Art. 11, of the constitution of the society, it was provided that "every member is entitled to $3 per week during sickness, provided he produces certificate from a doctor, and provided he obtains a majority vote of either a special or regular meeting of the society authorizing the payment of such benefit claim." The majority of the meeting voted against payment of the claim:—*Held*, that a majority vote was necessary before the claim could be collected, being a condition precedent to the right to recover, and that the payment of sick benefits was simply a gratuity. *Hughes* v. *Benevolent Irish Society*, 21 C. L. T. 516.

Winding-up — *Members suspended for non-payment of dues—Status—Notice of proceedings—Right to share in surplus—Remedy for exclusion — Action—Parties — Account— Payment into Court.*] — 1. A by-law of a mutual aid society providing for suspension of members who make default in paying their dues does not thereby exclude them from the society. They preserve their status as members and the rights which flow from it. Therefore, when the society is dissolved and being

wound up, they have the same right as other members to be notified and receive their shares (proper deduction for what they owe being made) in the distribution which is made of the excess of assets over liabilities.—2. A liquidation and distribution made without taking account of the suspended members and without giving them notice, gives them a right at common law to bring a single action against the other members jointly to make them pay into Court what they have received for the purpose of a new distribution; and this, although each of the claimants has a right to a different sum and each of the defendants has received and must bring into Court a different amount. *Boiteau* v. *Ethier*, Q. R. 35 S. C. 1.

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3. Burglar Insurance.

(No cases.)

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4. Employers' Liability.

Condition of policy — Breach—Avoidance of policy. *Dominion Paving & Contracting Co.* v. *Employers' Liability Assce. Corpn.*, 5 O. W. R. 400.

Contract — *Alteration after execution—Agent—Authority.*] — A local agent of an English insurance company, without authority from any one, upon the request of the assured, and after some correspondence with the chief agent for the company in Ontario as to other changes which had been refused, to the knowledge of the assured, altered an employer's liability policy which had been sent to him for delivery to the assured by making it comprehend the workman at a place other than those named in the policy, and then handed it to the assured, who paid him the premium. He then sent the premium to the chief agent for Ontario, and advised him at the same time of the alteration made. The power to make any change in the policy did not rest in the local agents nor in the chief agent for Ontario, but only in the manager and attorney for Canada, who was not notified of the alteration:—*Held*, that the company could not be considered to have authorised the alteration and were not bound by the contract as altered. *Pigott* v. *Employers' Liability Assurance Corporation*, 20 C. L. T. 260, 31 O. R. 666.

Employment of child under fourteen —*Condition in policy—Ontario Factories Act, R. S. O. (1897), c. 256, s. 3 (5)—Knowledge of insured—Liability of insurance company.*] —Plaintiffs employed one Jones, a child under fourteen, to work in their factory. He was injured by the fall of a goods elevator and recovered $1,500 damages against plaintiffs on the ground that it was negligence on the part of a company to employ a boy contrary to the prohibition of the Ontario Factories Act, R. S. O. 1897, c. 256, s. 3 (5). Plaintiffs then brought action against defendant company to recover amount paid Jones, claiming under an Employers' Liability Insurance policy issued plaintiffs by defendant company. Defendants contended that they were relieved of liability by a clause in the policy to the effect that the insurance did not cover injuries caused or received by any child illegally employed with the knowledge of the insured:—*Held*, that the plaintiffs had no knowledge that Jones was under the age of 14 years, and was employed contrary to the provisions of said Act, and that the defendant company was liable to repay plaintiffs amount which they had paid Jones. See 8 O. W. R. 11 O. W. R. 828, 12 O. W. R. 269. See, also, *Jones* v. *Morton*, 14 O. L. R. 402. *Morton* v. *Ontario Acc. Ins. Co.* (1909), 14 O. W. R. 1010, 1 O. W. N. 199.

Fidelity bond — *Obligations of assured — Supervision of employee — Defalcations —Remedies.*]—The assured by a contract of fidelity insurance is bound to supervise rigorously the conduct of the employee who is the subject of the contract, to exact from him conformity to the provisions of the law touching the keeping and auditing of his accounts, and in the case of defalcations to pursue with diligence the remedies of the law, criminal as well as civil; his neglect to fulfil these obligations will deprive him of recourse for the indemnity stipulated for in the policy. *St. Edouard School Commissioners* v. *Employers' Liability Assurance Corporation*, 16 Que. K. B. 402.

See Guaranty — Master and Servant —Principal and Surety.

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5. Fire.

Action on policy — *Defence — Misrepresentation as to amount of incumbrance—Second insurance—Failure to notify—Pleading — Admissions — Reply.*]—The declaration in an application for insurance against fire that the property to be insured is encumbered for a sum less than it really is encumbered for, is not a ground for avoiding the contract. Even were it a ground, offers of payment made by the insurers, after the loss, would operate as a renunciation on their part of the right of invoking it as a ground.—Default by the assured to inform the insurers of a second insurance effected by another company, is not a ground for setting aside the first contract.—A plaintiff who invokes the admissions and promises to pay of the defendant, in reply to a plea, cannot be hindered from making proof of them upon the contestation that these facts should have been set up in the declaration. *Fiset* v. *Equitable Mutual Fire Assurance Co.*, 31 Que. S. C. 334.

Action to recover insurance moneys —*Defence of insurers—Title of plaintiff—Incapacity to purchase property—Relative nullity not available to insurers.*]—The nullity of a sale resulting from incapacity to buy in the cases within Art. 1484, C. C., is only relative, and cannot be invoked except by those for whose advantage it is introduced. The insurer of a house sold in contravention of the article, being sued by the purchaser to recover the insurance money after a fire, has no status to set up the nullity of the sale to the purchaser, the plaintiff. *Edgar* v. *North British & Mercantile Ins. Co.*, 27 Que. S. C. 299.

Agent — *Authority — Concealment of fact—Act of agent.*]—An insurer who acts in such a way as to make the insured believe that the broker soliciting the risk is his agent, cannot plead the nullity of the contract upon the ground that the insured has not disclosed a circumstance aggravating the risk, the withholding being the act of the broker, upon whom the insured relied for all the formalities. *Abousamra* v. *Equitable Mutual Fire Assce. Co.*, 27 Que. S. C. 252.

Agreement as to loss—*Refusal to arbitrate—Adjustment — Conditions of policy—Waiver—Evidence.*]—By a contract of insurance against fire made between the plaintiff and defendants, it was provided that in case of disaster the amount of the damages should be determined by agreement between the company and the assured, or by arbitration; that the assured should, whenever demanded, produce for examination to any person appointed by the company anything which remained of the insured property damaged or not damaged; that he should also produce for examination to any person appointed by the company anything which remained of the insured property damaged or not damaged; that he should also produce for examination his books, invoices, or other papers, or certified copies if the originals were destroyed; that the company should not be considered to have waived any condition unless the waiver should be clearly expressed in writing and signed by an agent of the company. A fire having partly destroyed the insured property, the manager of the defendants himself visited the place, and the plaintiff having proposed to him to submit the settlement of his indemnity claim to arbitrators, the manager answered that he did not wish to have arbitration, and asked the plaintiff to prepare for him a statement of his loss and send it to him, adding that if it was satisfactory he would pay it. He told him at the same time that he could clean up the place and continue his business. The plaintiff prepared a statement, and, at the request of the manager, made his claim in writing. The manager submitted this claim to adjusters, and they went to the premises of the plaintiff to make an examination of his losses, but the plaintiff refused to shew them the damaged goods, which were for the most part still in his possession, saying that everything had been cleaned up and that no further statement of the damages could be made. The defendants then refused to pay, but did not allege that the account of the plaintiff was too large; and that the contract of insurance being in its nature commercial, oral evidence was admissible to prove the facts; and to do so was not to let in evidence to contradict a writing or to violate the condition of the policy which required a waiver in writing of the conditions of the contract, for the policy provided for a settlement by agreement, and the plaintiff was able to prove such agreement by witnesses.—2. In view of the refusal of the manager of the defendants to submit the settlement of the claim to arbitrators, and his proposition that the plaintiff should himself prepare a statement of his loss, the plaintiff could not be required to exhibit to the adjusters the damaged goods. *Duffy* v. *St. Laurent Fire Assce. Co.*, 23 Que. S. C. 181.

Alterations in property — *Increased risk—Onus.*]—Alterations made without notice by the owner in the property insured after the issue of a policy of fire insurance, which do not increase the risk, do not affect the policy, and the burden of establishing the increased risk is on the insurer. *Bachand* v. *Canadian Mutual Assce. Co.*, 27 Que. S. C. 509.

Amount of loss — *Insufficiency of proofs of claim — Statutory conditions—Premature actions.*]—Actions for amount of loss on fire insurance policies in T. & B. Co.'s. In T. policy loss had been made payable to C. Bank, creditor of plaintiff. After the fire but before action, the B. policy was assigned to the same bank:—*Held*, that the bank was not a necessary party to the action on the T. policy, but was in the B. policy action, and submitted to be added as defendants. Proofs of loss shewing approximately the general loss were delivered by plaintiff to the defendants on the 8th April and completed proofs on the 11th May. The actions were commenced on the 10th June:—*Held*, that as the first proofs were insufficient the actions were premature, and defendants were allowed a set-off of costs against the amount of loss allowed to plaintiffs. *National Stationery Co.* v. *British Am. Assce. Co., National Stationery Co.* v. *Traders Fire Ins. Co.* (1908), 13 O. W. R. 367, affirmed, 14 O. W. R. 261, 281.

Application—*Answers by soliciting agent —Diagram of premises—Immaterial misdescription—Alteration in use of building—Unoccupied house.*]—A statement in an application for insurance that "if answers to the questions are made by the agent of the company soliciting the insurance, he shall be considered for those purposes the agent of the applicant and not that of the company," must be construed strictly, and cannot therefore be extended to a diagram of the premises made by the agent on the back of the application.—2. A statement in an application that a diagram on the back of it disclosed the exact situation of the property insured, when it shewed another building as distant 30 feet instead of 23, and the company charged the premium at a higher rate, such as would have been charged had the distance been correctly given, is not a material misdescription sufficient to vitiate the policy. —3. When the owner, shortly before the fire, left the house insured to work in the lumber shanties, and his wife during his absence went to reside with her parents, the policy containing no special prohibition in this respect, the fact that the house was unoccupied at the time of the fire, without notice to the company, did not amount to such an alteration in the use or condition of the premises insured as would vitiate the policy. *Mutual Fire Ins. Co.* v. *Mercier*, 14 Que. K. B. 227.

Application — Diagram of building — Omission from—Agent. — *Ball* v. *Farmers' Central Mutual Fire Ins. Co.*, 1 O. W. R. 168.

Application—*Policy issued on changed conditions—Statute governed—No laches.*]—In an action upon a disputed fire insurance policy issued on changed conditions from the application, Divisional Court, affirming the judgment of the County Court of Haldimand, *held* that the contract was controlled by the

statutory condition "That the terms shall be deemed to be in accordance with the application unless the defendants point out in writing to the assured the particulars wherein the policy differed from the application."—Falconbridge, C.J.K.B., dissenting, *held*, on the facts plaintiff estopped by his laches, gross carelessness and acquiescence. *McCutcheon* v. *Traders Fire Ins. Co.* (1911), 19 O. W. R. 279, 2 O. W. N. 1136.

Application — *Untrue statement — Materiality—Statutory condition.*]—In an application for insurance against fire, to the question "Have you ever had any property destroyed by fire?" the applicant answered, yes. "Give date of fire, and, if insured, name of company interested." "1892. National and London and Lancashire." The evidence shewed that there was a fire on the applicant's property in 1882, and two fires in 1892, and the insurance granted on this application was on property which replaced that destroyed by the latter fires:—*Held*, reversing the judgment in 35 N. S. R. 488, that the above questions were material to the risk, and the answers untrue. The first statutory condition, therefore, precluded recovery on the policy. *Western Assurance Co.* v. *Harrison*, 33 S. C. R. 473.

Application for policy—*Warranty — Addition to statutory conditions.*] — Every statement in an insurance application was, by a provision in the policy, made a warranty. This provision being an addition to the statutory condition, the terms of R. S. N. S. c. 147 must be complied with, to make the warranty effective. *McNutt* v. *Western Assurance Co.*, 40 N. S. R. 375. See also *Morley* v. *City of Halifax*, *ib.* 378*n*; *Grant* v. *Western Assurance Co.*, *ib.* 380*n*.

Apportionment of loss — Concurrent policy. *Davidson* v. *Insurance Co. of North America*, 2 O. W. R. 621.

Appraisement of loss — *Agreement — Arbitration — Notice to parties — Necessity for — Award set aside.*]—An agreement for the ascertainment of the amount to be paid by an insurer to the insured, called an "appraisement bond," is in reality a submission to arbitration, and the rules prescribed by Arts. 1431 *et seq.*, C. P. C., are applicable to it, as well as to the subsequent proceedings of the appraisers, who are in reality arbitrators, and not *amiables compositeurs*. Therefore, the default by them to give notice to the parties or one of them of the time and place at which they will proceed with their appraisement is a violation of Art. 1436, which involves the nullity of their award. Judgment in 28 Que. S. C. 68 reversed. *Beauharnois* v. *Liverpool & London & Globe Ins. Co.*, 15 Que. K. B. 235.

Apprehension of incendiary danger —*Application filed in by local agent — Untrue answer.*]—An application for insurance on the contents of a barn contained the question, "Is there any incendiary danger threatened or apprehended," to which the answer was, "No." The plaintiff, who had not previously carried any insurance, stated that he effected the insurance, having learned that the owner of the barn had placed a high insurance on it, as well as on the adjacent dwelling-house. This was told by the plaintiff to the company's agent, who filled in the application and the answers to the questions. The application was then signed by the applicant, who was not an illiterate man, but he did not read over the application, and was not told that the question had been answered in the negative:—*Held*, that the plaintiff was bound by the answer to the question, as inserted in the application, it being material to the risk, and that it was untrue, for the reasonable inference was that the apprehension of incendiary danger as a fact existed. *Graham* v. *Ontario Mutual Ins. Co.*, 14 O. R. 378, and *Chatillon* v. *Canadian Mutual Fire Ins. Co.*, 27 C. P. 450, considered and commented on.—*Quære*, whether the inquiry raised by the question was not as to the apprehension of the applicant of incendiary danger, and not whether, as a fact, any incendiary danger was to be apprehended. *Kniseley* v. *Br. Am. Assce. Co.*, 21 C. L. T. 117, 32 O. R. 376.

Arbitration as to loss—*Terms of submission — Estimate of value — Powers of arbitrators — Misrepresentation — Functus officio — Setting aside award — Assignment under Collection Act — Effect of.*] — An agreement was entered into between the plaintiff and the defendant company for the appointment of two arbitrators to appraise the loss to property damaged and destroyed by fire, the arbitrators appointed being empowered to select a third, who should act with them in matters of difference only.—The arbitrators first appointed made an award which was good upon its face, but failed to comply with one of the material terms of submission, in failing to make an estimate of the value of goods actually destroyed, or to determine the sound value of goods not destroyed:—*Held*, that when the award was signed the authority of the arbitrators ceased, and that it was not within the power of either of them to re-open it or to deal further with the matter; that the fact that one of the arbitrators was misled by his co-arbitrator in connection with the signing of the award, if true, would form good ground for an application to the Court to set it aside, but did not justify him in calling in the third arbitrator and making another award different from that to which he was already a party; that a difference between the arbitrators arising after the filing of the award was not a difference within the meaning of the submission which justified the calling in of the third arbitrator.—After the making of the award, the plaintiff made an assignment under the Collection Act to a bank, which subsequently reassigned to the plaintiff. In the meantime, before the re-assignment, the plaintiff made an assignment, also under the Act, to M., who notified the company.—*Quære*, whether the action could be brought in the name of the plaintiff, and whether any legal interest passed to M. under the assignment. *Hall* v. *Queen Ins. Co.*, 1 E. L. R. 37, 39 N. S. R. 295.

Assignment of policy *for benefit of creditors — Insurable interest retained by assignor—Statutory condition No. 4—Effect of does not void policy.*]—Plaintiff company assigned a policy of fire insurance for the benefit of its creditors. Loss occurred and

defendants set up the defence that clause 4 of the statutory conditions voided the policy. That clause provides that "If the property insured is assigned without the written permission of the company, the policy shall be void," but this condition does not apply to a change of title by succession or by the operation of law, or by reason of death." There was no consent and the assignment did not come within the exception.—Middleton, J., *held* (16 O. W. R. 1004, 2 O. W. N. 59), that the words of this condition must be construed strictly and all that they prohibit is an absolute assignment which divests the insured of all his property in the goods, and by which he does not retain to himself an insurable interest. That here there did remain a beneficial and insurable interest in the assignor, his debts were to be paid and the residue was to be held in trust for him. Judgment for plaintiff for $2,402 and interest from time when it became payable, and costs. —Court of Appeal dismissed defendants' appeal with costs. Meredith, J.A., dissenting. *Wade* v. *Rochester German Fire Ins. Co.* (1911), 19 O. W. R. 99, 2 O. W. N. 1076.

Assignment of policy — *Formalities—Notice to insurers — Admission — Representation of value of goods insured—Fraud —Undisclosed insurance — Proof of claim—Time — Waiver.*]—A transfer of a contract of insurance, by a private writing made in duplicate, signed by the transferor and transferee in the presence of two witnesses, is good and valid. 2. The admission of the debtor that he received a duplicate of such transfer is a sufficient signification (1571, C. C.). 3. An estimate by the insured in round figures of the value of the stock, at the time of the application, should not be considered a ground of nullity, unless it contains such an exaggeration as creates a suspicion of fraudulent intention. 4. The fact that an interim receipt had issued for an insurance in another company, which insurance was afterwards declined by that company, does not establish a plea of undisclosed insurance. 5. The time limit for furnishing statement of loss is waived by a letter from the company to the insured, dated after the expiration of the delay, and enclosing a blank form of policy in order that the insured might know exactly what it was necessary that he should do. *Western Assce. Co.* v. *Garland*, 12 Que. K. B. 530.

Assignment of policy for benefit of creditors—*Insurable interest retained by assignor — Statutory condition No. 4 — Effect of does not void policy.*]—Plaintiff company assigned a policy of fire insurance for the benefit of its creditors. Loss occurred, and defendants set up the defence that clause 4 of the statutory conditions voided the policy. That clause provides that "If the property insured is assigned without the written permission of the company, the policy shall be void," but this condition does not apply to a change of title by succession or by the operation of law, or by reason of death." There was no consent and the assignment did not come within the exception. —Middleton, J., *held*, that the words of this condition must be construed strictly and all that they prohibit is an absolute assignment which divests the insured of all his property in the goods, and by which he does not retain to himself an insurable interest. That here there did remain a beneficial and insurable interest in the assignor, his debts were to be paid and the residue was to be held in trust for him. Judgment for plaintiff for $2,402 and interest from time when it became payable, and costs. *Wade* v. *Rochester German Fire Ins. Co.* (1910), 16 O. W. R. 1104, 2 O. W. N. 59.

Avoidance of policy—*Untrue answers of assured — Fires on premises — Knowledge of agent of insurers — Agent filling up application.*]—Action on a fire insurance policy dismissed. In the application the insured said there were no fires on the premises. This turned out to be untrue. Plaintiff claimed that defendants' agent knew there was, but this the agent denied. The agent had filled up the application, therefore he was agent of insured, not of company. *Parsons* v. *Alberta Can. Ins. Co.* (Sask.), 10 W. L. R. 161, 2 Sask. L. R. 76.

Breach of statutory condition—*Subsequent insurance — Notice — Knowledge of sub-agent — Dismissal of action on policy—Refund of premium.*]—By a condition of a policy of fire insurance (statutory condition No. 8) the insurance company were not to be liable if any subsequent insurance were effected unless and until the company should assent thereto, etc. A subsequent insurance was effected by the insured, and no notice in writing thereof was given nor any communication made to the company nor to any agent having power to receive such notice, and the fact of the existence of the subsequent insurance was not disclosed to the company until after the insured premises were injured by fire:—*Held*, that the circumstances that the subsequent insurance was effected by a sub-agent of the company's general agent, who had also acted in procuring the prior insurance with the company, should not be regarded as affecting the company with constructive notice of the subsequent insurance.—An action upon the policy being dismissed, the company were ordered to refund the last payment of premium, which was received in ignorance that the policy was no longer in force. *Imperial Bank* v. *Royal Ins. Co.*, 12 O. L. R. 519, 8 O. W. R. 148.

Builder's risk—*Building in "course of construction"—"Vacant or unoccupied" — Knowledge of company — Higher premium charged — Estoppel — Insurable interest—Question of fact.*]—Action to recover $2,000 on an insurance policy in plaintiff's favour as second and third mortgagee. Defendants pleaded: (1) that the buildings were not in course of construction, but were really abandoned; (2) that the insurance was void under 4th addition to the statutory conditions; (3) that plaintiff had no insurable interest in the property, it not being worth more than the insurance in favour of first mortgagee.—Falconbridge, C.J.K.B., gave effect to the first ground of defence and dismissed plaintiff's action.—Court of Appeal, *held* that the evidence as to the facts did not substantiate defendant's pleadings. Appeal allowed and judgment entered for the plaintiff, Meredith, J.A., (*dissenting*), agreeing with Falconbridge, C.J. *Dodge* v. *York Fire Ins. Co.*, (1911), 18 O. W. R. 241, 1 O. W. N. 1098, 2 O. W. N. 571

Cancellation—*Notice — Statutory conditions.*]—The insured sent to the company his policy with an indorsed surrender clause executed, and a letter asking that the insurance be terminated and the unearned proportion of the premium repaid. Owing to its misdirection by the insured, the letter was delayed in the post office and did not reach the company till the morning after the insured property had been destroyed by fire:—*Held*, that the letter did not take effect from the time of its being posted, but only from the time of its receipt, and that the relationship of the parties had been so changed by the occurrence of the fire before its receipt that the attempted surrender did not operate, and therefore the company were liable for the loss. Judgment in 22 C. L. T. 258, 4 O. L. R. 123, 1 O. W. R. 411, affirmed. *Skillings* v. *Royal Ins. Co.*, 23 C. L. T. 294, 2 O. W. R. 123, 701, 6 O. L. R. 401.

Cancellation of policies — Proposal—Acceptance—Return of premiums. *Armstrong* v. *Lancashire Ins. Co.*, 2 O. W. R. 509, 3 O. L. R. 395.

Church destroyed by fire—*Negligence of respondents' servants.*] — The parish church of Boucherville, in Lower Canada, having been in great part destroyed by a fire, which was occasioned by the negligence of the respondents' servants and being at the time insured by a policy effected by the *curé* upon the church and sacristy; the *curé* and one of the *marguilliers-en-charge*, by a notarial instrument, transferred to the appellants ("the Quebec Fire Assurance Company," who had granted the policy), in consideration of the payment by them of part of the amount of the damage sustained by such fire, the right to sue and claim from the respondents, the amount so paid:—*Held*, that this constituted a valid subrogation of the debt due to the insurers in right of the *fabrique*, according to the French law prevailing in Lower Canada. — *Held*, also, in an action brought upon the notarial *Acte*, that though the declaration was not strictly in form, yet it was substantially good; for the plaintiffs (the appellants) could not be held to sue as assurers, (in which character they had no title); but as being subrogated to the debt due to the *fabrique* of the church by the defendants (the respondents), by reason of the payment made on their behalf in respect of the damage occasioned by them.—*Semble*, by the old French law, the *curé* and *marguilliers* together could not convey by way of assignment without the consent of the *Bureau*, though they might subrogate a debt due to them in their official character. *Que. Fire Assce. Co.* v. *St. Louis* (1851), C. R. 2 A. C. 1.

Co-insurance clause — *Time of taking effect.*]—In an action for recovery of a fire-loss, upon a policy which contained a condition worded as follows: "It is a part of the consideration of this policy and the consideration upon which the rate of premium is based, that the assured will maintain insurance concurrent with this policy, on all the items of the property insured by this policy to the extent of at least eighty per cent. of the actual cash value thereof and that in default of the insured so doing, the insured will become co-insurer for the amount in default, and in such event shall bear his portion of the losses which may supervene":—*Held*, that the value to be considered in applying the condition, was the value of the items of the insured property at the time of the loss and not the value at the date of the contract. *Guardian Assce. Co.* v. *Trempe* (1910), 16 R. de J. 431.

Co-insurance condition.]—Where the premium is reduced in consideration of the insertion in a policy of fire insurance, in the manner prescribed by the Ontario Insurance Act, R. S. O. c. 203, s. 169, of the condition commonly known as the "co-insurance condition," that condition is *prima facie* valid, and should not be held to be "not just and reasonable" within the meaning of s. 171 of the Act, without evidence to that effect; Burton, C.J.O., and Moss, J.A., dissenting. —Judgment in 29 O. R. 695, 18 C. L. T. 361, affirmed. *Eckardt* v. *Lancashire Ins. Co.*, 20 C. L. T. 297, 27 A. R. 373.

Concurrent policies — *Contribution to loss — General and special insurances.*]—An insurer of a stock of merchandise under a general policy, who has to contribute to a loss with insurers under special policies, each upon a part of the same stock, is liable in proportion to the loss in each part. For this purpose the general policy is divided into as many parts as there are special insurances and proportionately to the losses on each, and each such part contributes ratably with the special insurances. *Bloomfield* v. *London Mutual Fire Ins. Co.*, 1 Q. R. 29 S. C. 145.

Condition—*Certificate of magistrates — Waiver — Proofs of loss.*]—A policy of fire insurance contained a condition requiring the assured, in case of loss, to procure a certificate as to the matters contained in the statement of loss under the hands of two magistrates most contiguous to the place of the fire. A further condition provided that no condition should be deemed to have been waived unless the waiver was expressed in writing indorsed on the policy:—*Held*, per Tuck, C.J., Hanington, Barker, and Gregory, JJ., that the production of the certificate of the magistrates most contiguous to the place of fire was a condition precedent to the assured's right to recover. *Per* Landry and McLeod, JJ., that the magistrate most contiguous qualified to act is the most contiguous within the meaning of the condition, though not the nearest in point of distance to the place of the fire. *Per curiam*, that if there could be a waiver under the condition without indorsement on the policy, the acceptance of the proof of loss by the company, without objection, was not a waiver. *Le Blanc* v. *Commercial Union Ins. Co.*, 35 N. B. R. 605.

Condition—*Change material to risk — Non-occupancy.*]—Where by a condition in a fire policy on a dwelling house, any change material to the risk, etc., should avoid the policy, the fact of the premises being unoccupied and vacant does not constitute a breach of such condition. *Boardman* v. *North Waterloo Farmers' Mutual Fire Ins. Co.*, 20 C. L. T. 176, 31 O. R. 525.

Condition for notice of additional insurance—*Breach.*]—H. insured in the defendant company's office, the policy containing a condition that if any additional insurance should be effected, notice must be given the company, otherwise the policy to be void. When the company's agents took the application plaintiff objected to this condition and the agents told him he could insure in some other company, but it did not appear that they told him he need not give notice of such other insurance. Plaintiff effected other insurance of which he gave no notice. Plaintiff's property having been burnt, he brought an action on the policy, and the company pleaded (1) that plaintiff was not interested to the amount insured, (2) that plaintiff delivered a fraudulent account of the goods, (3) no notice of the subsequent insurance, (4) that defendant was induced by fraud to make the policy. The jury did not find a verdict for either party but found a special state of facts from which the Court should direct for whom the verdict should be entered:—*Held*, (Peters, J.), that the condition as to notice of subsequent insurance had not been waived by the acts of the agent and that the verdict must be entered for defendant on the plea of want of notice, and for plaintiff on the other pleas. *Hayden* v. *Stadacona Ins. Co.* (1877), 2 P. E. I. R. 242.

Condition in policy as to salvage in case of fire—*Failure by the insured to comply with it and its consequences.*]—Failure by the insured to comply with the conditions of the policy that he will use all means in his power to save the goods insured, in case of fire, is a bar to his right to recover any insurance at all. *Parent* v. *Provident Assce. Mutuelle* (1900), 30 Que. S. C. 377.

Condition of policy — Gunpowder on premises — Stock-in-trade — Usage. *Foley* v. *Norwich Union Fire Insce. Society*, 40 N. S. R. 624.

Condition of policy—*Notice and proof of loss — Waiver by insurer — Representations — Finding of trial Judge — Appeal.*]—The condition in a policy of insurance against fire, that notice and proof of loss must be given within a stated delay, is not one of liability but of recovery, and is imposed in the interest of the insurer. The assured may therefore be relieved from it either expressly, or impliedly, *e.g.*, by the insurer putting him off when applying for a settlement, on the ground that the insurer is himself investigating the circumstances of the loss.—2. The finding of the trial Judge, in such matters as the representations by the assured as to the value of the property insured and the extent of the loss, will not be interfered with on appeal when the evidence is contradictory. *Mount Royal Ins. Co.* v. *Benoit*, 15 Que. K. B. 90.

Condition requiring occupation of premises—"*Untenanted*," *meaning of.*]—A condition in a policy of fire insurance that "if the premises insured become untenanted or vacant, and so remain for more than ten days without notifying the company," etc., "the policy will be void," is a reasonable condition, and the word "untenanted" therein must be read as synonymous with "unoccupied." Where, therefore, the occupant of a house left it for several weeks, but left the furniture and clothing therein, while a person went there to feed the pigs and chickens and water the flowers, and on two occasions the insured's husband slept in the house, it was *held* that the house was untenanted and vacant within the meaning of the condition. *Spahr* v. *North Waterloo Farmers' Mutual Fire Ins. Co.*, 20 C. L. T. 177, 31 O. R. 525.

Conditional purchase of real estate — *Legitimate interest in conserving the thing — Right to insure — False declarations and failure to disclose.*] — The purchaser of real estate by a sale (wrongly described in a deed as a lease) with a condition suspending the passing of the property until the full payment of the price has a legitimate interest in protecting it, which gives him the right to insure it against fire. Hence, the statement in his application for insurance that he is the owner is not a false declaration nor a concealment which might affect the validity of the policy. *Donaldson* v. *Providence Mutual Fire Assce. Co.* (1900), 36 Que. S. C. 439.

Conditions—*Limitation of risk—Amount of loss — Arbitration.*]—1. Where it is a condition of the policy that the total insurance on each item of the property insured shall not exceed two-thirds of the cash value of such item, and that notice shall be given of all previous insurance effected by the insured on the same property, and it appears that the insurance exceeds two-thirds of the cash value, and that other insurance, on two items, to the amount of $100, exists without having been declared to the company, the policy is void. 2. The condition that, in case of a loss by fire, the amount of the damages shall be determined by arbitrators, and that no action shall be brought until the amount of the loss is so determined is a legal condition. *Pharand* v. *Lancashire Ins. Co.*, 18 Que. S. C. 35.

Conditions—*Prior insurance — Abandonment — Subsequent insurance — Interim receipt — Estoppel.*]—B., having a policy of insurance for $2,000 in the M. Co., wrote to D., a sub-agent of the R. Co., that he was going to abandon that insurance, and insure in the R. Co. for about $3,000. B. gave D. his note for $51 and paid him $25 in cash, and D. sent B. the usual interim receipt of the R. Co., promising the subsequent issue of a policy which was to be subject to the conditions indorsed on the receipt. One of these provided that the policy should be void if there was any prior insurance, unless the consent of the company were indorsed. D. discounted the note and in due course accounted to the R. Co. for the full amount of the premium. The goods insured were destroyed by fire before the maturity of the note, which B. paid at maturity. No formal application for the insurance was signed by B., but a policy was made out before the fire and sent to D., who did not, however, deliver it to B. In actions brought upon the two policies by the assignees of B.:—*Held*, that B.'s statement that he was going to abandon the insurance in the M. Co. was not merely an expression of intention, but was a term or condition that affected the very existence

of the proposed insurance in the R. Co., which was not to become effective until that condition was fulfilled, and, as R. never did so abandon, there never was any effective insurance on his goods in the R. Co.; and therefore the M. Co. could not set up the conditional contract of insurance in the R. Co. as a breach of the statutory condition against a subsequent insurance. *Commercial Union Assce Co.* v. *Temple*, 29 S. C. R. 206, and *Western Assce. Co.* v. *Temple*, 31 S. C. R. 373, followed. *Whitla* v. *Royal Ins. Co.*, *Whitla* v *Manitoba Assce. Co.*, 22 C. L. T. 69, 72, 266, 14 Man. L. R. 90.

Conditions — *Prior insurance — Subsequent insurance — Substitution of policies — Implied assent — Adjustment of loss — Waiver.*]—In an application for insurance, particulars of prior insurance in two other companies of $4,000 in each company were given, but in the policy in question prior insurance for only $4,000 was assented to, neither company being named. The defendants pleaded as a breach of the statutory conditions non-disclosure of prior insurance for $4,000 in one of the two companies:—*Held*, that the plea must be read strictly and without amendment, and that so read the assent in the policy to insurance of $4,000 might be treated as an assent to the prior insurance complained of in the plea; and *semble*, that had the defendants not intended to assent to the prior insurance of $8,000, they would have been bound under the second statutory condition to point out in writing the particulars wherein the policy differed from the application.—*Held*, also, that to a subsequent insurance for $4,000, in another company, in substitution for a prior insurance to that amount in one of the two companies mentioned in the application, the assent of the defendants was not necessary. Assent, express or implied, to subsequent insurance is sufficient even if given after the loss has occurred. In this case such assent was held to be sufficiently shewn by the defendants joining in the adjustment of the loss and allowing the insured to accept from the subsequent insurers their proportion of the loss as so adjusted. *Matchmor* v. *Waterloo Mutual Fire Ins. Co.*, 22 C. L. T. 406, 4 O. L. R. 636, 1 O. W. R. 667.

Conditions — *Sole and unconditional owner — Mortgagor — Other insurance — Estoppel.*]—A policy of fire insurance contained a condition that if the insured were not the sole and unconditional owner of the property, the policy should be void. At the time the policy was issued there was a mortgage on the property for a small amount, the existence of which was not disclosed to the insurance company by the plaintiff, who insured as owner:—*Held*, that the mortgage did not avoid the policy under the condition. Another condition of the policy was that it should become void if the assured had or should obtain any other insurance on the property. While the policy was in force, the insured's son, without his knowledge, applied to another insurance company for a policy on the same property, but, before he was notified of the acceptance of his application, the property was destroyed by fire.—*Held*, following *Commercial Union Assurance Co.* v. *Temple*, 29 S. C. R. 206, that the policy was not avoided.—*Held*, also, that the plaintiff was not under the circumstances arising at the trial, estopped by his admission in the declaration from claiming that there was no other insurance *Temple* v. *Western Assce. Co.*, 21 C. L. T. 427, 31 S. C. R. 373.

Conditions — *Subsequent insurance — Destruction of property insured—Sole owner — Mortgagor — Pleading.*]—A policy of insurance against fire contained the following condition: "If the assured have or shall hereafter obtain any other policy or agreement for insurance, whether valid or not, on the property above mentioned, or any part thereof . . . this policy shall become void, unless consent in writing by the company be indorsed hereon:"—*Held*, following *Commercial Union Assce. Co.* v. *Temple*, 29 S. C. R. 206, that where additional insurance was applied for, but not accepted until after the property was destroyed by fire, the condition had no application. A mortgagor is the "sole and unconditional owner" of property within the meaning of a condition in a policy of insurance against fire stipulating that the policy shall become void if the assured is not the sole and unconditional owner of the property insured. The policy also contained a condition that it should become void if any building intended to be insured stood on grounds not owned in fee simple by the assured. The land upon which the buildings insured stood was subject to a mortgage:—*Held* that the defence that the lands were not owned in fee simple by the assured mortgagor was not available under a plea charging that the plaintiff had been guilty of misrepresentation in the application for insurance, in that he stated that the property insured was not mortgaged or otherwise incumbered, whereas, etc., it was mortgaged. *Temple* v. *Western Assce. Co.*, 35 N. B. R. 171.

Conditions—*Variation — Requirements of Insurance Act — Imperative provisions — Exception in body of policy — Negativing in pleading — Proofs of loss — Interest — Value of insured property.*]—In an action upon a fire insurance policy, it appeared that at the time of the loss a portion of the plaintiff's note given for the premium was unpaid, and the defendants relied upon a condition indorsed on the policy that the company should not be liable in such a case. What purported to be the statutory conditions prescribed by the Fire Insurance Policy Act, R. S. M. c. 59, were printed on the back of the policy, and following these, under the heading "Variations in conditions," were several other conditions, including the one relied on, printed in ink of a different colour, but in type apparently of the same size as that of the statutory conditions from the words found in the statute, and the heading prescribed by s. 4 of the Act was omitted:—*Held*, that the requirements of the statute were inoperative and the plaintiff was not bound by the condition on which the defendants relied. *Sly* v. *Ottawa Agricultural Co.*, 25 C. P. 28. *Sands* v. *Standard Ins. Co.*, 27 Gr. 167, and *Bellagh* v. *Royal Mutual Fire Ins. Co.*, 5 A. R. 87, followed. 2. The policy stated in the body of it that the defendants were not responsible for loss by prairie fires.—*Held*, that this qualification was a condition of the insurance within the meaning of the Act, and should have been set

forth in the manner prescribed for non-statutory conditions, which it was not, and in pleading the plaintiff was not bound to negative it. 3. The defendants objected at the trial to the sufficiency of the proofs of claim, but they had not notified the plaintiff in writing that his proof was objected to.—*Held*, that under s. 2 of the Act, they could not now take advantage of any defect in the proofs. 4. The plaintiff was entitled under 3 & 4 Wm. IV. c. 42, s. 29, to interest on the insurance money, but only from the expiration of thirty days from the time he sent in his corrected and completed proofs of loss. 5. The insured was not precluded from shewing what the real value of the property insured was by the fact that he had, under peculiar circumstances, offered to sell it for less than the amount for which it was insured. *Green* v. *Manitoba Assce. Co.*, 21 C. L. T. 360, 13 Man. L. R. 395.

Conditions — *Waiver—Acts of officers.*]—A fire insurance company cannot be presumed to have waived a condition precedent to an action on a policy on account of unauthorized acts of its officers. *Hyde* v. *Lefaivre*, 32 S. C. R. 474.

Conditions in policy—*Appeal — Right to hear objections not argued in Court below.*]—The Court of Appeal may hear an objection not argued in the Court of original jurisdiction.—If a condition, referred to in a policy of insurance against fire, requires in the event of loss, and before payment thereof, a certificate to be procured under the hand of a magistrate sworn or notary of the city or district, importing that they are acquainted with the character and circumstances of the persons insured, and do know or verily believe that they have really and by misfortune without fraud, sustained by fire loss and damage to the amount therein mentioned, such certificate is a condition precedent to a recovery of any loss against the insurers, on the policy. And if a certificate be procured, in which a knowledge and belief as to the amount of loss is omitted, it will be insufficient. *Scott* v. *Phœnix Assce. Co.* (1829), 1 C. P. A. C. 5, Stuart, 354, 1 R. J. R. Que. 188.

Conditions of policy — *Double insurance — Application — Representation and warranties — Substituted insurance — Condition precedent — Lapse — Estoppel.*] — B., desiring to abandon his insurance against fire with the Manitoba Assurance Co., and in lieu thereof, to effect insurance on the same property with the Royal Insurance Co., wrote to the local agent of the latter company stating his intention and asking to have a policy in the "Royal" in substitution for his existing insurance in the "Manitoba." On receiving an application and payment of the premium, the agent issued an interim receipt to B. insuring the property pending issue of a policy, and forwarded the application and the premium, with his report, to his company's head office in Montreal, where the enclosures were received and retained. The interim receipt contained a condition for non-liability in case of prior insurance unless with the company's written assent, but it did not in any way refer to the existing insurance with the Manitoba Assurance Co. Before receipt of a policy from the "Royal," and while the interim receipt was still in force the property insured was destroyed by fire and B. had not in the meantime formally abandoned his policy with the Manitoba Assurance Co. The latter policy was conditioned to lapse in case of subsequent additional insurance without the consent of the company. B. filed claims with both companies, which were resisted, and he subsequently assigned his rights to the plaintiffs, by whom actions were brought against both companies: — *Held*, reversing both judgments appealed from, 14 Man. L. R. 90, 22 C. L. T. 69, 72, 266, that, as the Royal Insurance Company had been informed through their agent, of the prior insurance by B. when effecting the substituted insurance, they must be assumed to have undertaken the risk, notwithstanding that such prior insurance had not been formally abandoned and that the Manitoba Assurance Co. were relieved from liability by reason of such substituted insurance being taken without their consent; and both companies did not deprive him or his assignees of the right to recover against the company liable upon the risk. *Whitla* v. *Manitoba Assce. Co.*, *Whitla* v. *Royal Ins. Co.*, 24 C. L. T. 111; *Manitoba Assce Co.* v. *Whitla*, *Royal Ins. Co.* v. *Whitla*, 34 S. C. R. 191.

Consequence *when the interim receipt provides that the insured will be subject to the condition of a policy to be issued within thirty days and the policy is not issued within that delay—Adjuster's award.*]—When, in the interim receipt delivered to the insured by a fire insurance company, it is provided that the insured takes it subject to the conditions of the company's policy which will be issued within thirty days, the insured will not be held to the strict observance of such conditions if, within the specified delay, the company neither issued the policy nor gave notice, in writing, to the insured that his application for insurance was refused, nor made known to the insured the conditions of the policy.—Under such circumstances, notwithstanding certain conditions, recited in the policy which the company should have issued, to the effect that the insured was, as a condition precedent, bound to furnish a statement of damages in detail, and that, in the adjusters' award each object should be specifically inspected, an award of adjusters, chosen by the parties, with a referee, would be in plaintiff's favour, particularly, in any event, when the company failed to make the conditions known, when the adjustment was made regularly and in good faith, and when the company, before suit was taken, did not require further details and absolutely refused to pay the insured any sum of money whatever. *Belanger* v. *Scottish Union & National Ins. Co.* (1908), 17 R. de J. 249.

Contents of dwelling-house — *Ownership of property — Wearing apparel — Articles worn by wife of assured—Validity of marriage — Pleading — Scandalous and irrelevant allegations — Origin of fire — Suspicious circumstances — Evidence — Proofs of loss — Gasoline kept on premises — Statutory condition 19 — Arbitration clause — Action — Condition precedent — Quantum of loss.*]—In an action upon a policy of insurance issued by the defendants by which they insured the household goods, etc., of the plaintiff contained in a certain

dwelling-house against loss or damage by fire to the amount of $1,000:—*Held*, upon the evidence, that the household goods destroyed or injured by fire were the property of the plaintiff.—The plaintiff claimed for the loss of furs and wearing apparel of a woman who lived in the house with him, and was said to be his wife; there was some doubt about this; and the defendants alleged that the articles belonged to the woman, and that she kept a house of ill-fame. The plaintiff swore that he was her husband, and that he supported her. — *Held*, that the Court was not concerned as to the validity of the plaintiff's marriage, and that the plaintiff had an insurable interest in the articles. *Semble*, that allegations as to the character of the woman should have been stricken from the record as scandalous and irrelevant.—*Held*, on the evidence, that although there were peculiar and suspicious circumstances connected with the fire the defendants had failed to establish that it was caused by the wilful act or procurement and connivance of the plaintiff.—*Held*, also, that proofs of loss were duly furnished; and that inflation of the value of the goods destroyed was not fraudulent to the extent of vitiating the policy. — *Held*, also, that keeping a small quantity of gasoline upon the premises for domestic purposes did not avoid the policy under statutory condition 10.—*Thompson* v. *Equity Fire Insurance Co.*, 30 C. L. T. 807 (Privy Council), followed.—*Held*, also, that a clause in the policy providing for arbitration in the event of a difference as to the amount of the loss did not make an arbitration a condition precedent to the bringing of an action.—Quantum of loss computed at $400. *Paterson* v. *Central Can. Ins. Co.* (1910), 15 W. L. R. 123.

Affirmed (1911), 16 W. L. R. 647, Man. L. R. .

Contract — *Authority of agent — Sub-agent — Notice of termination of authority.*]—*Delegatus non potest delegare.* Therefore the defendants were held not bound by a policy signed by the general manager and countersigned in the name of one who had been their agent, by one of his clerks, but without any authorisation by him even though the insured may not have known of the cessation of the agency. The policy contained a stipulation that it should be valid only when countersigned by the duly authorised agent of the company. *Walkerville Match Co.* v. *Scottish Union Co.*, 24 C. L. T. S. 6 O. L. R. 674, 1 O. W. R. 647, 2 O. W. R. 1016.

Contract — *Lex loci—Lex fori—Principal and agent — Payment of premium — Interim receipt — Repudiation of acts of sub-agent.*]—The *lexi fori* must be presumed to be the law governing a contract, unless the *lexi loci* be proved to be different. The appointment of a local agent of a fire insurance company is one in the nature of a *delectus personæ*, and he cannot delegate his authority nor bind his principal through the medium of a sub-agent. *Summers* v. *Commercial Union Assurance Co.*, 6 S. C. R. 19, followed. The local agent of a fire insurance company was authorised to effect interim insurances by issuing interim receipts, countersigned by himself, on the payment of the premiums in cash. He employed a canvasser to solicit insurances who pretended to effect an insurance on behalf of the company by issuing an interim receipt countersigned by him (the canvasser) as agent for the company, taking a promissory note payable in three months to his own order for the amount of the premium:—*Held*, that the canvasser could not bind the company by a contract on the terms he assumed to make, as the agent himself had no such authority.—*Held*, further, that, even if the agent might be said to have power to appoint a sub-agent for the purpose of soliciting insurances, the employment of the canvasser for that purpose did not confer authority to conclude contracts, to sign interim receipts, nor to receive premiums for insurances. *Canadian Fire Ins. Co.* v. *Robinson*, 22 C. L. T. 8, 31 S. C. R. 488.

Contract — *"Valid in Canada"—Policy in company not licensed in Canada — Premium.*]—A contract to procure fire insurance is some office valid in Canada, means, in some company licensed to do business in Canada, and a premium paid under such a contract may be recovered back, as upon a failure of consideration, if the insurance is effected without the knowledge of the insured in a company not so licensed. *Barrett* v. *Elliott*, 24 C. L. T. 344, 10 B. C. R. 461.

Contract of re-insurance — *Limitation clause imported from original policy—Construction — Unreasonable and inapplicable clause.*]—In a contract of re-insurance which was engrafted on an ordinary printed form of fire insurance policy, and incorporated all its terms, there was a clause which purported to prohibit an action thereon unless commenced within twelve months next after the fire:—*Held*, that, having regard to the true construction of the contract, which carelessly purported to include many conditions inapplicable to re-insurance, the above clause must also be regarded as inapplicable. Such a clause is reasonable in the original policy, where the assured can sue immediately on incurring loss; it cannot apply where the insured is unable to sue until the direct loss is ascertained between parties over whom he has no control.—Judgment in *Victoria-Montreal Fire Ins. Co.* v. *Home Ins. Co.* (1907), 25 C. L. T. 3, 35 S. C. R. 208, reversed. A. C. 59, 16 Que. K. B. 31.

Failure to state prior insurance—*Renewal of policy — Effect of.*] — Where, at the time of effecting an insurance against fire, there was a prior insurance in force, and no statement thereof was made, either in the application or policy issued thereon, the renewal of such policy, without any such statement being then made—such prior insurance having then expired—does not validate the policy, for the renewal constitutes merely a continuation of the policy, and not a new insurance. *Agricultural Savings & Loan Co.* v. *Liverpool & London & Globe Ins. Co.*, 21 C. L. T. 124, 32 O. R. 369.

Fire insurance moneys are not attachable by garnishee under Alta. Rule 385, until amount of liability is ascertained. *Hartt v. Edmonton Laundry Co. & Colonial Assce. Co.*, (1909) 2 Alta L. R. 130.

Foreign company not registered in Ontario — *Cause of action cognizable in Ontario—Place of payment — Ontario Insurance Act, s. 143—Rule 162 (c)—Delivery of policy of agent of assured—Prohibited contract—Insurance Act, s. 85.*]— Defendants were incorporated under the laws of the State of Delaware, and their home office was at Wilmington, in that State, but the president and secretary reside in Chicago, where the policy was executed. George Wilson & Co., of St. Catharines, applied for this policy through one Nairn, an insurance broker carrying on business in Montreal. According to the evidence of the president of defendants, taken under commission, Nairn was not an agent of defendants, nor had they any agent or officer in Ontario or any part of Canada. By order of a Divisional Court (3 O. W. R. 372), it was directed that defendants should be allowed to enter a conditional appearance, and that plaintiffs "do prove at the trial of this action a cause of action upon which they are entitled to sue the defendants within the province of Ontario." No place of payment was named in the policy. In *Clark* v. *Union Fire Ins Co.*, 10 P. R. 313, 6 O. R. 223, it was decided that where no place of payment was mentioned in the policy it must be assumed that the place of payment was where the head office of the company was situated. The evidence bearing upon the delivery of the policy consisted of that of the assured, Wilson, who swore that he received the policy through the mail from Nairn, and the evidence of the president of defendants that the policy was delivered to the assured's agent, Mr. Nairn. The evidence does not disclose whether such delivery was made personally in Chicago or by mail in Montreal. By the last provision in s. 143 of the Ontario Insurance Act, R. S. O. 1897 c. 203, as to committing a policy to the post office "to be delivered or handed over to the assured, his assign or agent in Ontario," contemplates a committing to the post office of the policy by the insurer, addressed to the insured, his assign or agent in Ontario, and does not contemplate circumstances such as those in this case. Further, that the provision in such event that the moneys should be payable at the office of the chief officer or agent in Ontario, shews that the section was intended to apply to companies having an officer or agent in Ontario, and not to a company which has in no way brought itself or its business within the limits of Ontario. There was no evidence of any request or authority from defendants to Nairn to forward the policy to Wilson, and therefore the plaintiffs have failed to shew that the policy in question was, by or with the authority of defendants, committed to the post office to be delivered or handed over to the assured, his assign or agent in Ontario, and therefore plaintiffs have failed to prove a cause of action upon which they are entitled to sue in Ontario. The address of the insured was not given in the policy, which simply insures "George Wilson & Co." for the term of one year against loss by fire, to the amount of $1,000, to the property therein described, located at St. Catharines, Ontario, Canada, loss, if any, payable to the Quebec Bank; and there was nothing in the evidence to shew that defendants knew that Wilson & Co. resided at St. Catharines. Even if it were intended by defendants that the policy should be delivered to the insured at St. Catharines within the meaning of s. 143, then the plaintiffs have not proved a cause of action for which they are entitled to sue within Ontario. Action dismissed with costs. *Burson* v. *German Union Ins. Co.*, 6 O. W. R. 21, 10 O. L. R. 298.

Forfeiture clauses in policy — *Non-occupation of premises without notice — Failure to furnish proofs of loss—Building and plant—Separate insurances — Supervision of premises — Knowledge of agent — Pleading—Cancellation of policy.*]—The tribunal seised of an action for the recovery of fire insurance moneys cannot escape the application of the forfeiture clauses in the policy invoked by the insurers, even where it is proved that the circumstances in view of which these clauses were framed, have had nothing to do with the origin and development of the fire. Therefore, an assured who, in breach of these clauses, leaves the insured buildings unoccupied without notice to the insurers, and neglects to furnish preliminary proofs of his claim within the time prescribed, is deprived of the right to recover the insurance moneys.—2. The forfeiture stipulated for in a policy of insurance on a factory and its plant, in the case of non-occupation of the building, or cessation of carrying on the work, without giving notice to the insurers, is incurred when, the work ceasing, the building is no longer occupied, even though it is under the constant supervision of the owner or a foreman and visited daily by one or the other.—3. Knowledge acquired by the agent of the insurers of the increase in the risk resulting from the non-occupation will not relieve the assured from the forfeiture which he incurs by the neglect to give notice to the insurers.—4. The above forfeiture is incurred in regard to the insurance of the plant as well as to that of the building, they being insured separately, while the plant incorporated in the workshops or consisting of utensils necessary to its exploitation forms part of it and is immovable, in the one case by nature and in the other by destination. As to the surplus, even considering it as distinct from the building, the forfeiture will be none the less incurred by reason of the increase in the risk resulting from the non-occupation.—5. The insurers, in an action against them for the recovery of the insurance moneys, are not obliged to ask for the cancellation of the policy although they allege the forfeiture. Their defence does not involve the rescission of the contract, but asserts grounds for their being freed from the obligations of insurers, while leaving those of the assured to stand. *Masson* v. *Liverpool & London & Globe Assce. Co.*, 35 Que. S. C. 455.

General allegation of fraud—*Pleading — Duplicity — Amendment allowed after demurrer argued.*]—Plaintiff claimed under a policy of insurance against loss by fire and the declaration averred that immediately after the fire he sent in as particular an account of his loss as possible. The defendants pleaded *non actio*, because plaintiff did not send in as particular an account of the loss as alleged, and in the same plea added "nevertheless for a plea in this behalf," al-

leging fraud in general terms. To this there was a special demurrer on the grounds of duplicity, and that the allegations of fraud were too general:—*Held*, Peters, J., no duplicity, the real plea being fraud, and that the traverse at the beginning of the plea was an introductory part, which was waived as a defence.—The charge of fraud was sufficiently specific, as the alleged fraud was within the knowledge of the opposite party. —That plaintiff should be allowed to withdraw his demurrer and reply. *Hazard* v. *Charlottetown Mutual Ins. Co.* (1868), 1 P. E. I. R. 275.

Goods destroyed and damaged by fire — *Appraisement — Property included in policy.*]—In an action to recover amount of a fire insurance policy, held that "lumber manufactured or in course of manufacture," covered lumber in process of manufacture for cradles and washing machines. *Kreutzinger* v. *Standard Mutual Fire Ins. Co.*, 13 O. W. R. 753.

Goods destroyed on premises *described in policy — Had been transferred to other premises — Later re-transferred to original premises—Assent to transfer by New York agents—Not endorsed on policy —Not ratified by defendants — Ratification after loss—Mistake of fact—Action dismissed with costs.*]—An action by plaintiff company to recover $2,000 on a policy of insurance on a stock of merchandise consisting of leaf tobacco, etc., contained in a building in the city of Quincy, Florida, destroyed by fire.—Sutherland, J., *held*, that plaintiffs' dealings with defendants' New York agents were never endorsed on or added to the policy and never came to defendants' knowledge and were not ratified by defendants.—Action dismissed with costs. *Kline Bros* v. *Dom. Fire Ins. Co.* (1911), 18 O. W. R. 876, 2 O. W. N. 917.

Illegal and immoral contract — *Premises occupied as a "sporting-house"— Statutory conditions — Variation — Non-compliance with statute as to printing—Unoccupied premises — Agreements for sale — Changes material to the risk.*]—In an action on a fire insurance policy the first defence was that the policy was void because the building insured was, at the date of the policy, being used as a bawdy-house, being described in the policy as "occupied as a sporting-house."—*Held*, that the rule established by *Clarke* v. *Hagar*, 22 S. C. R. 510, is that any instrument purporting to pass title and any instrument purporting to secure purchase money are respectively void, if there was in the mind of the vendor the intent and purpose that the property should be applied by the transferee in the accomplishment of the illegal or immoral purposes; but mere knowledge on the part of the transferor of the intent or purpose of the transferee to use the property for an illegal or immoral purpose is insufficient. And a contract for the insurance of a building cannot fairly be taken to be a participating in the purpose for which the thing is used—the purpose being a matter of indifference to the insurer, and one not induced or furthered by the fact of the creation or existence of the insurance. The question of insurance or no insurance upon the building can have no bearing by way of encouragement or otherwise upon the business carried on in the building insured —the insurance is wholly collateral to and independent of the immoral business—and the policy was valid as against this objection.—Distinction as to policies of marine insurance pointed out.—The second defence was, that, in breach of the 3rd condition of the policy, the building was vacant and unoccupied for a period of 30 consecutive days prior to the fire:—*Held*, that the addition made to the 3rd statutory condition was not binding on the assured, not being printed in accordance with the provisions of the statute with reference to variations; and, assuming that there was a vacancy, that fact was not material to the risk within the meaning of the 3rd statutory condition; and the circumstances of the case did not make it so.—*Beardman* v. *North Waterloo Insurance Co.*, 31 O. R. 525, followed.—The third defence was, that, in breach of the 3rd condition, there were changes material to the risk within the control or knowledge of the insured, namely, agreements for the sale of the premises:—*Held*, that this would not be a breach of the 4th statutory condition, nor a change material to the risk under the 3rd statutory condition.—*Sovereign Fire Insurance Co.* v. *Peters*, 12 S. C. R. 33, and *Trotter and Douglas* v. *Calgary Fire Insurance Co.*, 12 W. L. R. 672, followed.—Judgment of Stuart, J., 12 W. L. R. 387, affirmed. *Morin* v. *Anglo-Can. Fire Ins. Co.* (1910), 13 W. L. R. 667.

Illegal contract — *Bawdy-house.*]—Insurance upon the furniture in a house of ill-fame is an illegal and immoral contract which the Court will not enforce. *Bruneau* v. *Laliberté*, 19 Que. S. C. 425.

Insurable interest — *Unpaid vendor.*]—An unpaid vendor who, by agreement with his vendee, has insured the property sold, may recover its full value in case of loss, though his interest may be limited, if, when he effected the insurance, he intended to protect the interest of the vendee as well as his own. The fact that the vendor is not the sole owner need not be stated in the policy nor disclosed to the insurer. Judgment in 26 A. R. 277, 19 C. L. T. 207, reversed, and that in 29 O. R. 394, 18 C. L. T. 176, restored. *Keefer* v. *Phœnix Ins. Co.*, 21 C. L. T. 221, 31 S. C. R. 144.

Insured buildings destroyed by fire from railway — Compromise of owner's claim against railway company—*Bona fide* settlement—Claim against insurance company —Subrogation. *Kirton* v. *Br. Am. Assce. Co.*, 10 O. W. R. 498.

Interim receipt — Immaterial variation in policy—Prior insurance not assented to—Insurance in plaintiff's name—Mortgagee—Agent—Ratification. *Coleman* v. *Economical Mutual Fire Ins. Co.* 4 O. W. R. 466, 5 O. W. R. 79.

Interim receipt — *Agent, powers of — Premium.*]—On the 21st April, 1900, D. and C. applied for a policy of insurance for $5,000 upon their property, and an interim receipt, signed by one of the company's agents, was given to them on the same day. According to this receipt the property in question was thereby insured for thirty days from

the date thereof, unless the policy was sooner delivered, or notice was given that the application was declined by the company: the receipt also provided that any loss payable under the policy should be paid to R., who held a mortgage on the property. The property was destroyed by the great fire of the 20th April, 1904. The company refused to pay the claim thus made, upon the ground that no premium had ever been received, and also upon the ground that the person who signed the receipt was not a duly authorised agent: —*Held*, that the agent who signed the receipt was at the time a duly recognised agent of the company; and that the company was bound by the receipt, although no premium had actually been paid. *Can. Fire Ins. Co.* v. *Robinson*, 21 C. L. T. 443.

Interim receipt — *Estoppel* — *Statutory conditions — R. S. O. 1897, c. 203, s. 168.*]—The plaintiffs, through an agent of the defendants, orally applied on the 7th November, 1901, for an insurance for one year, and the defendants accepted the risk for one year at a premium of $33.60, and gave an interim receipt, which, however, provided in terms that the insurance should be for 30 days only. On the 30th November, 1901, the plaintiffs paid a full year's premium to the agent, and believed themselves insured for the whole year. According to his usual course of dealing with the defendants, the agent did not pay over the premium to the latter till the 20th January, 1902, and the defendants accepted it, knowing for what it was paid. They did not, however, issue a policy, and after the fire had occurred repudiated liability, on the ground that they had only insured the plaintiffs for 30 days:—*Held*, that the defendants were liable, for, if they intended to treat the insurance as terminated at the end of 30 days, it was their plain duty to have so informed the plaintiffs, and returned them a proper proportion of the premium paid; and not having done so they were legally, as well as morally, liable both by virtue of the second statutory condition, R. S. O. 1897, c. 203, s. 168 (2), and also on the ground of estoppel. *Coulter* v. *Equity Fire Ins. Co.*, 24 C. L. T. 88, 7 O. L. R. 180, 3 O. W. R. 194, 4 O. W. R. 383.

Lease—*Change in nature of risk—Absence of notice or knowledge by landlord—Third statutory condition—"Control" of landlord —Omission to notify insurers.*]—The judgment of a Divisional Court in favour of the plaintiffs was affirmed by the Court of Appeal (Meredith, J.A., dissenting), substantially for the same reasons as those appearing in the opinion of the Divisional Court delivered by Boyd, C., 13 O. L. R. 540, 8 O. W. R. 872. *London & Western Trusts Co.* v. *Can. Fire Ins. Co.*, 16 O. L. R. 217, 11 O. W. R. 781.

Loss — Appraisement — Special agreement—Insurance Act, s. 145, s.-s. 3—Appraisers — Umpire—Indifferent persons — Prejudice — Validity of appraisement — Proof of loss—Condition precedent to action —Premature action—Payment into Court—Costs. *Axler* v. *London & Liverpool & Globe Ins. Co.*, 12 O. W. R. 109.

Misdescription in application—*Correction in policy—Rate of premium—Change —Renewal—Acceptance of premium—Policy in force.*]—The furniture in the plaintiff's hotel, consisting of a brick building and a frame addition, was insured by the defendants for $2,000. The application was dated the 2nd March, 1907, and an interim receipt was issued by the agents on the same day for the premium of $48 for one year from the 20th February, 1907. In the application the building was described as "the brick building only." A policy was issued by the defendants from their branch office at Winnipeg, dated the 6th March, 1907, in which the building was described as "the three-storey brick metal-roofed building and two-storey frame addition," and other changes were made in the description of the property insured, etc., corresponding changes being made in pencil in the application, at the defendants' Winnipeg office. On the 11th February, 1908, a renewal receipt was issued, signed by the Winnipeg manager, for $50, being for the renewal of the policy for 12 months from the 20th February, 1908. The local agent called attention to the fact that the premium should be only $48, and that was the amount actually paid by the plaintiff. With regard to the rate and a proposed change in the policy there was correspondence between the local agent and the manager at Winnipeg, and the former called on the plaintiff, and suggested that the insurance should be allowed to stand on the furniture in the brick part only, and the agent said that the plaintiff agreed to that. The plaintiff denied it, however. No change was made in the policy, and shortly afterwards a fire occurred; the damage was adjusted at $650, made up of $155 on furniture in the brick building and $495 on furniture in the frame addition:—*Held*, that the policy was not invalid by reason of the misdescription in the application; there was no mistake on the part of the defendants, and the policy was exactly what was intended by both insured and insurers. — *Held*, also, that the validity of the policy was not affected by what took place between the local agent and the plaintiff, and at the time of the fire it remained effective as regards all the furniture in both parts of the building. *Malin* v. *Union Assce. Soc.* (1910), 13 W. L. R. 653.

Misrepresentation.]—In plaintiff's application for insurance the question as to incumbrances was left blank and was afterwards filled up by defendants' agent in the negative. Property was destroyed. Plaintiff sued defendants for insurance money and defendants refused payment on the ground that the plaintiff's property was incumbered when insurance effected, and plaintiff's failure to answer the question about incumbrances was equivalent to a false answer or misrepresentation. Verdict for plaintiff:—*Held*, Peters, J., that verdict was properly found. *LePage* v. *Canada Fire & Marine Ins. Co.* (1880), 2 P. E. I. R. 322.

Misrepresentation by applicant *in answer to question — Argument upon C. C. 2486 that fact was already known to insurer—Effect upon such misrepresentation of provision of R. S. Q. 7031 that if application is made out by company's agent it shall be deemed to be the act of the company—R. S. Q. 7028, C. C. 2485-2489.*]—In answer to a question in the application "have you (or

if it is a partnership, has one of its members) previously sustained any loss by fire?" the applicant's answer was "no."—In fact, the applicant's place of business, situated in another part of the province, at a considerable distance from the property offered for insurance, had been destroyed by fire about five years before the date of the application for the insurance in question and the applicant had received from the present defendant $500 in settlement of insurance upon such previous loss. It was proved that the fire, which caused the loss sued for, occurred the day after the date of the application made to the defendant's local agent, and that the application had not been sent into the company, though an interim insurance receipt had been given to the plaintiff by the local agent. It was also proved that the application had been made out by the defendant's local agent before having been signed by the plaintiff:— *Held* (*a*) That, though the insured is not bound to represent facts known to the insurer, it was not a proper inference upon the facts, in view of the applicant's denial that he had previously suffered a fire loss, to conclude that the fact that the plaintiff had had a previous fire loss was known to the defendant; and that there had consequently been a misrepresentation by defendant as to a matter material to the risk, such as rendered the contract null; (*b*) That notwithstanding that the application had been made out by the defendant's agent and was, for that reason, to be deemed to be "the act of the company," the plaintiff was still a party to it, and it was to be considered with the contract (art. 7028 R. S. Q.). *Rimouski Ins. Co.* v. *Caron* (1910), 17 R. de J. 139.

Misstatement as to value of goods insured—Circumstances material to risk—False representation—Mistake of agent—Cost of goods. *Eacrett* v. *Perth Mutual Fire Ins. Co., Perth Mutual Fire Ins. Co.* v. *Eacrett*, 2 O. W. R. 1011.

Mistake in describing location of property insured—*Increased risk—False declaration by the insured—Materiality of the fact declared — Default — Burden of proof—Occupation of the premises after the fire—Things replacing those insured—Extent of the risk—Station in life of the owner—Interest in keeping the thing—Irregular or insufficient title—Capacity of the insurer—Lack of capacity set up as a bar to not receiving, by the insurer against the claims of the insured.*]—A mistake in giving the location of the thing insured (e.g., giving the location of the mill as in the parish of St. Honoré in the county of Armand, when it is really in the parish of St. Hubert, in the county of Demers), when it does not affect the risk is not a reason for setting aside the policy. Although a false declaration by the insured vitiates the policy, it must be on some material point of a nature to increase the risk. The burden of proof as to its materiality is on the insurer who raises this defence. Hence, if he does not furnish it, the fact that a stove was on the premises, although the insured had stated in his application that there was none, is not admitted as a ground for cancelling the policy. It is the same with regard to the fact that the insured had lost a mill although in his application he denied it. In the absence of agreement, the fact that after the fire the insured premises were unoccupied, without any proof of the increased risk, does not entail a forfeiture. It is the same with regard to additions made to the mill insured without giving notice to the insurer. The insurance of the things set out in the policy covers those of the same kind that replace the ones lost in the fire. The circumstances of the owner of the thing insured taken by the assured in the offer to insure is justified notwithstanding the imperfection and irregularity of his title, if it depends on the circumstances that he had the same interest in preserving the thing that he would have had as an owner with incontestible title. The insurer suing to recover the amount of the policy is not permitted to set up at the hearing on the merits a lack of capacity of which he has made no mention in the pleadings. Moreover, after taking the premiums for several years it is no longer reasonable to raise this point after a fire has happened. *Mutual Fire* v. *Aubin*, 18 Que. K. B. 345.

Mortgage — *Covenant to insure — Loss payable to mortgagee — Appraisement—Statutory condition—Notice.*]—Where a policy of fire insurance, not containing any mortgage or subrogation clause, nor any direct agreement with the mortgagee, is effected by a mortgagor pursuant to a covenant in the mortgage, and by the policy the loss, if any, is made payable to the mortgagee as his interest may appear, an appraisement of the loss under statutory condition 16 of the Insurance Act, R. S. O. 1807, c. 203, s. 168, is, in the absence of fraud or collusion, binding on the mortgagee, although he has not been consulted in or notified of the appraisement. In such a case the mortgagee can sue the insurance company in his own name for the amount due under the policy. *Greet* v. *Citizens Ins. Co.*, 27 Gr. 121, 5 A. R. 596, followed. *Hasiem* v. *Equity Fire Ins. Co.*, 24 C. L. T. 340, 8 O. L. R. 246, 3 O. W. R. 614.

Mortgage — *Machinery — Vendor's lien —Priorities — Subrogation.*]—Under a contract with the owner of a mill and machinery which was subject to two mortgages, each containing a covenant to insure, the plaintiffs took out the machinery, replacing it with new machinery, reserving a lien for the balance of the price, the lien agreement providing that the mill-owner should insure the machinery for the plaintiffs' benefit. Before any further insurance was effected, the mill and machinery were destroyed by fire:—*Held*, upon the evidence, Maclennan, J.A., dissenting, that the second mortgagees had consented to the purchase of the new machinery upon the terms specified, and, as a result of that finding, that the plaintiffs were entitled, subject to the mortgagee's claim, to payment of the insurance money on the machinery, and to be subrogated to the first mortgagee's rights against the land to the extent to which that insurance money was exhausted by him. Judgment in 31 O. R. 142, 19 C. L. T. 380, affirmed. *Goldie & McCullough Co.* v. *Bank of Hamilton*, 21 C. L. T. 18, 27 A. R. 619.

Mortgagor and mortgagee—*Release of Equity of redemption — Cessation of mortgagor's interest.*]—H., who had made a mortgage under the Short Forms Act on certain lands to the plaintiff, such mortgage contain-

ing a covenant to insure the mortgaged premises, effected thereon an insurance against fire. On the face of the policy was this indorsement: "Loss, if any, payable to (the plaintiff) as his interest may appear under the mortgage." The interest having become in arrear H. made a deed to the plaintiff, whereby he granted, released, and confirmed unto the plaintiff the said mortgaged lands, without the consent of the insurance company having been obtained therefor. The premises having been subsequently destroyed by fire:—*Held*, that the plaintiff was not entitled to the insurance moneys, for (1) the fact of the conveyance made by H. to the plaintiff whereby he ceased to have any interest at the time of the fire, was a good answer to the claim; and (2) such conveyance constituted a breach of the fourth statutory condition, which provided against the insured premises being assigned without the insurance company's consent. *Pinhey* v. *Mercantile Fire Ins. Co.*, 21 C. L. T. 526, 2 O. L. R. 286.

Mutual company—*Assessment—Default—Forfeiture—Notice — Receipt of arrears.*]—The forfeiture decreed by Art. 5321, R. S. Q., against the assured in a mutual insurance company who has neglected to pay his assessments within six months from their falling due, cannot be enforced by the company until they have given to the assured a notice subsequent to the notice required to make the assessment exigible, notifying him that in default of payment within the time specified he will be foreclosed of his right to indemnify against loss; and more especially so when the company have accepted, after the expiration of the time, payment of premiums in arrear. *Thirot* v. *Mutual Fire Assce. Co.*, 10 Que. Q. B. 104.

Mutual company—*Premium note—Liability on in winding-up proceedings — Increased risk—Cancellation of policy—Correspondence—Company estopped by—Statutory conditions 3 and 19.*]—The company issued a policy to insured, taking a note for the premium. The insured placed a gasoline engine in the building. The company demanded a higher rate for carrying the policy. Insured refused to pay the higher rate. The policy was cancelled and insured took out a new policy in another company. The first company became insolvent and the liquidator sought to hold insured liable on their premium note. The Official Referee placed them on the list of contributories but Boyd, C., reversed the decision of the Official Referee, holding that the correspondence between insured and the company estopped the company from setting up a claim after cancellation of their policy. *Re Standard Mutual Fire Ins. Co., McDonald & Henry's Case* (1910), 17 O. W. R. 407, 2 O. W. N. 235.

Mutual company — *Promissory note — Directors — Their powers — Warranty — Dilatory exception — C. P. 177.*] — The directors of a mutual insurance company who, without having the power to do so, authorize the signing of a promissory note by the company, may be called in warranty by the holder of the note in a suit taken by him against the company when the latter pleads that it was not empowered to sign a promissory note; particularly when the directors have made themselves jointly and severally liable on the note.—In such case, the defendant may, by dilatory exception, have the delay for answering the plea prolonged until he takes an action in warranty. *Deliste* v. *Provincial Ins. Co.* (1911), 17 R. L. n. s. 264.

Mutual contract—*Alienation of goods insured — Conditions.*] — The purchaser of movables insured in a mutual insurance company, cannot, in case of their destruction by fire, have recourse against the company, unless he has complied with all the conditions of s. 7307, R. S. Q. *Mass* v. *Mutual Fire Assce. Co.*, 6 Que. P. R. 356.

Mutual contract — *Assessments — Deposit notes—Lien.*]—To secure payment of the assessments charged upon the deposit notes of members of mutual fire insurance companies, in the counties of the province of Quebec, these companies have a special privilege only on the chattels of the assured; and as to their lands simply an ordinary hypothèque, taking rank after the date of the deposit note, and not a privilege taking rank after the municipal taxes. *Cantwell* v. *Wilks*, 26 Que. S. C. 149.

Mutual contract — *Deposit note — Hypothec — Order to distribute — C. P. 799; C. C. 2033; 8 Edw. VII. c. 69, s. 192.*]—Mutual fire insurance companies have upon immovable property mentioned in policy a legal hypothec which only takes effect from date of the deposit note signed by assured. —Thus a hypothecary claim registered 12 Nov., 1908, will take precedence of the legal hypothec created by virtue of a deposit note dated in Jan., 1909.—*Commercial Mutual Fire Ins. Co.* v. *Tucker* (1910), 12 Que. P. R. 22.

Mutual contract — *Untrue representation—Title—Material statement — Sketch on policy.*]—In a contract of mutual fire insurance, where the application forms part of the contract, representations in the application as to the title of the insured are to be strictly interpreted, and the rules of ordinary fire insurance do not apply. So, where the insured stated in the application that he was owner of the immovable sought to be insured, whereas his father-in-law was the registered owner, his pretension that he was the real owner, and that his father-in-law was merely his agent in respect of the property, could not avail, and the contract was absolutely null and void.—2. Where the insured has made a material false statement in his application, as to one of the subjects insured, the whole contract is void.—3. An inadvertent misstatement by the insured, in his application, as to the name of the company in which an insurance existed, is immaterial, and will not avoid the contract.—4. The insured is not bound by sketches or additions made by the company's agents on the back of the policy, after he signed the same. *Lambert* v. *La Foncière Compagnie d'Assurance centre le Feu*, 25 Que. S. C. 109.

Mutual insurance — *Proofs of loss — Application — Ownership — False declaration.*]—The observance of the formalities prescribed by the statute respecting mutual as-

surance against fire, in order to claim the insurance money after a loss, is a necessary condition precedent to the institution of an action for the recovery of the insurance money.—An insured who in his application for insurance describes himself as the owner of the property to be insured, when in fact he has only an agreement for the sale of it to him, makes a false declaration which will involve the nullity of the contract. *Ouellette* v. *La Jacques Cartier*, 31 Que. S. C. 29.

Mutual plan — *Annual renewal—Proposal for increased premium — Non-acceptance—Condition of payment in advance — Delivery of receipt—Waiver.*]—On the 31st October, 1898, the defendants issued their policy on the mutual plan to the plaintiffs for an insurance of $20,000 upon their property, and on the 31st October, 1899, a further policy for $10,000. The policies provided for insurances for one year and "during such further period or periods for which the assured shall from time to time have paid in advance the renewal premium or premiums required by the company, and for which the company shall have issued a renewal receipt or receipts." The plaintiffs paid the premiums in 1898, 1899, and 1900, but not in advance. On the 28th October, 1901, the executive officer of the defendants wrote to the plaintiffs enclosing renewal receipts and asking the plaintiffs to remit the amounts of the cash premiums. The rates being higher, some correspondence ensued, and on the 16th Nov., 1901, when a fire took place, the plaintiffs had not paid the cash premiums nor signed premium notes. The defendants reinsured their risk as soon as the premiums became payable, and had not cancelled these reinsurances down to the time of the trial: —*Held*, that no contract existed between the plaintiffs and defendants for an insurance for the year beginning on the 31st October, 1901.—*Semble*, that if the plaintiffs had unqualifiedly accepted the renewal terms, the condition providing for payment in advance of the cash premium would have been waived; for the intention of the defendants in delivering the receipt, where the money had not in fact been paid, was to keep the policy in force and to give the plaintiffs credit for the amount. *Doherty* v. *Millers and Manufacturers Insurance Co.*, 22 C. L. T. 295, 4 O. L. R. 303, 1 O. W. R. 457.

Affirmed on ground that there had been no renewal of contract of insurance, 2 O. W. R. 211, 6 O. L. R. 78.

Neglect of agent to effect additional insurance.] — Plaintiffs brought action against an insurance agent claiming $2,500 damages for negligence in not effecting an additional insurance for $5,000 on plaintiffs' goods, as it was alleged defendant had contracted to do. The plaintiffs' goods being destroyed by fire, they claimed that they had sustained this loss. At trial before Riddell, J., 14 O. W. R. 197, judgment was given plaintiffs. The Court of Appeal reversed this judgment and dismissed the action on the ground that there was no agency established, that there was no breach of duty to insure, and therefore no actionable negligence. *Beaudry* v. *Rudd* (1909), 15 O. W. R. 197.

Non-payment of premiums — *Non-delivery of proofs of loss—Other insurance undisclosed — Over-valuation — Mistake in policy.*]—Action on a fire insurance policy. Where the evidence is contradictory regarding the effectiveness of a policy, it and the assignment must be accepted according to their purport. The company will be estopped denying the non-payment of the premium where same was charged to their agent and has not been disputed until filing statement of defence. Delivery of proofs of loss to adjuster for the companies sufficient. Where a policy existed, undisclosed to defendants, but which it was not intended to keep alive, this will form no ground of defence. Over-valuation of goods not knowingly made cannot be taken advantage of by defendants. Policy covering store but intended to cover goods was rectified. *Trotter* v. *Western Fire Ins. Co.*, 9 W. L. R. 694.

Notice of loss — *Omission to give — Conditions of policy—Fire Insurance Policy Ordinance—Waiver—Proof of loss—Adjustment of loss—Estoppel—Curative clause of statute—Application of.*]—A policy of fire insurance contained the statutory conditions taken from the Fire Insurance Ordinance, No. 13 of which required that a person entitled to make a claim under the policy should (a) give notice in writing forthwith after the loss, (b) deliver, as soon after as practicable, as particular an account of the loss as the nature of the case permits, (c) furnish a statutory declaration verifying the account and giving other information, (d) produce the books of account, etc., and (e) produce a certificate of a justice of the peace or other person. The plaintiffs suffered a loss, but did not give notice in writing to the company of their loss. The company's agent on the day after the fire informed the company by wire of the destruction of the plaintiffs' store and contents by fire, and on the following day wrote to the company giving them particulars, but both letter and telegram were sent without the knowledge or instructions of the plaintiffs:—*Held*, that the notice received by the company from their agent could not be regarded as a compliance by the plaintiffs with condition 13; and, even if that agent were the plaintiffs' agent, by condition 14 the notice could only be given by an agent of the assured in the absence or inability of the assured to give the same, and the plaintiffs were present at the fire and capable of giving the notice.—*Held*, also, that notice in writing to the company was a condition precedent to the bringing of an action on the policy.—*Commercial Union Assurance Co.* v. *Margeson*, 29 S. C. R. 601, *Guerin* v. *Manchester Fire Assurance Co.*, *ib.* 139, *Atlas Assurance Co.* v. *Brownell*, *ib.* 537, and *Employers' Liability Assurance Corporation* v. *Taylor*, *ib.* 104, followed.—*Held*, also, that the company did not, by sending to their agent blank proofs of loss to be filled out by the plaintiffs and by causing their adjuster to make an adjustment of the loss, waive the serving of the notice, having regard to the terms of the policy and the wording of the proofs of loss.—*Abrahams* v. *Agricultural Mutual Insurance Co.*, 40 U. C. R. 175, *Atlas Assurance Co.* v. *Brownell*, 29 S. C. R. 537, and *Logan* v. *Commercial Union Insurance Co.*, 13 S. C. R. 270, followed.—*Held*, also, that the company were not estopped from setting up want of notice.—*Held*, also, that the want of notice was not

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remedied by s. 2 of the Fire Insurance Policy Ordinance.—Judgment of Wetmore, C.J., 11 W. L. R. 633, affirmed. *Bell* v. *Hudson's Bay Ins. Co.* (1910), 15 W. L. R. 709, 3 Sask. L. R. 219.

Notice of loss — *Statutory condition 18 — "Forthwith" — Strict enforcement of condition — Notice to agent 17 days after fire.*]—The plaintiffs had insured a part of their building and their stock of oils, etc., with the defendants, and had received a policy, which stated that it was made and accepted subject to the stipulations and conditions printed on the back, which were made part of the policy. Indorsed upon the policy were the statutory conditions. Condition 13 requires that "any person entitled to make claim under this policy is to observe the following conditions: (a) he is forthwith after loss to give notice in writing to the company; (b) he is to deliver, as soon afterwards as practicable, as particular an account of the loss as the nature of the case permits." On the 15th November, 1908, the policy being then in force, the plaintiffs' premises were totally destroyed by fire. The defendants' local agent learned of the fire on that day, and at once wired the news to the defendants' head office. He also engaged an adjuster to adjust the claim on behalf of the defendants, and supplied him with a form of statutory declaration, which was subsequently filled up and made by an officer of the plaintiffs and dated the 27th November, 1908. It was handed to the local agent on the 30th November, and by him forwarded in due course to the head office. No other notice was given by the plaintiffs, and there was no explanation of the delay:—*Held*, that under statutory condition 13, as soon after the fire as is reasonably possible, the party entitled to make a claim is to give an informal notice in writing of the loss, so that the insurer will know, not only that the loss has taken place, but also that the assured intends to make a claim therefor. The fact that such notice must be given forthwith, and that, as soon afterwards as practicable, a particular account with a statutory declaration must be furnished, strengthens the view that "forthwith" means that the assured must without delay take some vigorous action. The declaration could not be considered notice to the company until received by the local agent on the 30th November, and that was not in time. The plaintiffs, not having complied with the condition, were not entitled to recover upon the policy. *Bell Brothers* v. *Hudson's Bay Insurance Co.*, 2 Sask. L. R. 355, 11 W. L. R. 633, followed. *Atlas Assurance Co.* v. *Brownell*, 29 S. C. R. 537, 545, and *The Queen* v. *Justices of Berkshire*, 4 Q. B. D. 471, referred to. *Prairie City Oil Co.* v. *Standard Mutual Fire Ins. Co.* (1910), 14 W. L. R. 41.

Above judgment was affirmed on appeal, the Court being divided in opinion as to whether, having regard to the pleadings and their effect as defined in Rules 290 and 315 A, the defendants were entitled to rely upon statutory condition 13 as a defence to the action. *Ib.* 380.

Notice of loss—*Waiver of formalities.*]—A notice of loss by fire in the words, "*Je vous donne avis que mon ameublement de maison est brûlé le* 10 *de ce mois; veuillez y voir;*" receipt of which is acknowledged by the insurer and followed by an offer by the latter of a sum in payment, is sufficient. The offer is a waiver of the requirements in the conditions of the policy and in the provisions of the law respecting the form and contents of notices, intended to give the insurer information, which he may exact or dispense with, as he chooses. *Labbé* v. *Equitable Mutual Fire Ins. Co.*, 29 Que. S. C. 274.

Obligation to maintain. *Houle* v. *St. Aubin*, 3 E. L. R. 446.

Oral application—*Authority of agents—Ownership of goods insured — Insurable interest — Lessees — Notice to agents—Policy differing from application — Statutory condition 10—Estoppel from application—Statutory condition 2—Reformation of policy.*]—Appeal by defendants from judgment of Teetzel, J., in favour of plaintiffs in action to recover $2,500, the amount of loss which plaintiffs sustained by the destruction by fire of certain machinery which was on their premises at the time when the fire occurred, and against the loss by fire of which, as plaintiffs alleged, defendants had contracted to indemnify them to the extent of $2,500. The application for the insurance was made on 3rd February, 1903, and was for an insurance for one year; it was oral; one of the application forms of defendants was partly filled up by the agents and signed in the name of plaintiffs, per G. S., which are the initials of a member of the firm of R. Stewart & Son, the agents. This was done without the knowledge, consent, or authority of plaintiffs. In the policy the property insured was stated as being held by assured as owners. The latter statement did not appear in the application form. . . . All the property was destroyed by fire during the currency of the policy, and this action was brough, to recover $2,500, the amount insured. The only defence made was, that plaintiffs were not, by reason of the 10th statutory condition, entitled to recover for the loss in respect of the 3 machines, because, as it is pleaded, they were owned by a person other than plaintiffs, and the interest of plaintiffs in them was not stated in or upon the policy:—*Held*, plaintiffs had an insurable interest in the property at the time of the fire to the extent of at least $2,500, and the 2nd statutory condition: "After application for insurance it shall be deemed that any policy sent to the assured is intended to be in accordance with the terms of the application, unless the company point out in writing the particulars wherein the policy differs from the application," and there was no reason for confining the operation of this condition to a written application. *Davidson* v. *Waterloo Mutual Fire Ins. Co.*, 5 O. W. R. 264, 9 O. L. R. 394.

Oral contract—*Interim receipt—Estoppel—Statutory conditions—R. S. O. 1897 c. 203, s. 168.*]—The plaintiffs, through an agent of the defendants orally applied on the 7th November, 1901, for an insurance for one year, and the defendants accepted the risk for one year at a premium of $33.00, and gave an interim receipt, which, however, provided in terms that the insurance should be for 30 days only. On the 30th November,

1901, the plaintiffs paid a full year's premium to the agent and believed themselves insured the whole year. According to his usual course of dealing with the defendants the agent did not pay over the premium to the latter till the 20th January, 1902, and the defendants accepted it knowing for what it was paid. They did not, however, issue a policy, and after the fire occurred repudiated liability on the ground that they had only insured the plaintiffs for 30 days:—*Held*, defendants liable, for if they intended to treat the insurance as terminated at the end of 30 days it was their duty to have so informed the plaintiffs and returned them a proper portion of the premium paid, and not having done so they were legally, as well as morally liable both by virtue of the second statutory condition, R. S. O. 1897 c. 203, s. 168 (2), and also on the ground of estoppel. *Coulter* v. *Equity Fire Ins. Co.*, 24 C. L. T. 88, 7 O. L. R. 180, 3 O. W. R. 194.

Affirmed 25 C. L. T. 30, 4 O. W. R. 383, 9 O. L. R. 35.

Other insurance — *Limitation on placing.*]—A person who has his insurance policy endorsed by the company carrying the risk so that he may obtain further insurance to the extent of $2,000, cannot take out a policy in another company to the extent of $2,500; if he does so the first policy becomes null and void.—Steps taken by the assured to secure the information required for the purpose of fixing the loss thereunder, is not a renunciation of his right to question the validity of the policy. *Goldstein* v. *Richmond & Drummond Ins. Co.* (1910), 17 R. L. n. s. 85.

Ownership of property—*Husband and wife—False representations — Insurable interest of husband in property of wife.*]—A contract of insurance of movables in favour of a husband, who represents himself to the insurer as the owner of them, whereas they belong to his wife, is null and void for false representation.—*Quære*, has the husband, on a true representation of the facts, an insurable interest in the property of his wife on which to found a valid contract of insurance? *Lemieux* v. *Equitable Fire Assce. Co.*, 30 Que. S. C. 490.

Policy — *Application—Misrepresentation —Ownership — Agent.*]—An application for insurance made by the plaintiff contained the following question: "Are you the owner of the land on which the above described building stands?" Before the written answer to this was put down the plaintiff told M., the defendants' agent, that he was not the owner of the land, but that the building stood on the highway. Whereupon M. said: "We will put it down as yours," and, with the consent of the plaintiff, wrote "Yes" as the answer to the question. The application contained this provision also: "If the agent of the company fills up or signs this application, he will in that case be the agent of the applicant and not the agent of the company." The jury found that the house stood on the highway:—*Held*, in an action on the policy (Tuck, C.J., and VanWart, J., dissenting), that, notwithstanding the foregoing provision, the verbal communication made to M., the agent, must be taken as if made to the company, and, therefore, there was no misrepresentation on the part of the plaintiff. The first condition in the policy was as follows: "If an application, survey, plan, or description of the property herein insured is referred to in this policy, such application, survey, plan, or description shall be considered a part of this contract, etc." The only reference to the application in the policy was as follows: "Situate on the north side of the Great Road from Dalhousie to Bathurst, in the Parish of Durham, Restigouche County, N. B., as per diagram filed with application." The diagram was on the back of the application, but it was not put there until after the plaintiff had signed it. The presumption was that it was so put there by M., the company's agent:—*Held* (Tuck, C.J., and VanWart, J., dissenting), that, as the diagram was treated as a separate piece of paper, the words of reference in the policy were not sufficient to incorporate into it the whole application. *La Bell* v. *Norwich Union Fire Ins. Co.*, 34 N. B. R. 515.

Reversed, 19 C. L. T. 239, 29 S. C. R. 470.

Policy — *Condition avoiding — Non-occupancy — Justness and reasonableness — Materiality.*]—In an action for a loss on a fire policy, containing a condition that any change material to the risk should avoid the policy, unless promptly notified to the company, and that any change of occupancy or non-occupancy should be deemed material to the risk, it was proved that the premises insured had been vacant for some months during the currency of the policy, but were occupied at the time of the loss, and it did not appear that the loss was in any sense due to the non-occupancy. Under a proviso in the policy that certain conditions (including the one in question) should be in force only so far as the Court or a Judge should declare it to be just and reasonable, to be exacted by the company, the trial Judge declared the condition as to occupancy made at the time the policy issued, but tested with relation to the circumstances which afterwards arose, to be unjust and unreasonable. He submitted to the jury the questions whether the change from occupancy to non-occupancy was material to the risk in this case, and whether it was material generally. To the former question the jury answered, "No," and to the latter, "Yes." On these answers a verdict was entered for the plaintiff:—*Held*, per Barker, C.J., Hanington and McLeod, JJ. (Landry, J., dissenting), that the condition as to occupancy was to be tested as to its being just and reasonable in the light of circumstances at the time the policy issued, and not at the time of the loss, and being so applied was just and reasonable, and the breach of non-occupancy avoided the policy, and a verdict should be entered for the defendants. *Payson* v. *Equitable Fire Ins. Co.*, 38 N. B. R. 436, 5 E. L. R. 186.

Policy—*Conditions—Notice of loss—Imperfect proofs—Non-payment of premium — Waiver—Application of statute — Remedial clause—N. W. Ter. Ord. 1903 (1st sess.), c. 16, s. 2.*]—The premium on a policy of fire insurance was not paid at the time the policy was delivered, but, on request, credit was given for the amount and a draft for the same by the insurance company, accepted by the insured, remained due and unpaid at the time the property insured was destroyed by fire:—*Held*, that, in an action to recover

the amount of the insurance, the non-payment of the premium was not available as a defence.—The policy was subject to the statutory condition requiring prompt notice of loss by the insured to the company; by another condition the insured was required, in making proofs of loss, to declare how the fire originated so far as he knew or believed. Upon the occurrence of the loss, the company's local agent gave notice thereof to the company, and informed the insured that he had done so and that the company had acknowledged receipt of his notice. The insured gave no further notice to the company. Forms were then supplied by the company for making proofs of loss and they were completed by an agent of the company and signed and sworn to by the insured, the origin of the fire being therein stated to be unknown. On examination for discovery the insured stated that, at the time he signed the declaration, he entertained an opinion as to the origin of the fire, and the company's adjuster reported a similar opinion as to its origin. An adjustment of the amount of the loss was then proceeded with by the several companies carrying insurances on the property in which the defendant company took part, but, after payment by the other companies of their proportionate shares according to the adjustment, the defendants repudiated liability on the grounds of want of notice as required by the statutory condition and non-disclosure of the opinion entertained by the insured as to the origin of the fire.—*Held*, reversing the judgment appealed from (3 Sask. L. R. 219), that, in respect of both conditions, the default was the result of mistake on the part of the insured and, in the circumstances of the case, the provisions of s. 2 of the Fire Insurance Policy Ordinance, N. W. Ter. Ord., 1903 (1st sess.), c. 16, should be applied and the insurance held not to be forfeited by reason of default of notice or imperfect compliance with the conditions as to proofs of loss. *Prairie City Oil Co.* v. *Standard Mutual Fire Ins. Co.*, 44 Can. S. C. R. 40, followed. *Bell Brothers* v. *Hudson Bay* (1911), 44 S. C. R. 419.

Policy — *Conditions — Subsequent insurance — Benefit of another.*]—The appellant agreed to sell a property to L. with a condition that L. should insure it against fire in favour of the appellant, for $800. L. did so with the respondents, whose policy contained a condition that it should become void if the assured then had, or afterwards obtained, another policy upon the same property. A fire took place, and at the time of it L. had another fire insurance upon the property, without the knowledge or consent of the respondents, but to the knowledge of the appellant:—*Held*, that the breach of the condition made the policy void.—2. The statement in the policy that it is in favour of a third person is subject, as regards the latter, to the conditions which the policy contains; the insurer not being subjected to other obligations than those which he has assumed by his contract. *Migner* v. *St. Lawrence Fire Ins. Co.*, 10 Que. Q. B. 122.

Policy—*Form of—"Co-insurance" clause —Statutory conditions — Variations.*] — A policy of fire insurance issued on the 2nd January, 1896, contained the clause known as the "co-insurance clause" (requiring the insured to keep the property covered by other policies to at least seventy-five per cent. of its value), printed under the heading "variations in conditions," as prescribed by ss. 115 and 116 of R. S. O. 1887 c. 167:—*Held*, affirming the judgments in 27 A. R. 373, 29 C. L. T. 297, 29 O. R. 695, 18 C. L. T. 361, that, whether or not the alteration introduced into the policy was of a nature of a variation of any particular statutory condition, or in addition to statutory conditions, the clause was neither unjust nor unreasonable, and that it formed part of the contract of insurance to the same extent as the statutory conditions indorsed on the policy would have, if the alteration had been printed therein. *Eckhardt* v. *Lancashire Ins. Co.*, 21 C. L. T. 136, 31 S. C. R. 72.

Policy — *Statutory conditions — Gasoline on premises—Illuminating oils insured—Notice of loss—Remedial clause in Act—Discretion of Court.*]—By the Manitoba Fire Insurance Act (R. S. M. (1902) c. 87), an insurance company insuring against loss by fire is not liable "for loss or damage occurring while . . . gasoline . . . is stored or kept in the building insured or containing the property insured unless permission is given in writing by the company." Insurance was effected "on stock consisting chiefly of Illuminating and lubricating oils, &c., and all other goods kept for sale." A small quantity of gasoline was in the building containing the stock when it was destroyed by fire:—*Held*, that gasoline is an illuminating oil, it was part of the stock insured and the above statutory condition could not be invoked to defeat the policy.—*Held, per* Anglin, J., that if gasoline was not insured as an illuminating oil it was within the description of "all other goods kept for sale." —By s. 2 of the said Insurance Act "where, by reason of necessity, accident or mistake the conditions of any contract of fire insurance on property in this province as to the proof to be given to the insurance after the occurrence of a fire have not been strictly complied with . . . or where from any other reason the Court or Judge before whom a question relating to such insurance is tried or inquired into considers it inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with such conditions," the company shall not be discharged from liability.—By statutory condition 13 (*a*) in the schedule to the Fire Insurance Policy Act every person entitled to make a claim "is forthwith after loss to give notice in writing to the company."—*Held*, Fitzpatrick, C.J., dissenting, that the above clause applies to said condition.—Judgment in 19 Man. R. 720, *sub nom. Prairie City Oil Co* v. *Standard Mutual Fire Ins. Co.*, reversed, Fitzpatrick, C.J., dissenting. *Prairie City Oil Co.* v. *Standard Mutual Fire Ins. Co.* (1910), 31 C. L. T. 252, 44 S. C. R. 40.

Policy on goods—*Partial loss — Other insurance — Proportionate payment — Conditions of policy — Construction — Overvaluation.*]—The insurance was upon goods valued in the application at $15,000. The policy was dated the 11th June, 1902, and the fire occurred on the 12th July following, with a loss of $6,250. The defendants' policy was for $3,000; there was other insurance to the amount of $7,000; and the total value of

the goods at the time of the fire was $9,274.62. Statutory condition No. 9 provided that "in the event of any other insurance on the property herein described having been assented to as aforesaid, then this company shall, if such other insurance remains in force, on the happening of any loss or damage, only be liable for the payment of a ratable proportion of such loss or damage, without reference to the dates of the different policies." A special condition was indorsed on the policy as follows: "The assured shall not be entitled to recover from this company more than two-thirds of the actual cash value of any building, and in case of further insurance then only the ratable proportion of such two-thirds of the actual cash value, unless more than such two-thirds value, as represented in the application, shall have been insured, in which case the company shall be liable for such proportion of the actual value as the amount insured bears to the value given in the application. In the case of property insured being found, by arbitration or otherwise, to have been overvalued in the application for this policy, the company shall be liable (in the absence of fraud) for such proportion of the actual value as the amount insured bears to the value given in the application:"—*Held*, that the special condition was inapplicable to the case of a partial loss, and that the plaintiff was entitled to recover from the defendants three-tenths of the amount of his loss, in accordance with statutory condition No. 9. *Eacrett* v. *Gore District Mutual Ins. Co.*, 24 C. L. T. 7, 6 O. L. R. 592, 2 O. W. R. 1009.

Premium notes of mutual fire insurance companies—*Venue of action on—Ontario Insurance Act, R. S. O. (1897), c. 203, not affected by 6 Edw. VII. c. 19, s. 22.*]—The provisions of the Ontario Insurance Act, R. S. O. 1897, c. 203, relating to the venue of actions on the premium notes of mutual fire insurance companies, are not repealed or affected by 6 Edw. VII. c. 19 (Ont.), s. 22. *Waterloo Mutual Fire Ins. Co.* v. *Bindner* (1910), 16 O. W. R. 209.

Proof of loss — *Condition—Waiver—Delay — Agent — Adjuster.*]—A condition of the policy required that proof of loss "shall be made by the assured." The son of the assured filled in and signed the statement of loss, under the general authority of a notarial power of attorney:—*Held*, that this was a sufficient compliance with the condition of the policy. 2. Where the insurer retains the proof of loss, without objection as to its sufficiency, for more than sixty days before action taken, the company will be considered to have waived the condition which requires a delay of sixty days after filing claim before the institution of suit; and the fact that a blank in the statement was filled in, at the request of the company, within the period of sixty days before suit, will not affect the right of action. 3. The condition which requires proof of loss to be furnished within thirty days after the fire may be waived either expressly or impliedly; and the assured is held to be relieved from this condition if the presentation of the claim has been delayed by the company's investigation of the loss, or if the representations of the company's authorised agents have led the assured to understand that compliance with this condition will not be required. 4. While adjusters of fire losses are not, as a general rule, agents of the companies under an authority sufficient to make their statements binding upon the companies for whom they act, yet an adjuster may become a duly authorised agent of the company by the course of procedure in a particular case, *e.g.*, where the adjuster was the only medium of communication after the fire between the company and the assured, and was engaged by the company to look over the proofs, advise as to a settlement, &c. *Western Assce. Co.* v. *Pharand*, 11 Que. K. B. 144.

Proofs of loss — Delay—Conditions of policy — Estoppel — Ownership of property. *Baker* v. *Royal Ins. Co.*, 1 O. W. R. 294.

Proofs of loss—*Increase of risk—Appeal — Questions of fact.*]—A departmental store company, whose premises were destroyed by fire in 1897, had insurance on the stock amounting to $219,000, and actions were brought against five companies by a bank, as assignees of the claims by an assignment after the loss. The companies defended on the grounds of false and fraudulent statements in the proofs of loss; that the fire was caused by the act of the insured; that the risk was increased by overstocking and heavy insurance; and that the bank was not in law the assignee of the policies. The causes were tried without a jury, and resulted in a verdict for the bank, which was sustained by the Court of Appeal. On appeal to the Supreme Court of Canada:—*Held*, Gwynne, J., dissenting, that the appeal depended almost entirely on questions of fact, passed upon by two Courts, and for a second appellate Court to reverse the decisions would be going in the teeth of many former decisions; that on the question of law, that the proofs were defective, it being claimed that according to the evidence the accounts of stock were padded and the true value was much less than the insurance, the reasons given by the trial Judge and Judges in appeal were conclusive; that the explanation of the discrepancy had been accepted by the trial Judges; and that, on the question of increase of risk, the Ontario Courts had adopted too narrow a construction in holding that such increase could only be effected by direct dealing with the property insured; but there was no increase in fact. *Quebec Fire Ins. Co.* v. *Bank of Toronto*, 20 C. L. T. 229.

Property subject to agreement for sale—*Insurable interest.*] — The owner of property covered by insurance policy and subject to an agreement for sale has an insurable and beneficial interest in the property. *Castellain* v. *Preston*, L. R. 11 Q. B. 380, 52 L. J. Q. B. 366, followed. Where the insurance policy is claimed to be for a larger amount than the value of the property insured, the judgment in the absence of fraud, will be in favour of the plaintiff for the value, with a reference to the clerk to ascertain such value. The insured, having a beneficial interest in the property covered by the policy, is entitled to insurance money, and the insurance company will not be subrogated to the insured's right to claim from the purchaser the balance of the purchase price, if the contract for sale specially pro-

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vides that insured (the vendor) is not to be liable to the purchaser in the event of loss of property by fire. *Hoffman* v. *Calgary Fire Ins. Co.* (1909), 2 Alt. L. R. 1.

Provincial company—*Goods out of the province — Application — Concealment — Transfer of debt — Notice to debtor.*]—A company incorporated by the Legislature of Quebec to carry on insurance business in that province may insure, in that province, merchandise which is out of the province. 2. The fact that the assured has not disclosed that he has contracted to keep for a creditor everything that he receives, and to transfer to him the policy of insurance, if desired, does not constitute a concealment which annuls the contract of insurance. 3. Notice of the transfer of a debt should be given in such a way that the debtor shall have no doubt that it is the assignee who is now his creditor, and notice given by means of the delivery of an unauthentic copy of the instrument of transfer is insufficient to vest the claim in the assignee as against the debtor. *Bank of Toronto* v. *St. Lawrence Fire Ins. Co.*, 19 Que. S. C. 434.

Re-insurance — Condition — Warranty — Breach — Change material to risk. *Equity Fire Ins. Co.* v. *Merchants Fire Ins. Co.*, 2 O. W. R. 820.

Renewal — *Prior insurance—Action — Parties — Mortgage.*]—The renewal, as it is commonly called, of a contract of insurance is not a renewal or extension of the original contract, but a new contract based, as far as applicable, upon the original application and in accordance with the policy issued in pursuance thereof. Where, therefore, at the time of such a new contract by way of renewal, no prior insurance is in force, the insurance is not avoided, although when the original contract was entered into prior insurance was in force, and this fact was not disclosed. Judgment of Rose, J., 32 O. R. 369, *ante* 124, reversed. Mortgagees to whom by a policy the loss is made payable as their interest may appear, have a right of action upon the policy in their own name against the insurers, and are entitled to enforce payment to the extent of their interest. *Agricultural Savings & Loan Co.* v. *Liverpool & London & Globe Ins. Co.*, 21 C. L. T. 582.

Renewal premiums — Non-payment — Non-existence of contract — Delivery of receipt — Meaning of. *Doherty* v. *Millers' & Manufacturers' Ins. Co.*, 1 O. W. R. 457, 4 O. L. R. 303.

Representation—*Denying previous fires —Materiality — Conditions of policy.*] — One who was insured against fire, who had been burned out three times, in answer to the company's agent said that he had only had one fire:—*Held*, that this reply was material to the risk and invalidated the policy. 2. That the following clause, "and the said applicant hereby covenants and agrees to and with the company that the foregoing is a just, true, and full exposition of all the facts and circumstances in regard to the condition, situation, and value of the property to be insured, so far as the same are known to the applicant and are material to the risk, and agrees and consents that the same be held to form the basis of the liability of the company, and shall form a part and be a condition of the insurance contract," does not constitute an absolute warranty, but the replies given by the assured amount only to warranties by virtue of this clause in so far as they are material to the risk. *Gillis* v. *Canada Fire Assce. Co.*, 26 Que. S. C. 166.

Rights of hypothecary creditor — *Default of owner.*]—An hypothecary creditor has a real right in an insured immovable, which right is an interest capable of insurance. 2. If the insurance of the immovable is made payable to this hypothecary creditor, or is transferred to him, such creditor becomes the true assured; he is not an ordinary transferee of a purely personal claim, but he is the assured just as if he were co-proprietor *par indivis* of the immovable itself, and as such he retains his rights even when the assignor has lost his by default. *Mignet* v. *St. Lawrence Fire Ins. Co.*, 17 Que. S. C. 586.

Right to insurance moneys—*Hypothecary claims — Priorities.*]—An hypothecary creditor, whose debtor has undertaken to insure against fire the buildings erected on the hypothecated lands, is not entitled to receive the amount of the insurance (become due by reason of a fire), in preference to one in whose favour the policy has been issued, and who has, against the same debtor, a vendor's claim guaranteed by a first hypothec, and a claim upon written instruments, the amount of which, added to that of the hypothec, is greater than the sum insured. *Davies* v. *Valiquette*, 4 Que. P. R. 106.

Sale of business — *Conversion of pool room into restaurant — More dangerous risk —Loss — Company not liable.*]—Plaintiffs insured their pool and billiard business in defendant company. They sold out to a third party. Notice of sale and transfer was registered with the company. Later, the business was converted into a restaurant, which was destroyed by fire. The company refused payment, contending that the property had been sold without notice to company, that a more dangerous business was being carried on without notice to them, and that gasoline was brought into the premises for use in a gasoline stove without the knowledge or consent of the company.—Sutherland, J., *held*, in favour of defendants, and dismissed plaintiff's action with costs. *Morton* v. *Anglo-Am. Ins. Co.* (1910), 17 O. W. R. 396, 2 O. W. N. 237.

Sale of insured property — *Insurable interest — Statutory conditions — Change material to risk.*]—Action on a fire insurance policy. Plaintiff T. agreed to sell to plaintiff D.:—*Held*, that on D. going into possession, T. had no insurable interest, and cannot recover. D. cannot recover because the insurance company's consent to the transfer has not been obtained. It made no difference that D. had tried to get the local agent to consent, but did not owing to the latter's absence from his office. *Trotter and Douglas* v. *Calgary Fire Insurance Co.* (Alta.), 10 W. L. R. 267.

Reversed (1910), 12 W. L. R. 672.

Specific goods — *Substituted goods — Construction of policy — Termination of insurance — Notice — Reinsurance — Breach of warranty — Limitation of actions — Statutory condition — Unjust and unreasonable variation.*] — The policy of plaintiffs bears date 24th February, 1899, and was for a term of one year. The property insured was described in it as "120 sacks of green coffee while stored in the 3-storey patent roofed building occupied by the assured situate 37 and 39 Dalhousie street, Brantford, Ontario." The policy was, in pursuance of one of its terms, renewed in each of the years 1900, 1901, and 1902. The loss was made payable to the Bank of British North America. The business of the Snow Drift Co. was that of dealers in coffees, spices, extracts, and other articles. They carried insurance on their general stock for a considerable amount, besides the policy on the green coffee. The reason for effecting the insurance of 4th February, 1899, on the green coffee, was that the Snow Drift Co. had exceeded their line of credit with their bankers, the Bank of British North America, who required security, and the means adopted to give the security was the effecting of this insurance, and providing by the policy that the loss should be payable to the bank. A fire occurred on 18th September, 1902, which resulted in the total destruction of the whole of the company's stock in trade, including the green coffee. . . . The loss on it was $1,321 at the lowest; . . . it is more likely that the loss exceeded $2,000:—*Held*, such insurance was not for the specific 120 bags of green coffee, but for any 120 similar bags of green coffee. The assured had on 10th September, 1902, written to the agents at Brantford of plaintiffs in the following terms: "In reference to policy 2958, in amount $2,000, held by the Bank of British North America, on 120 bags of coffee, we wish to cancel this policy and have you give us a new one for $1,000, as there are now only 50 bags of coffee in stock."—*Held*, the letter was not such a written notice as the condition relied on refers to. It was only an intimation of the intention of the assured to terminate the insurance if and when there was substituted for it a new policy for $1,000; to that plaintiffs never agreed, and it was never done. . . . It was contended lastly that, as the action was not begun until more than six months after the loss occurred, it was barred, and condition 22, as varied by the indorsement on defendants' policy, was relied on in support of that contention.—*Held*, the variation of the statutory condition 22 which defendants attempted to impose upon the assured, by reducing the time allowed for bringing an action from one year to six months, to be both unjust and unreasonable. *Merchants' Fire Ins. Co.* v. *Equity Fire Ins. Co.*, 5 O. W. R. 27, 9 O. L. R. 241.

"Sporting house" — *Illegal contract — Public policy—Increase in rate—Division of profits of immoral business — Absence of knowledge by assured of increase in rate — Erection of buildings near insured property —Statutory condition 3—Absence of notice —Change contemplated when insurance affected—Assignment of interest in policy— Payee of loss—Right of assignee to maintain action—Trust—Addition of assured as plaintiff—Limitation clause in policy.*]—A policy of fire insurance was issued by the defendants to H. in respect of a house owned by her, described in the policy as a "sporting house," and as situate "detached from other buildings 100 feet." The local agent of the defendants who obtained the risk said that he knew that other houses would be erected within this distance, and charged a rate to meet these anticipated changes in conditions:—*Held*, *per* Macdonald, C.J.A., and Galliher, J.A., that, although, subsequently to the policy, buildings were erected within 100 feet, and the assured did not notify the company thereof in writing, the policy was not on that account void under statutory condition 3, as the change was contemplated by the defendants' agent and he charged the higher rate on that account.—*Held*, also, *per* Macdonald C.J.A., and Galliher, J.A., following *Clark* v. *Hagar*, 22 S. C. R. 570, that the contract of insurance was not void as contrary to public policy; and, although it appeared from the evidence that a higher rate is charged by insurance companies upon risks in respect of houses of the character described, and it might be said that the contract was tantamount to a division of profits of the immoral business, this could not avail the defendants, as it did not appear that H. was aware that she was being charged a higher rate.—The policy was made out in favour of H., with loss, if any, payable to W., a lienholder, as his interest might appear, and W. assigned to the plaintiff company.—*Held*, *per* Macdonald, C.J.A., and Galliher, J.A., that the plaintiffs were entitled to maintain the action.—*Per* Irving, J.A., that the plaintiffs were entitled to maintain the action by virtue of the trust created in W.'s favour, by the request of H. and the assent of the defendants to hold the moneys payable in respect of loss (if any) for the benefit of W.; but, following *Pearce* v. *Brooks*, L. R. 1 Ex. 213, and *Cowan* v. *Melbourn*, L. R. 2 Ex. 230, that the contract was an illegal one, and the plaintiffs could not succeed.—*Per* Martin, J.A., that the contract was not void as contrary to public policy; but that the plaintiff company were not entitled to sue by virtue of a contract or trust or otherwise; and that the addition of H. as a party plaintiff at the trial did not help the case, as her right had then become barred by statutory condition 12, owing to the lapse of twelve months since the time she could have brought an action. *Trites Wood Co.* v. *Western Assce. Co.* (1910), 15 W. L. R. 475, B. C. R.

Standing timber—*Property.*]—The defendants, an insurance company, incorporated under the laws of Ontario, insured the plaintiffs, a railway company, having a branch line in the State of Maine, the policy stating the insurance to be "against loss or damage by fire . . on property as follows: On all claims for loss or damage caused by locomotives to property located in the State of Maine not including that of the assured." By the statute law of Maine, when "property" is injured by fire communicated by a locomotive engine, the railway company is made responsible, and it is declared to have an insurable interest in the property along its line for which it is responsible:—*Held*, that the policy was a valid policy of fire insurance, but did not, under the insurance company's statutory powers, cover standing

timber along the defendants' line of road; that the policy was not therefore ineffective, and the plaintiffs were not entitled to recover back the premiums, for there was abundance of other property covered by the policy in which the plaintiffs had an insurable interest.—Judgment of Clute, J., 9 O. L. R. 493, 5 O. W. R. 496, affirmed. *Can. Pac. Ry. Co.* v. *Ottawa Fire Ins. Co.*, 11 O. L. R. 465, 7 O. W. R. 353.

Statutory condition—*Gasoline "stored or kept" in insured building.*]—A statutory condition applicable to fire insurance in Ontario provided that the insurance company should not be liable for loss or damage occurring while gasoline was "stored or kept" in the insured building.—The appellant insured a building used by him as a drug store and furniture shop. He had an assistant, a qualified chemist, who used the upper part of the building as a dwelling house. This assistant had a gasoline stove which he had used occasionally for domestic purposes and later on he brought it down to the shop and used it in making syrups, and while doing so the building took fire and was burnt down. The only gasoline in the building was the small quantity which was in the stove:—*Held*, that the expression in the statutory condition as to gasoline being "stored or kept" imported the notion of warehousing or depositing for safe custody or keeping gasoline in stock for trade purposes, and did not apply to the small quantity which was in the stove for consumption and, consequently, that there had been no breach of the condition, and that the appellant was entitled to recover from the insurance company.—Decision of Supreme Court of Canada, 41 Can. S. C. R. 491, reversed by P. C. *Thompson* v. *Equity Fire Ins. Co. & Union Bank* (1910), 30 C. L. T. 867.

Statutory conditions—*R. S. O.* (*1897*), *c. 203, s. 168, s-s. 10 (f)—Gasoline stored or kept.*] — The Ont. Ins. Act, R. S. O. (1897), c. 203, s. 168, s-s. 10 (*f*), provides that an insurance company is not liable for loss occurring while gasoline *inter alia* is stored or kept in the building insured . . . unless permission is given in writing by the company.—T. affected insurance on a building used as a drug and furniture shop, having in his employ a qualified chemist who occupied rooms in the upper part as tenant. The clerk had a gasoline stove which he used occasionally for domestic purposes and later on he brought it down to the shop and used it in making syrups, and while doing so the building took fire and was totally destroyed.—Privy Council *held*, that this was not a keeping of gasoline on the insured premises within the meaning of the statutory condition, and the insurance companies were liable for the loss.—Judgment of Supreme Court of Canada reversed; judgment of Court of Appeal for Ontario and Hon. Mr. Justice Riddell, at trial, restored. *Thompson* v. *Equity Fire Ins. Co.*, C. R., [1910] A. C. 151, 80 L. J. P. C. 13, [1910] A. C. 592, 103 L. T. R. 153, 26 T. L. R. 616.

Statutory conditions — *Variation — Appraisement in place of arbitration—Condition No. 16—R. S. O. 1897 c. 203—Action —Stay of proceedings.*]—In a policy of fire insurance it was provided, by way of variation of statutory condition No. 16, providing for reference under the Arbitration Act in case of differences, that if any difference arose as to the value of the property insured, of the property saved, or the amount of the damages or loss, the same should be submitted to and ascertained by appraisers, one to be appointed by the assured and one by the company, who were to select an umpire, and that the assured and the company should pay the appraisers respectively selected by each of them, and that each should pay one-half of the expenses of the umpire:—*Held*, that the variation was not binding upon the assured, not being "just and reasonable to be exacted by the company," inasmuch as it was more stringent and onerous than the statutory condition; both because (1) the plaintiff would be bound by the findings of the majority of the appraisers as the result of their own personal opinions only, and would be deprived from examining witnesses on oath touching the amount of his loss; and because (2) it imposed upon the insured the payment of certain of the expenses in any event, whereas the statutory condition provides that, where the full amount of the claim is awarded, costs shall follow the event, and in other cases be in the discretion of the arbitrators; and a motion to stay the proceedings in an action brought upon the policy until after the appraisal required by the variation, was refused.—*Semble*, that if the language of the variation was to deprive the insured of the benefit of the provisions of the Arbitration Act, which the statutory condition expressly made applicable to the reference, it would be manifestly unjust, as more stringent and onerous than the latter. *Cole* v. *London Mutual Fire Ins. Co.*, 15 O. L. R. 619, 10 O. W. R. 930.

Subletting of premises — *Change in nature of risk — Absence of notice or knowledge by landlord — 3rd Statutory condition — Control of landlord — Omission to notify insurers.*]—After the owner of dwelling-house property had effected an insurance thereon, he leased the premises to a tenant, who, without the owner's knowledge, changed the occupation thereof, by bringing in a stock of goods, which he sold to pedlars:—*Held*, that the owner was not affected by the third statutory condition, R. S. O. 1897, c. 203, s. 168 (3), which requires notice of any change material to the risk within the control or knowledge of the insured, to be given to the company, for, being under lease, the premises were not under the owner's control, while the change in the occupation was without his knowledge, and the fact that the change was made by the tenant after the making of the policy was immaterial. *London & Western Trusts Co.* v. *Can. Fire Ins. Co.*, 8 O. W. R. 273, 872, 13 O. L. R. 540.

Subsequent insurance — *Notice — Mortgagee.*]—A policy of insurance on a mortgaged property contained a condition that the insured should give notice of any other insurance already made, or which should afterwards be made elsewhere on the same property, whether valid or not valid, and whether concurrent or otherwise, so that a memorandum of such insurance might be indorsed on the policy. The mortgagee, without such notice or indorsement, effected

another insurance with another company in the name of the plaintiff's wife, with the loss, if any, payable to himself as his interest might appear:—*Held*, that the mortgagee's insurance, without the notice and indorsement, voided the plaintiff's insurance. *Perry* v. *Liverpool & London & Globe Ins. Co.*, 34 N. B. R 380.

Transfer of policy — *Defect.*] — The transfer of a policy of fire insurance to a mortgage creditor of the insured, as security for the debt of the latter, has no retroactive effect, and does not protect the transferee against defects and nullities in the policy existing prior to its transfer to and acceptance by him. So, where the insured had no valid title to the property insured, the transferee cannot recover.—2. The acceptance by the insurance company of a transfer of fire insurance, validates the transfer as a transfer, but does not create a new contract of insurance with the transferee. *Stanstead and Sherbrooke Mutual Fire Ins. Co.* v. *Gooley*, 9 Que. Q. B. 324.

Variations in statutory conditions— *Printing of — Conspicuous type — Compliance with statute—Existence of incumbrance —Failure to disclose — Materiality — Unjust and unreasonable variation — Alteration in risk — Notice to local agent—Variation requiring notice to company — Just and reasonable variation — Policy avoided.*] — Indorsed upon a policy were the statutory conditions, with certain variations printed below in red ink. One of the variations was as follows: "Any incumbrance by way of mortgage . . . shall be deemed 'material to be made known to the company,' within the provisions of the first statutory condition:"—*Held*, defendant company had failed to make out their defence on this branch of the case. By another variation it was provided that "the words 'or its local agent' in the 3rd statutory condition are struck out, and whenever the words 'agent' or 'authorised agent' occur elsewhere in the said statutory conditions, such agent or authorised agent shall be held to mean the company's secretary only."—*Held*, this to be a just and reasonable variation. The particular company had between 400 and 500 local agents in all.—*Held*, when a company had their head office in the province, and had no general agents away from their head office, but local agents having limited duties to perform, it is not unjust or unreasonable in their stipulating that notice of an important change in the character of the risk should be communicated to their head office, particularly as the 23rd statutory condition permits it to be given by the sending of a registered letter to the head office of the company, and the address for the purpose is printed on the back of the policy. The plaintiff made a material alteration in the risk by substituting steam for water power; that she did not give notice in writing to defendants; and she could not recover upon this policy. *Lount* v. *London Mutual Fire Ins. Co.*, 5 O. W. R. 344, 6 O. W. R. 84, 9 O. L. R. 549, 69.

Verbal contract of insurance — *Is it valid in Quebec?—Promissory note—Given in payment for premium—Dishonoured at maturity—Loss by fire—No policy ever issued — Action to recover.*]—The Montreal Assurance Company was incorporated by the Canadian Ordinance, 4th Vict. c. 37, and the Statute, 6th Vict. c. 22. By section 4 of the latter statute, it was provided that all policies of insurance should be subscribed by three directors, countersigned by the secretary and manager, and under the seal of the corporation. By a by-law of the company, made in conformity with the powers conferred by the Ordinance and Statute, a resolution to the same effect was passed. H. mortgaged a house in Lower Canada to R. Some time afterwards R.'s representative being dissatisfied with the security, applied for repayment of the mortgage money, when H. agreed to insure the mortgaged premises in a certain sum for the benefit of the mortgagee's representative. In pursuance of this arrangement, H. applied to the Montreal Assurance Company, through M., their manager and agent, to insure the premises against fire. H. was unable to pay the premium and proposed to M. that the company should take his promissory note, payable in twelve days. This was agreed to by M. and a promissory note given, M. at the same time promising to send the policy. The particulars of the policy were entered in the books of the company, but the note being dishonoured when due, the entry was erased. The policy was never issued. Shortly afterwards the premises were burned down.—*Held* (reversing the judgment of the Court of Queen's Bench in Canada), first, that the powers of M. as manager, being public, must be taken to have been known to H., the insurer, and that the acts of M. in the transaction were *ultra vires* and void, not being within the scope of his general authority as manager, and, therefore, not binding upon the Montreal Assurance Company. Second, that as such a contract was not binding on M.'s principals, it did not become binding upon them by reason of its having been entered into through the medium of M., their agent, his powers as agent being restricted by the limitation of the powers of his principals. Whether a verbal contract of insurance against fire, is good by the law of Lower Canada, *quære*? *McGillivray* v. *Montreal Assce. Co.* (1859), C. R. 3 A. C. 404.

Void policy — *Renewal — Mortgage clause.*]—By s. 167 of the Ontario Insurance Act, a mercantile risk can only be insured for one year and may be renewed by a renewal receipt instead of a new policy:—*Held*, reversing the judgment of the Court of Appeal, 3 O. L. R. 127, 21 C. L. T. 582 and restoring that at the trial, 32 O. R. 369, 21 C. L. T. 124, Girouard, J., dissenting, that the renewal is not a new contract of insurance. Therefore, where the original policy was void for non-disclosure of prior insurance, the renewal was likewise a nullity, though the prior insurance had ceased to exist in the interval. Per Girouard, J., that the renewal was a new contract, which was avoided by nondisclosure of the concealment in the application for the original policy. The mortgage clause attached to a policy of insurance against fire, which provided that "the insurance as to the interest only of the mortgages therein shall not be invalidated by any act or neglect of the mortgagor or

owner of the property insured." &c., applies only to acts of the mortgagor after the policy comes into operation, and cannot be invoked as against the concealment of material facts by the mortgagor in his application for the policy.—*Quære*, would the mortgage clause entitle the mortgagee to bring an action in his own name alone on the policy? *Agricultural Savings & Loan Co.* v. *Liverpool & London & Globe Ins. Co.*, 23 C. L. T. 133, 33 S. C. R. 94.

Warranty in application not part of policy—*Failure to disclose encumbrances—Chattel mortgage.*]—Action on a fire insurance policy. In this case it was *held* that vendor's liens were not material to the risk. Nor was the giving of a chattel mortgage subsequent to the application for insurance a change material to the risk. Any variation or condition added to the statutory ones which is intended to prevent a Judge or jury from determining the materiality of any statement is not reasonable or just. The warranty of the truth of the statements in the application was not made a part of the policy. *Fritzley* v. *Germania*, 14 O. W. R. 18, 19 O. L. R. 49.

Wearing apparel — Household furniture — Loss before policy issued—Interim receipt — Premium paid — Proofs of loss—Valuation — Fraud — Evidence. *Gauthier* v. *Union Assce. Society*, 4 E. L. R. 331.

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6. Guarantee.

Fidelity of servant — *Interim receipt—Conditions — Prosecution of servant.*]—The appellants effected an insurance with the respondents for the fidelity of certain of the appellants' employees, amongst whom was B. An interim receipt for the premium was given, in which it was stated that it was issued "subject to the conditions of the company's general form now in use for the class of risk." Before the expiration of the three months allowed for the issue of the policy under the conditions of the interim receipt, there was a shortage in B.'s accounts, for which the appellants made a claim under the contract of insurance. The respondents pleaded that by one of the conditions of their ordinary policy the insured was obliged to prosecute the defaulting employee to conviction with all diligence, and that, as this condition had not been complied with by the appellants, they could not recover: — *Held*, affirming the judgment in 16 Que. S. C. 78, that the conditions of the respondents' ordinary form of policy for this class of risk must be included and read into the text and meaning of the interim receipt. The acceptance of the receipt in this form must be held to indicate either that the appellants knew what these particular conditions were, or had such a knowledge of the general conditions in use by guarantee companies, that they were willing to be bound by them. 2. It was not an unreasonable condition that the employer should, as a condition precedent, use all possible diligence to prosecute the defaulting employee to conviction. *Can. Life Assce. Co.* v. *London Guarantee & Acc. Co.*, 9 Que. Q. B. 83.

7. Hail.

Mutual company—*Assessment of premium notes — Discount for prompt payment.*]—Action to recover the amount of an assessment on a premium note given by the defendant for an insurance against loss by hail. Section 35 of the Mutual Hail Insurance Act, R. S. M. c. 106, under which the plaintiffs were incorporated, provides that the assessments upon premium notes or undertakings shall always be in proportion to the amounts of such notes or undertakings. In making the assessment of five per cent. upon the amount of each policy, the directors added a proviso that all members and policy-holders who should pay the full amount of the assessment on or before the 1st November, 1899, should be entitled to and should receive a discount of 25 per cent. upon the amount of such assessment:—*Held*, that the plaintiff had no power to allow a discount for, or to impose penalties for default in, prompt payment, and being a mutual company, the directors must strictly observe the requirements of the Act and preserve equality amongst the members in assessing them; and that the effect of the resolution was really to assess 75 per cent. of five per cent. upon those who should pay before a certain date and the full five per cent. upon all others, and that the assessment was therefore void under s. 35 of the Act. *Manitoba Farmers' Mutual Hail Ins. Act* v. *Lindsay*, 21 C. L. T. 90, 13 Man. L. R. 352.

Mutual company—*Assessment of premium notes — Withdrawal from membership—Presumption of continuance of policy—Impossibility of performance of condition.*] — In an action by a company incorporated under the Mutual Hail Insurance Act, R. S. M. c. 106, to recover the amount of an assessment imposed by resolution of the directors upon one of its members for the second crop season after the issue of the policy, it is incumbent on the company to shew that by the terms of the policy the person called on to pay the assessment is still a member of the company, and if no evidence is given to shew what the terms of the policy were in regard to the period covered by it the action should be dismissed. If a member of such a company is entitled to withdraw from membership upon certain conditions, including the surrender of the policy issued to him, he cannot exercise such right without surrendering the policy, although the loss of it has rendered it impossible for him to perform that condition. *Crookewitt* v. *Fletcher*, 1 H. & N. 893, and *Cutter* v. *Powell*, 6 T. R. 320, followed. *Manitoba Farmers' Mutual Hail Ins. Co.* v. *Fisher*, 22 C. L. T. 303, 14 Man. L. R. 157.

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8. Life.

Action for premium—*Plea that policy not in accordance with application—Reply—Willingness to change.*]—In an action by a life insurance company for a premium, where the defendant pleads that the policy did not comply with his application, the company may, in reply, allege that the policy was a substantial compliance with the application, but they cannot declare and pray *acte* of their willingness to effect any change that may be

required to have the policy conform with the application. *Mutual Life Ins. Co.* v. *McCool*, 6 Que. P. R. 87.

Action for return of first premium —*Policy not according to application—Return of policy—Wife, the beneficiary, not joining in return—Conditions—Not to engage in military or naval service—Limitation of action—Allowing company 60 days for payment—Explanation of policy* — "*Yearly for the following 14 years.*"]—Divisional Court *held*, that an action to recover the premium paid on an application for a policy is maintainable, if defendant refuses the policy on the grounds that it does not comply with the terms agreed to by the company's agent, and plaintiff need not sue for reformation of the policy.—That if plaintiff never applied for the policy, which defendants assumed to issue, and did not accept, nor agree to accept, his wife would have no interest in it, and need not join in the return or attempted surrender of the policy.—*La Marche* v. *N. Y. Life Ins. Co.* (1899), 126 Cal. 498, followed. —That a condition that applicant shall pay $50 additional premium on each $1,000 of insurance on engaging in military or naval service in time of war, was reasonable, when contained in the application.—That a condition that all claims under a policy should be void after the expiration of one year from date of death of insured, unless enforced by suit or action commenced before the expiration of said year, is valid under R. S. O. (1897), c. 203, s. 148 (2).—That a condition allowing the company 60 days for payment after receipt of proof of death, was covered by R. S. O. (1897), c. 203, s. 80, and that payments thereafter to be made "yearly for the following 14 years," fairly means yearly from the time provided by law for payments of the first instalment.—That an explanation to assured that $2,981 was required for the policy to be deemed to have matured as an endowment, was fairly covered in the policy by a foot note stating the commuted value of the policy to be $2,981, which beneficiary had the option of demanding in cash. *Gill* v. *Great West Life Assce. Co.* (1911), 18 O. W. R. 733, 2 O. W. N. 777. O. L. R.

Action on policy — *Condition as to award — Application to stay proceedings.*]—In an action on a policy on which was indorsed a condition that, in case any question should arise, "it is a condition of this policy which the assured by the acceptance thereof agrees to abide by, every such difference shall be referred to the arbitration and decision of a neutral person and the decision of the arbitrator shall be final and binding on all parties, and shall be conclusive evidence of the amount payable and it is hereby expressly stipulated and declared that the obtaining of an award by such arbitrator shall be a condition precedent to the liability or obligation of the corporation to pay or satisfy any claim under this policy," etc. "Provided also that compliance with the stipulations endorsed hereon is a condition precedent to the right to recover on this policy," etc.:—*Held*, that no action lay, nor did the amount payable under the policy become due, until the determination of the arbitrator to be appointed under the agreement to refer contained in the condition; that the plaintiff could not claim under the policy without assenting to its terms; and that the condition was not in contravention of s. 80 of R. S. O. c. 203. *Spurrier* v. *LaCloche*, [1902] A. C. 446, followed. *Nolan* v. *Ocean Acc. & Guarantee Cor.*, 23 C. L. T. 187, 5 O. L. R. 544, 1 O. W. R. 77, 2 O. W. R. 98, 272.

Action to cancel policy — Material misstatements—Refusals by other companies to insure — Intemperate habits — Application filled in by agent and not read by applicant. *Lamothe* v. *North American Life Assce. Co.*, 2 E. L. R. 563.

Agent — *Promissory note payable to agent.*]—A sub-agent of the defendants on receiving an application for insurance took a promissory note in payment of the first premium. The policy never issued. The agent sold the note to the plaintiff. The maker being sued claimed indemnity against the defendants the insurance company:—*Held*, the latter were not liable. *Beaudoin* v. *Charrnan*, 5 E. L. R. 579, 4 E. L. R. 60.

Agreement with wife—*Change of beneficiaries—Dispute as to their rights — Extraneous influence—Suspicious circumstances —Onus on defendants — Judge's conclusion taken on appeal.*]—Plaintiffs claimed 2-3 of certain insurance moneys paid into Court by I. O. F. on an endowment certificate of $3,000. The original insurance was for $1,000, which certificate was surrendered and a new certificate for $3,000 issued. The beneficiaries named therein were plaintiffs and defendant in equal shares. The certificate continued in force until the death of the insured. — Divisional Court, affirming the judgment of Middleton, J., set aside a change of beneficiaries under a life insurance policy, the transaction being considered a most unrighteous one.—Also *held*, that an agreement without consideration could not be given effect to owing to the wording of 1 Edw. VII. c. 21, s. 2, s-s. (5), (6), which amended 47 Vict. c. 20, s. 151, s-s. 3, and s. 160 of s-s. 2, as effected by 1 Edw. VII. c. 21, s. 2, s-s. 4, which amended 47 Vict. c. 20, s. 151, s-s. 4, and s. 160, s-s. 5, which gave to the clauses a retroactive effect and so covered the amendment. *Clark* v. *Loftus* (1911), 19 O. W. R. 606, 2 O. W. N. 1288.

Application — *Concealment — Accident policy.*]—M., in answer to a question in an application for insurance on his life, requiring him to state "the amount of insurance you now carry upon your life," gave particulars of all ordinary life policies, but failed to disclose the fact that he had two accident policies, on each of which $10,000 was payable in the event of his death by accident:—*Held*, that an accident policy is not life insurance within the meaning of the application, although such accident policy contains an undertaking to indemnify the insured in case of death by accident only. *Montreal Coal & Towing Co.* v. *Metropolitan Life Ins. Co.*, 24 Que. S. C. 399.

Application — *Issue of policy — Date—Completed contract — Due dates of premiums.*]—The initialling of an application for insurance by officers of an insurance company, though indicating acceptance of the risk, does not, without communication of the fact to the applicant, constitute any contract with

him. If a policy is afterwards prepared, and the applicant informed that it is ready for him, this will constitute an acceptance of the original application; and such policy may be properly antedated as of the date of the application. A provision in the application and policy that the insurance shall not be binding on the company, or the policy go into effect, until payment of the first premium, will not postpone or affect the due dates at which the respective premiums will fall due, so as to make them different from those mentioned in the policy. *Armstrong* v. *Provident Savings Life Assce. Soc.*, 22 C. L. T. 13, 2 O. L. R. 771.

Application—*Withdrawal before acceptance — Return of premium—Contract—Interim receipt.*]—Appeal by defendants from judgment of County Court of Wentworth in favour of plaintiff in an action for the return of a life insurance premium paid by plaintiff to defendants. On 19th May, 1904, plaintiff signed a written application to defendants for an insurance on his life of $10,000, and on the same day paid to the local agent of defendants $51.90 and gave him his (plaintiff's) promissory note for $300, the two sums making up the amount of the first annual premium, for which he received the company's receipt in full, stating: "The insurance will be in force from the date of approval of the application by the medical director. In case the policy should not be issued, the money will be refunded; provided, a completed application for such insurance is made and submitted to the company, at its home office, and that the applicant, if he shall not receive his policy within 30 days from date hereof, shall notify the company." On 1st June, 1904, and before any acceptance by defendants of the offer of plaintiff which was contained in the application, plaintiff gave notice to defendants of the withdrawal of his application, and requested the return of the money he had paid and the promissory note he had given: —*Held*, that what took place between the parties amounted merely to an offer by plaintiff to defendants of the risk on his life, on the terms mentioned in the application, and the payments by plaintiff of the sum required to pay the first premium to be applied for that purpose if and when the offer of plaintiff should be accepted, and that defendants before the application was withdrawn had neither accepted the risk nor bound themselves to do anything in consideration of what plaintiff had done. Appeal dismissed. *Henderson* v. *State Life Ins. Co.*, 5 O. W. R. 585, 9 O. L. R. 540.

Application and medical examiner's report — *Answers of deceased negativing disease—Death occurring shortly afterwards —Honesty of answers—Evidence—Delivery of policy—Payment of first premium—Recognition by insurers—"Continued good health of the assured."*]—In an action by the executrix of a deceased to recover the amount of a policy of insurance upon his life, it appeared that the application for the insurance was dated the 13th November, 1908; that the policy was dated the 1st December, 1908; that the deceased died on the 13th July, 1909, of chronic Bright's disease or nephritis; that, in answer to questions, the deceased stated, in his application, that he was then and always had been in good health, and, in the medical examiner's report, signed by the deceased, and dated the 9th December, 1908, that he had not nor was he subject to Bright's disease or to disease of the kidneys; and that he warranted the truth of the answers:—*Held*, upon the evidence, that the deceased was quite honest in his answers to the various questions in the application and the medical examiner's report; and that it was not established that, at the time of the application, the deceased was suffering from Bright's disease or disease of the kidneys.—The following condition was contained in the policy: "This policy shall not take effect until the same be delivered and the first premium shall have been paid thereon during the lifetime and continued good health of the assured:"—*Held*, in the circumstances set out in the judgment, that the policy was delivered and the first premium virtually paid, and recognised by the company as paid, at a time when, so far as appeared, there was "continued good health of the assured." *Miner* v. *Excelsior Life Ass. Co.* (1911), 16 W. L. R. 698, Alta. L. R.

Apportionment of insurance moneys — *Revocation by will — Application of foreign law — Lien for premiums.*] — A contract of life insurance entered into by a company whose head office is in Ontario, the policy having issued from the head office and providing for payment of the insurance money there, is an Ontario contract, and must be interpreted and carried out in accordance with Ontario law, although the assured lived in Manitoba and made application there to a local agent for the insurance, but an assignment of or dealing with the benefits of the policy made by the assured in Manitoba will be governed by the law of this province relating thereto. The deceased, who was a resident in Manitoba, insured his life with a company whose head office was in Ontario, and by the policy the insurance money was appropriated in favour of his wife, but by his will he absolutely revoked this appropriation and directed that the money should become part of his estate and should be paid to his executor. Section 12 of the Life Assurance, R. S. M. c. 88, as re-enacted by 62 & 63 V. c. 17, permits such a revocation and new disposition of the insurance money, but the corresponding statutory provision in Ontario (R. S. O. 1897 c. 203, s. 160), forbids it:—*Held*, that the law of Manitoba must be applied to the determination of the question as to the right of the assured to make such new disposition, and that the insurance money must be paid to the executor as part of the deceased's estate. *Toronto General Trust Co.* v. *Sewell*, 17 O. R. 442, and *Lee* v. *Adby*, 17 Q. B. D. 309, followed; — *Held*, also, that a will is an instrument in writing within the meaning of the Manitoba statute above referred to. The widow was held entitled to a charge in her favour for insurance premiums paid by her to keep the policy in force. *National Trust Co.* v. *Hughes*, 22 C. L. T. 101, 14 Man. L. R. 41.

Assignment — *Insurance moneys—Tontine life policy—Right of assignee to select cash surrender value — Declaration by insured in favour of wife under Insurance*

Act.]—On 18th April, 1905, defendant assigned all his right, title, and interest in and to life insurance policy No. 364,467, in the New York Life Insurance Company to his solicitor, to whom he was at that time indebted to the amount of (about) $40. The assignment, though absolute in form, was on the following conditions: The assignee was to apply to the company for the cash value of the policy, and, if the company consented to pay such cash value, the debt of the defendant to the assignee was to be deducted, and the balance paid to Mrs. Marshall, the wife of defendant. On 30th May, 1905, plaintiff obtained judgment for $75 debt and $19.22 costs against defendant. On the same day notice of the assignment was given by the assignee to the New York Life Insurance Company, and on the same day the assignee made, in writing, what purported to be a selection of the cash value of the policy. On 31st May plaintiff served an attaching order upon the garnishees. On 23rd June the assignee, the garnishees having made no acknowledgment of his selection, revoked in writing his selection of option, which revocation the garnishees declined to recognise. On 29th June, 1905, defendant made a declaration under the Ontario Insurance Act, *s.* 159, declaring the policy and the money to be derived therefrom to be for the benefit of his wife, subject to the assignment above mentioned:—*Held*, 1. That the declaration in favour of defendant's wife was valid. The judgment of his late brother Robertson in *Weeks* v. *Frawley* was very strong, and, although this point did not come up directly for decision in that case, the rest of the Court seem to have taken no exception to his remark. The wording of the statute seems clear and plain. The appeal will therefore be dismissed with costs. 2. That the money was not attachable There was no sum of money or debt due or payable, the time having elapsed and the selection having been made too late. The assignee's revocation was communicated to the garnishees before their acceptance of his selection, and they had no right or power to prevent such revocation. 3. That an assignee holding a life assurance policy as security for a debt would have no right to make a selection of the cash surrender value, thus completely changing the character of the security. *Fisken* v. *Marshall*, 6 O. W. R. 611, 10 O. L. R. 552.

Assignment of policy — Insurable interest — Creditor. *Decker* v. *Cliff*, 1 O. W. R. 354, 419.

Assignment of policy—*Qualified assignment — Interest of assignee — Declaration by legal representatives of insured.*]—An assignment of a policy of life insurance, with a direction that in the event of death the amount be paid to the assignee, as his interest may appear, is a qualified assignment, and costs on the assignee when claiming under the policy the obligation to establish an indebtedness of the assured to him. A declaration by the legal representatives of the insured that they do not pretend to have any claim under the policy will entitle the assignee to the full amount. *Dubrule* v. *Sun Life Ins. Co.*, 29 Que. S. C. 457.

Assignment of policy — *Security for debt — "Beneficiary" — Insurance Act.*]—The holder of a policy of insurance on his own life, intending to secure payment of a loan to him, signed a document addressed to the lenders in which he stated: "For collateral security I have placed aside and assigned to you a policy of insurance in the Standard Life Assurance Company for $2,000:"—*Held*, that the effect of the document was to give the equitable right and title to the policy to the lenders of the money as beneficiaries; and that other creditors could not claim as against them, for they could take no higher right than the insured had at the time of his death. *Thompson* v. *Macdonnell*, 8 O. W. R. 721, 13 O. L. R. 653.

Assignment of policy by beneficiary subject to charge — Death of insured when renewal premium overdue — Right of beneficiary or representative of insured to tender during days of grace—Insurance Act—Conduct of insurers—Dispensing with tender — Estoppel. *Tattersall* v. *People's Life Ins. Co.*, 6 O. W. R. 756, 11 O. L. R. 326.

Beneficiaries — *Designation of—"Legal heirs" — Trust—Reservation of power of revocation — Declaration — R. S. O. 1897 c. 159, s.-s. 1—Construction of—Preferred beneficiaries—Next of kin.*]—Appeal by John Arthur Farley from order of Meredith, C.J., 5 O. W. R. 530, 9 O. L. R. 517, declaring Mary Lawson Farley entitled to the proceeds of an insurance policy in the friendly society called "The Royal Templars of Temperance." The policy in question, dated 12th September, 1901, was upon the life of deceased, the father-in-law of Mary Lawson Farley. The insured had, when the policy issued, designated the beneficiaries in these terms:—"Harold E. Peagam, Charles R. S. Dinnick, and William W. Farley, executors, in trust for legal heirs." At that time his son William W. Farley was alive, as was also his grandson John Arthur Farley. No other descendants of Arthur Farley were living in September, 1901. His son William predeceased him; his grandson John Arthur survived. In November, 1903, the insured executed the following memorandum: — "Toronto, November, 1903. I, Arthur Farley, hereby declare that the money payable under the benefit certificate upon my life issued to me by the Royal Templars of Temperance, of which I am a member, shall be paid to my daughter-in-law Mary Lawson Farley for her own use and benefit. Arthur Farley." The question for determination was the efficacy of this memorandum, the appellant contending that the original designation was that of a preferred beneficiary, within R. S. O. 1897, c. 203, s. 159, and as such irrevocable:—*Held*, at the time when the insured declared that the policy should be payable to his executors "in trust for his heirs," his son William alone answered that description, so far as any person can be said to be the heir of one living. Had he survived the insured the present claimant, John Arthur Farley, would have no status. On the other hand, had both the son William and the grandson John Arthur predeceased the insured, the words "legal heirs" would have described persons incapable of designation as "preferred beneficiaries." The provision of the Insurance Act referred to by the learned Chief Justice, R. S. O. c. 203, s. 2, s.-s. 36, puts the matter beyond doubt. This sub-sec-

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tion, adopted in 1897, reads as follows: "In insurance of the person the phrase 'legal heirs' or 'lawful heirs' shall mean and include all the lawful surviving children of the assured; or, where the assured died without lawful surviving children and unmarried, it shall mean those persons entitled to take according to the Statute of Distribution." Regarding and applying s.-s. 36 and reading it with s.-s. 35, which distinguishes between children and grandchildren, of an assured dying "without lawful surviving children and unmarried," with the consequence that the phrase "legal heirs" means "those entitled to take under the Statute of Distributions." This precludes any argument that "legal heirs," so interpreted, can be deemed a designation of preferred beneficiaries under s. 159. The appeal fails and should be dismissed with costs. *Re Farley*, 6 O. W. R. 78, 1 O. L. R. 540.

Beneficiary — *Acceptance of benefit* — *Revocation* — *Marriage* — *Evidence* — *Intention.*]—A man who insures his life, in the policy designating his mother as beneficiary, may afterwards, having since married, revoke the designation by his will, leaving the proceeds of the policy to his wife provided that the mother has not previously accepted the provision.—2. The facts of having the policy in her possession and of her having paid the premiums, do not shew that the mother has accepted the provision, for the circumstances do not indicate that she has thus paid for herself, for her own benefit, and as having accepted the provision, and the circumstances did indicate that the policy had been left with her for safe keeping. There should be shewn on the part of the mother an act or a fact leaving no doubt as to the manifestation of the wish of the mother to accept the provision, and such act and fact have not been shewn. *Baron* v. *Lemieux*, 17 Que. K. B. 177.

Beneficiary certificate — Letters probate issued to plaintiff—Plaintiff appointed executor and trustee by will—Also guardian of infant children of deceased—Satisfactory proof of loss filed — Defendants wanted guardian appointed by Surrogate Court — Sutherland, J., *held*, defendants not entitled —Judgment for plaintiff—Plaintiff costs out of fund—No costs to defendants. *Dicks* v. *Sun Life Ins. Co.*, 14 O. W. R. 978, 15 O. W. R. 366, 20 O. L. R. 369, 1 O. W. N. 178, 461, followed, *Brooks* v. *Catholic Order of Foresters* (1911), 18 O. W. R. 397, 2 O. W. N. 771, 833.

Beneficiary — *Change of — Identifying policy — "By number or otherwise"—Will —Extrinsic evidence—R. S. O. 1897 c. 203, s. 160.*]—Section 160 of the Ontario Insurance Act, R. S. O. 1897 c. 203, provides that the assured may vary a policy previously made so as to restrict, extend, etc., the benefits, or alter the apportionment, *inter alia*, by a will identifying the policy by a number or otherwise. The assured, in this case, being the holder of a beneficiary certificate in a benevolent society made payable to his wife, by his will bequeathed "out of my life insurance funds the sum of $200 to my sister," and "all the rest, residue, and remainder of my insurance funds . . . to my daughter:" — *Held*, that this did not sufficiently identify the beneficiary certificate above mentioned, nor was it permissible to prove by extrinsic evidence that the testator must have referred to it, as he held no other policies.—*Re Cheesborough*, 30 O. R. 639, specially discussed.—*Semble*, even were it otherwise, the widow's claim would have been good to the extent of the $200 assumed to be bequeathed to the sister. *Re Cochrane & A. O. U. W.*, 16 O. L. R. 328, 11 O. W. R. 956.

Beneficiary — *Change of — Requisites for — Payment of premium by insured on understanding that policy would enure to benefit of new beneficiary — Trusts—Costs.*]—Deceased made his fiancee the beneficiary in a life policy. They disagreed and he said he would make his mother the beneficiary, and the premium was paid on that understanding. No change, however, was made in the beneficiary. The insured died intestate: —*Held*, there is a resulting trust in favour of the mother, and it should go to her in her own right. *Allen* v. *Wentzell*, 7 E. L. R. 575.

Beneficiary—*Murder of assured—Liability of insurers.*]—The fact that the beneficiary of a policy of life insurance has intended to assassinate, and has in fact assassinated, the assured, in order to obtain payment of the amount of the policy, is not sufficient—at any rate if it is not proved that the assured knew of this intention when he insured his life, nor that the beneficiary was his agent in effecting such insurance—to release the insurer from the obligation to pay the amount of the insurance to the heirs of the assured; the benefit stipulated for in favour of the assassin having been judicially declared void. *Trudeau* v. *Standard Life Ins. Co.*, 16 Que. S. C. 539.
Affirmed 9 Que. Q. B 499.
Affirmed 31 S. C. R 376.

Beneficiary certificate — *Will — Motion for construction—Does insurance money pass under will?—Con. Rule 936.*]—Testator held a beneficiary certificate in Canadian Home Circle, payable to his wife. He made a will directing that real and personal estate "be sold and converted into cash and divided as follows: one-third of the same (which includes the money that shall come from the Home Circle) to be invested for my present wife, and the interest arising therefrom paid her during her lifetime, and after her death the principal to be equally divided among my children share and share alike:"—*Held*, that there was nothing in the will which operated to change the beneficiary, and the policy was not affected by the will. *In re Cochrane*, 16 O. L. R. 328, followed. *Re Earl* (1910), 16 O. W. R. 901, 1 O. W. N. 1141.

Beneficiary for value—*Change of beneficiary—Will—R. S. O. c. 203, ss. 151, 160.*]—When a policy of insurance is payable to a beneficiary for value, not so named on the face of the policy, who is also one of the preferred class of beneficiaries, the assured cannot by his will transfer the benefit of the insurance to another beneficiary of the preferred class. Such a case is governed by s. 151, and does not fall within s. 160, of the Insurance Act, R. S. O. c. 203. Judg-

ment of Meredith, J., 32 O. R. 206, 20 C. L. T. 386, reversed. *Book* v. *Book*, 21 C. L. T. 111, 1 O. L. R. 86.

Beneficiary for value.] — Under ss. 151 and 160 of the Ontario Insurance Act, R. S. O. c 203, it is not necessary, in the absence of a requirement therefor on the face of the policy, to find as a fact whether or not the beneficiary is one for value; but, apart from this, the evidence in this case shewed that the plaintiff, who claimed to be a beneficiary under such a policy, had no claim whatever thereunder. *Potts* v. *Potts*, 20 C. L. T. 179, 31 O. R. 452.

Benefit certificate — Apportionment among children — Will. *Re Marshall*, 5 O. W. R. 404, 395.

Benefit certificate—Assessments—Non-payment — Suspension — Forfeiture — Negotiations — Reinstatement — Release — Estoppel. *Hamilton* v. *Mutual Reserve Life Ins. Co.*, 7 O. W. R. 430.

Benefit certificate — *Attempt to change beneficiary — Necessity of consent — Trust — Application of existing law—Statutes—Retrospective operation.*]—Under an insurance certificate for $3,000 issued by a society in 1882, the insured's wife was made the beneficiary, and the certificate was delivered to her and always remained in her possession. In 1886 the husband purported to surrender the certificate, procuring another one to be issued in favour of his son and daughter, which was delivered to the daughter, who had always retained it. In 1887 the wife procured a divorce from her husband, which was admitted to be invalid; and in 1889 the husband went through a form of marriage with one E., when he purported to surrender the last mentioned certificate, procuring another one to be issued in E.'s favour, to whom it was delivered, and who always retained possession of it. On the husband's death a claim made by E. was settled, and the question was as to the rights of the wife and children under the respective certificates: —*Held*, that under the statute then in force, 47 V. c. 20 (O.), the first certificate became a trust in the wife's favour, over which, so long as she lived, the husband had no control except under ss. 5 and 6 of that Act, which, however, did not empower him to surrender and replace it by another, for this could be done only with the wife's consent under 48 V. c. 28, s. 1, s.-s. 3 (O.), and that the wife's rights were not affected by s.-s. 5 of s. 160, R. S. O. 1897, the assured not having availed himself of the power conferred by that section. *Cartwright* v. *Cartwright*, 12 O. L. R. 272, 8 O. W. R. 109.

Benefit certificate — *Change of beneficiary — Wife of member — Foreign divorce — Validity — Estoppel — Remarriage — Second wife and adopted daughter—Claim of.*]—The deceased was married in 1860, in Massachusetts, U.S., to M., where they both resided until 1886, when, in consequence of his becoming amenable to the criminal law, he left, and came to Canada, where he resided until his death, M. remaining in the State. In 1891, on proceedings taken by M., the deceased not appearing, she obtained a decree of divorce *a vinculo* upon the ground of desertion and cruelty. In 1896 the deceased went through a form of marriage with one C., and thereafter continued to live with her as his wife down to the time of his death. In 1889 the deceased insured in a fraternal society for $2,000, which by the certificate was made payable to his wife M., and was so continued until 1896, when he endorsed on the certificate a revocation of the payment to M., and procured a duplicate certificate to be issued, stating that M. was dead, and having the amount made payable to C. and an adopted daughter, and the insurance so continued until his death, C. for several years before his death paying the premiums:—*Held*, without deciding whether or not the divorce obtained by M. was valid, that she could not be heard to impugn the jurisdiction of the Court in the United States which she had invoked to grant the divorce.—*Held*, also, that it was not necessary to decide whether or not C.'s marriage was legal or the adopted daughter entitled, as the society had not contested their claims, and it was not open to M. to do so, and that C. and the adopted daughter were entitled to the moneys. *Re Williams & A. O. U. W.*, 10 O. W. R. 50, 215, 14 O. L. R. 482.

Benefit certificate—*Designation of beneficiary — Rules of society — Will—Statutes —Widow — Election.*]—Interpleader at the instance of a benevolent society incorporated under 40 V. c. 25, now R. S. M. 1902 c. 18, the subject matter being the proceeds of a life insurance certificate or policy which the insured had made payable to his wife. By his will the insured made other provision for her, and directed that the money in question should fall into and form part of his general estate:—*Held*, that the case was not governed by the Life Insurance Act, R. S. M. 1902 c. 83, and that the will did not operate as a good appointment of the fund under the rules of the society, which did not allow such appropriation; that the direction of the will could not operate so as to make the money part of the general estate; and that the widow was entitled to it.—*Leadlay* v. *McGregor*, 11 Man. L. R. 9, and *Johnston* v. *Catholic Mutual Benefit Assn.*, 24 A. R. 88, followed.—(2) The widow was not put to her election, and was entitled to the full benefit of the will, as well as to the moneys payable under the certificate.—*Griffith* v. *Howes*, 5 O. L. R. 439, *Re Warren's Trust*, 26 Ch. D. 208, and *Re Beale's Settlement*, [1905] 1 Ch. 256, followed. *Re Anderson's Estate*, 3 W. L. R. 127, 16 Man. L. R. 177.

Benefit certificate — *Disposal of fund —Wife and children — Income — Corpus.*] —The whole of the deceased's estate consisted of $2,000, secured by a benefit certificate, by which it was made payable to his executors to be put at interest, to be paid to his wife, for the benefit of herself and children until her death or marriage, when it was to be paid to his children until the youngest attained 21, when the principal was to be equally divided amongst them:—*Held*, that the intention was not that the wife and children should be jointly entitled to the interest, but that, until the wife's death or marriage, the whole should be payable to her, giving her a discretionary power as to its disposal according to the family needs and requirements, and that the *corpus* should

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not be distributable until her death or marriage, and until the youngest child attained 21 years of age. *Re Shafer*, 10 O. W. R. 409, 885, 15 O. L. R. 266.

Benefit certificate—Friendly society — Rules — Impairment of contract—Insurance Act — Non-observance of requirements — Setting out rules — Incorporation by reference — Action by administratrix — Suicide —Insanity. *Waller* v. *Independent Order of Foresters*, 5 O. W. R. 16, 421.

Benefit certificate — "*Legal heirs*"— *Will — R. S. O. 1897, c. 203, s. 2, s-s. 36— 7 Edw. VII, c. 36, s. 1.*]— A benefit certificate issued to deceased was, at his death, made payable to his "legal heirs." There was no change of beneficiaries, and in his will and codicil thereto no reference was made to this certificate or to his life insurance. He left a widow and eight children, six of them infants:—*Held*, that the moneys payable under this certificate belonged to his "legal heirs" personally, that is, the widow and eight children were each entitled to a one-ninth share in same. *Re Hamilton & Canadian*, 13 O. W. R. 410.

Benefit certificate payable to wife of assured — *Subsequent designation by will in favour of mother and sisters—Predecease of mother — Certificate unaltered—Payment into Court.*]—Benefit society permitted to pay moneys payable under a certificate into Court, there being rival claimants. The certificate was payable to the wife who had separated from her husband. There were no children. Subsequently, by will he bequeathed the certificate to his mother, and if she pre-deceased him, then to his two sisters equally. The mother predeceased the testator. The widow and sisters each claimed the certificate:—*Held*, to be a valid gift to the sisters. *Re Canadian Foresters and McHutchion* (1909), 13 O. W. R. 1010, 14 O. W. R. 251.

Benefit certificate — Rule of benevolent society — Designation in favour of wife — Insurance Act, s. 159 — Application of — Preferred beneficiary — Power of assured to change designation by will. *Re L'Union St. Joseph du Canada & Cardinal*, 12 O. W. R. 37.

Benefit certificate — *Variation by will —Allotment to widow in lieu of dower.*] — Unless there is an express variation of the allotment and an apportionment of insurance moneys amongst the preferred class depriving the widow of her share, testator could not make acceptance by her of the sum so allotted conditional upon such acceptance being in lieu of dower. *Re Lester*, 13 O. W. R. 343, affirmed *ibid*, 772.

Benefit of wife and children—*Certificate of benefit society — Disposition of proceeds by will — Identification of certificate — Residuary estate — "Including."*] —Motion by executor under Rule 988 for order determining a question arising under the will of Adam Harkness as to the disposition of life insurance moneys. The testator was the holder of a policy of insurance issued by the Ancient Order of United Workmen, payable to "his order or heirs." After devising certain real estate, the will contained the following clause: "(2) I give the residue of my property, including life insurance, to my wife Harriet Elizabeth, and to my two youngest children, Adam Wier and Andrew Edmund, share and share alike, it being understood that my wife accepts this in lieu of dower," etc. Excluding the insurance money, the estate was not sufficient to pay the testator's debts, and the question was whether the insurance money was available for creditors or went to the widow and two children. *Re Cheeseborough*, 30 O. R. 639, applied:—*Held*, "the residue of my property, including life insurance," although not using the words "policy" or "certificate," makes it as certain and clear as in the Cheeseborough case what policies or certificates of insurance are meant, namely, any and every policy securing insurance on testator's life in respect to which he had a disposing or an appointing power. Jarman on Wills, 5th ed., p. 1090, defining the meaning of the words "namely" and "including," says: "Namely imports interpretation, that is, indicates what is included in the previous term; but 'including' imports addition, that is, indicates something not included;" and the same definition is given in Stroud's Judicial Dictionary under title "namely." See also *Re Duncombe*, 3 O. L. R 510, 1 O. W. R. 153. Order made that the widow and children are entitled to the insurance moneys to the exclusion of the creditors. *Re Harkness*, 4 O. W. R. 533, 25 C. L. T. 43, 8 O. L. R. 720.

Benevolent association — *Member changed occupation — Liability under beneficiary certificate.*]—Members of benevolent associations are bound by the rules and requirements of the association. — Where a carter changed his occupation to a railway brakeman, without notice to the association, when the rules required him to do so and to pay a higher rate for his insurance, it was *held*, that his beneficiary could not recover on his beneficiary certificate. *Wilson* v. *Sons of England* (1909), 14 O. W. R. 912, 1 O. W. N. 144.

Benefit to children — *Will—Right of trustee to proceeds.*]—A trustee appointed by will to receive all moneys payable under life insurance policies of testator is the proper person to receive the money, and his receipt therefor is a valid discharge of the liability of the company. *Campbell* v. *Dunn* (1893), 22 O. R. 98, followed. Judgment of MacMahon, J., 14 O. W. R. 978, affirmed. *Dicks* v. *Sun Life Co.* (1910), 15 O. W. R. 366, 20 O. L. R. 369.

Bequest to infant — Executors of insured — Domicil — Payment into Court. *Re Webb*, 2 O. W. R. 169, 230.

Certificate—*Endorsement for benefit of wife — Subsequent revocation by will — By-laws of society.*]—A certificate of life insurance issued to a member by a benefit society stated on its face that it was subject to the provisions of the by-laws, rules, and regulations of the society. One of the by-laws provided for the payment of the insurance money to any person nominated by indorsement, which indorsement might be revoked. The member, by indorsement on the certificate, directed that all money accruing

upon it should be paid to his wife upon his death; but, subsequently, by will directed that only a portion of it should be paid to her, and the balance to his half-brothers and sisters:—*Held*, that the insurance was subject to the provisions of the Ontario Insurance Act, R. S. O. c. 203; and the by-laws and rules of the benefit society, in so far as they were inconsistent with such provisions, were to be regarded as modified and controlled by them. The statute provided in effect that when the indorsement was in favour of the wife of the member, he could not revoke it, and the by-law was in this respect modified and controlled by the statute. *Mingeaud* v. *Packer*, 21 O. R. 267, 19 A. R. 260, applied and followed. *Re Harrison*, 20 C. L. T. 38, 31 O. R. 314.

Certificate — *Forfeiture—Non-payment —Rules.*]—The defendants were an unincorporated union or society of workmen of a particular class, having their head office in a foreign country, with unincorporated branches or lodges in this Province:—*Held*, that beneficiary certificates issued by them to members, entitling members or their representatives, upon payment of certain assessments and compliance with certain conditions, to certain pecuniary benefits, were not subject to the provisions of s. 144 of the Ontario Insurance Act, 60 V. c. 36.—*Held*, also, that, even if the Act did apply, a beneficiary certificate not containing an absolute contract to pay any sum, but stating merely that upon compliance with the conditions, and upon payment of the assessments, directed by the constitution, the sum authorised by the constitution would be paid, and that any default would render the certificate void, was not within the section, and that the conditions of the constitution must be read into it in determining its validity. *Wintemute* v. *Brotherhood of Railroad Trainmen*, 20 C. L. T. 347, 27 A. R. 524.

Certificates issued by benefit society —"*Policy of insurance*" — *Manitoba Life Insurance Act, 1902, c. 83, s. 28 — Effect of will of testator — Claims of creditors and beneficiaries — Application by testators for advice.*]—Testator died leaving one child and five step-children. His wife predeceased him, leaving a will bequeathing all her estate to her husband. A policy of insurance in the Woodmen of the World was made payable to his wife or those legally entitled to receive same. A certificate in a benefit society was also payable to his wife. Testator devised all his estate to his executors to be invested for his children:—*Held*, that the Woodmen policy became part of the husband's estate, both under the above statute and under her will, and being part of the general estate of the testator, is available for creditors. As to the other certificate, it is not subject to the Life Insurance Act, and the proceeds must go to the children under s. 91 of the Society's Articles. *Re Drysdale*, 10 W. L. R. 642.

Change in beneficiary — "*Instrument in writing*" — *Incomplete will — Operation of — Insurance Act.*]—A will invalidly executed is not an "instrument in writing" effectual to vary the benefit of an insurance certificate, under R. S. O. 1897 c. 203, s. 160, s.-s. 1. *Re Jansen*, 12 O. L. R. 63, 8 O. W. R. 17.

Change in beneficiary—Incomplete instrument — Designation by will — Validity —Infant — Payment into Court. *Re Murray*, 4 O. W. R. 281.

Change of beneficiary — *Preferred class — Beneficiary for value — Premiums.*] —A person whose life was insured by a benevolent society in favour of his wife, a beneficiary for value, though not stated to be so in the certificate, was unable or unwilling to keep the insurance in force, and the later assessments before his death were paid by the wife. By his will the assured gave the whole of the insurance moneys to one of his sons:—*Held*, that he had power to do so by virtue of s. 169 of the Ontario Insurance Act, R. S. O. c. 203. The proviso at the end of s.-s. (2) shews that the section is applicable to the case of a beneficiary for value, and that those only who appear as such expressly on the policy are protected against the wide power to change beneficiaries conferred by the section. It was conceded that the wife should have a return of all moneys paid by her to keep the certificate in force, with interest. *Book* v. *Book*, 20 C. L. T. 386, 32 O. R. 206.

Change of beneficiary — *Surrender of policy — Issue of paid-up policy.*]—In 1888 the deceased was insured for $1,000 payable at his death, in favour of his mother as sole beneficiary. In 1894 he assumed to surrender that policy in consideration of $148.62 and a paid-up policy for $500 payable at his death. In the latter policy it was provided that "the sum insured is to be paid to (mother), or in the event of her prior death to (a sister), or, if the assured shall survive the aforesaid beneficiaries, to his legal representatives or assigns." The mother died in 1901, and the assured died in 1903:—*Held*, that the sister, who had supported the mother for the last four years of her life at the request of the assured, was entitled to the insurance money as against the executors of the latter. *Re Travellers Ins. Co., Kelly* v. *McBride*, 24 C. L. T. 62, 7 O. L. R. 30, 2 O. W. R. 1107.

Claim by assignee of policy — Fraudulent representations of assured in application — Sickness at time of application — Insurable interest — Speculative insurance —Invalidity. *Dupere* v. *London & Lancashire Life Assce. Co.* (Que.), 6 E. L. R. 232.

Claim under policy — Time for making —Extension — Insurance Act, s. 148 (2), construction of. *Re Fallis*, 6 O. W. R. 385.

Condition—*Domestic tribunal — Renunciation of right to set-off.*]—It may be stipulated by a policy of insurance that the assured shall not sue the insurance company until he has endeavoured to obtain justice through the officers of the company in the manner provided by its by-laws. But no stipulation will be valid which has for its object directly or indirectly to hinder the insured from having recourse to the Courts or to force him to go before a tribunal, even a voluntary one sitting in a foreign country. 2. A person may by argument renounce the right of set-off, but such renunciation will not be presumed, and must be stipulated for in a clear and precise manner; in case of

doubt as to whether there has been renunciation, the set-off must have effect. *Dahme* v. *Supreme Court of the Order of Foresters*, 21 Que. S. C. 439.

Condition — *Pleading—Burden of proof —Waiver.*] — A life insurance policy contained a condition providing for payment in ninety days after satisfactory proofs of death were furnished to the association; another that death from consumption and certain other diseases was not covered by the policy; and another setting out what proofs must be given. In an action on this policy the plaintiff alleged that she had furnished proof of the death of the insured on a certain date, and that all conditions were performed and all times elapsed to entitle her to payment. The defendants denied these allegations and put the plaintiff to strict proof thereof:— *Held*, that under the Ontario Judicature Act, differing in this respect from the practice in England, the plaintiff was bound to prove the truth of her above allegations; that giving of satisfactory proofs was a condition precedent to her right of action, performance of which she had to allege and prove; that no rule of law obliged the defendants to prove non-performance; that there was no evidence of waiver of proof as contended by the plaintiff; and that in any case the plaintiff could not recover, as the proofs given, taken in connection with the evidence, shewed the deceased to have died of consumption, which was not covered by the policy. Judgment of the Court of Appeal, 9th May, 1899, reversed. *Randall* v. *Home Life Assoc.*, 20 C. L. T. 49, 30 S. C. R. 97.

Condition of policy—*Payment of premium — Promissory note.*]—When the renewal premium of a policy of life insurance became due, the assured gave the local agent of the company a note for the premium, with interest added, which the agent discounted and had the proceeds placed to his own credit in a bank. The renewal receipt was not countersigned nor delivered to the assured, and the agent did not remit the amount of the premium to the company. When the note matured a part was paid and a renewal note given for the balance, which was unpaid at the time of the death of the assured. A condition of the policy declared that if any note given for a premium was not paid when due, the policy should cease to be in force:— *Held*, Davies and Maclennan, JJ., dissenting, that the transaction between the assured and the agent did not constitute a payment of the premium in cash, and that the policy had lapsed on default to pay the note at maturity. *Manufacturers Acc. Ins. Co.* v. *Pudsey*, 27 S. C. R. 374, distinguished.— *London & Lancashire Life Assce. Co.* v. *Fleming*, [1897] A. C. 499, referred to.— Judgment in 28 N. S. R. 15 affirmed. *Hutchings* v. *National Life Assoc. Co.*, 26 C. L. T. 187, 37 S. C. R. 124.

Conditions — *Misrepresentation — Non-disclosure — Accident policies—Warranties —Jury — New trial.*]—Unless the evidence so strongly predominates against the verdict as to lead to the conclusion that the jury have wilfully disregarded the evidence or failed to understand or appreciate it, a new trial ought not to be granted. On an application for life insurance, the applicant stated, in reply to questions as to insurances on his life then in force, that he carried policies in several life insurance companies named, but did not mention two policies which he had in accident companies insuring him against death or injury from accidents. The question so answered did not specially refer to accident insurance, but the policy provided that the statement in the application should constitute warrants and form part of the contract:—*Held*, affirming the judgment appealed from, Taschereau, C.J.C., dissenting, that "accident insurance" is not insurance of the character embraced in the term "insurance on life" contained in the application, and, consequently, that the questions had been sufficiently and truthfully answered, according to the natural and ordinary meaning of the words used, and, even if the words used were capable of interpretation as having another or different meaning, then the language was ambiguous and the construction as to its meaning must be against the company by which the questions were framed. *Confederation Life Association* v. *Miller*, 14 S. C. R. 330, followed. *Mutual Reserve Life Ins. Co.* v. *Foster*, 20 Times L. R. 715, referred to. *Metropolitan Life Ins. Co.* v. *Montreal Coal & Towing Co.*, 25 C. L. T. 4, 35 S. C. R. 266.

Construction of policies—*Non-payment of premiums — Lapse — Forfeiture.*] — A life insurance policy issued by the defendants was dated the 20th May, 1901; the premium was $31.20, payable in advance on the 30th May in each year for 20 years. The premiums were paid for five years. None was paid on the 20th May, 1906, or thereafter. The insured died on the 8th November, 1906. It was provided on the face of the policy: (1) that if, after the payment of three full years' premiums, the policy should lapse for the non-payment of any premium, the insurers would, upon application, the payment of all indebtedness, and the surrender of the policy and the last renewal receipt within three months after such lapse, issue a non-participating paid-up policy for as many twentieth parts of its principal amounts as complete annual premiums shall have been paid, or apply the same towards the purchase of extended insurance in accordance with the schedule indorsed; (2) that if, after the payment of five full years' premiums, the policy should lapse as aforesaid, the insurers would, upon application, etc., within three months after such lapse, pay to the holder of the policy the cash surrender value shewn in the schedule or, at the option of the holder, lend him any sum not exceeding the sum shewn in the schedule for one year, the premium for the ensuing year and interest on the amount lent being first deducted. The schedule shewed that a policy in force for three years would entitle the holder to a paid-up policy for $150, or to have the existing policy extended for one year, and at the end of that year a paid-up policy for $47; that a policy in force for five years would entitle the holder to $66 in cash, or a loan of $85, or a paid-up policy for $250, or the extension of the existing policy for two years, and at the end of that period a paid-up policy for $84. Clause 5 of the printed conditions indorsed provided that one calendar month would be allowed for payment of renewal premiums, at the expira-

tion of which time, if the premium remained unpaid, the policy should cease to be in force: —*Held*, that it was not necessary for the holder of the policy to make application in order to have the policy extended; the insurers were bound to apply the money in hand to the credit of the holder, namely, the $66 shewn in the schedule, towards the purchase of extended insurance; there was no lapse, and the policy was in full force when the assured died.—A second policy for $1,000 was dated the 31st March, 1903. By it the defendants, "in consideration of the application . . . and of the sum of $17.95, being the premium for one year's term insurance, to be paid in advance to the company . . . on the delivery of this policy, and the further sum of $33.90 payable annually for an additional term of 19 years, the first of such additional payments to be made on the 20th day of March, A.D. 1904, insured the life," etc. The premium said to be payable on the 20th March, 1906, had never been paid. An indorsement upon the policy provided that if any premium should not be paid when due, the policy should be void.—*Held*, that the terms of the policy not being clear and explicit, but so framed as to lead to doubt and contention, must be construed most favourably to the insured, and so as to avoid a forfeiture; and, so reading it, it was not to be implied that any of the premiums but the first and second were payable in advance, and the policy was in force on the 8th November, 1906, when the insured died.—*Held*, by the Court of Appeal, reversing this decision, that upon the proper construction of the policies sued upon, in the circumstances disclosed, both policies had lapsed and ceased to be in force at the time of the death of the person insured, and there could be no recovery thereon. *Pense* v. *Northern Life Assce. Co.*, 9 O. W. R. 646, 14 O. L. R. 613, 10 O. W. R. 826, 15 O. L. R. 131. See 42 S. C. R. 246.

Contract — *Condition—Payment of premium — Delivery of policy — Concurrent death of assured.*]—The husband of the plaintiff had, on the 24th February, 1900, made to the defendant company, an application for insurance containing the following condition: "The policy applied for, if it is issued, will not come into force until the premium shall have been actually paid to the company and accepted by it, while the person whose life is offered for assurance is alive and in good health." In making this application for insurance the plaintiff's husband paid $4 on account of the premium, and, the medical examination having been satisfactory, the company issued a policy of insurance at New York on the 8th March, 1900, and deposited it in the post office of that city on the 9th March, addressed to its agent at Montreal, to whom the letter containing the policy was delivered upon the 10th March (a Saturday). On the 8th March the plaintiff's husband was seized with an illness, of which he died on the 10th March between half-past nine and ten o'clock in the morning. The plaintiff afterwards offered the balance of the premium to the agent of the company, who refused to give her the policy: —*Held*, that if, in principle, the acceptance of the proposal for insurance constituted a valid contract of insurance (Art. 2481, C. C.), in this case the acceptance of the proposal was subject to the condition stated, and such condition not having been complied with, no contract of insurance existed. 2. That, in view of the condition, the deposit of the policy in the post office at New York did not constitute a delivery to the deceased. *Girard* v. *Metropolitan Life Ins. Co.*, 29 Que. S. C. 532.

Contract made by minor — *Plea of lesion.*]—Action on a promissory note for $680.25 given in payment of the first premium on a policy of life insurance for $25,000. The defendant pleaded that he was a minor when the contract was made; that it was disadvantageous to him, as it absorbed nearly all his annual revenue; and that as soon as his tutor had heard of it he had served a protest on the company on the ground that the contract was injurious to his pupil:—*Held*, that the defendant had established his plea, and that it was not his interest to have so large an insurance, especially as his health was not good, and the premium took up nearly all of his fixed income. Action dismissed, but without costs, inasmuch as the plaintiffs had been led into error as to the defendant's age, health and financial circumstances. *Imperial Life Ins. Co.* v. *Charlebois*, 22 C. L. T. 417.

Days of grace—*Assignment of policy by beneficiary subject to charge — Death of insured when renewed premiums overdue — Right of beneficiary or representative of insured to tender during—Insurance Act—Conduct of insurers—Dispensing with tender—Estoppel.*]—Appeal by the defendants from judgment of Idington, J., upon the findings of a jury, in favour of plaintiff, the widow and administratrix of the estate of Richard Tattersall, for $3,950.50, with interest and costs, in an action upon a policy of insurance on the life of the deceased. The company defend on the following grounds: (1) Fraudulent representations by Tattersall on application for insurance. (2) Denial that plaintiff was assured that the policy was all right, or misled. (3) Statement that plaintiff was told that premium had not been paid. (4) All liability ceased on the death of Tattersall with overdue premium unpaid. (5) On his death, not possible to renew or revive policy by tender because no beneficiary who could make tender under the contract. (6) Tattersall having died in default, and no tender made by any one within 30 days from due date of premium, liability ceased on policy:—*Held*, as to the matters of fact the jury found in favour of plaintiff's contention, and the evidence was sufficient to support such finding as right and proper. On matters of law it was argued that there was no right to tender after death of assured, and if such right existed, there was no beneficiary in this case to make tender. The last premium of $49.50 fell due on 10th April, 1903, and was not paid. The death was on 22nd April, 1903, intestate, and plaintiff was administratrix. On 15th December, 1902, the wife, in whose favour was the policy, assigned her interest to the husband, subject to the terms of an agreement referred to in the assignment. This was not notified to the insurance company till after the death. The policy was assigned to the husband, in consideration of his granting her an annuity of $1,500, on condition that

if he predeceased his wife the said policy and the proceeds thereof should be charged with payment of the said annuity. There had been default also in the last payment of the annuity before the husband's death. Indorsed on the policy are conditions and provisions, of which Nos. 5 and 8 are important: —"5. Thirty days of grace will be allowed for payment of renewal premiums, if the insured be unable to pay them when due. . . ." "8. From any sum payable under the policy the company may deduct any lien that may be standing against the policy and the balance (if any) of the yearly premium for the then current year. . . ." The statute applicable to this policy provided for 30 days of grace during which the payment in default may be made by the assured or by any of the beneficiaries under the contract: R. S. O. 1897 c. 203, s. 148 (1). The original section, passed in 1893, provided that this payment might be made "when the event upon the happening of which the insurance money becomes payable has not yet happened;" 56 V. c. 32, s. 10, s.-s. 12 (8). These words, in case of life policy, exclude the right so to renew or revive the contract by after-payment when death has happened to the person insured. But this qualification was expunged by the legislature in the amendment made in 1897, 60 V. c. 36, s. 148 (1), the section now in the R. S. O. 1897: —*Held*, that the facts disclose a case of estoppel against the company, whereby their conduct and statements, as well as the silence (when it was a duty to speak) of the company's agent, operated to mislead the plaintiff and lull her into security during the currency of the days of grace: this on the lines indicated in *Sanford* v. *Accidental Ins. Co.*, 2 C. B. N. S., at pp. 287, 288. Appeal dismissed with costs. *Tattersall* v. *Peoples Life Ins. Co.*, 5 O. W. R. 307, 6 O. W. R. 284, 756, 9 O. L. R. 611.

Declaration in favour of wife and children—*Variation in favour of beneficiary who is also a creditor — Intention to exonerate estate from the debt — Invalidity— Exercise of power — Equitable grounds — Insurance Act of Ontario.*]—By s.-s. 1 of s. 159 of the Ontario Insurance Act, R. S. O. 1897 c. 203, the insurance money payable under a benefit certificate to preferred beneficiaries is constituted a trust fund therefor, and so long as any object of the trust remains shall not be subject to the control of the assured or his creditors or form part of his estate. By s.-s. 1 of s. 160 the insured is empowered to vary the apportionment in favour of one or more of the preferred beneficiaries, and by s.-s. 2 no authority is deemed to be conferred to divert the moneys from the class to a person not of the class or to the assured himself or his estate.—Under a benefit certificate in a fraternal society, the sum insured, $2,000, was made payable on the insured's death to his wife and children. Being indebted to a daughter in the sum of $3,000, he indorsed on the certificate a transfer of the insurance to, and surrendered the certificate and obtained a new one in favour of, such daughter, he undertaking to keep the insurance in force, and she, on being apprised thereof, acquiesced in the transfer, and agreed to release the insured from the debt:—*Held*, reversing the judgment of a Divisional Court, 14 O. L. R. 424, 9 O. W. R. 30, and restoring the order of Falconbridge, C.J., that the transfer was not invalid, either under the statute or as an improper exercise of a power of appointment, and that the other beneficiaries were debarred on equitable grounds from contesting the claim of the daughter to the insurance money. *Re Kemp, Johnson* v. *A. O. U. W.*, 11 O. W. R. 91, 15 O. L. R. 339.

Delivery of policy — *Payment of premiums.*]—A contract for life insurance is complete on delivery of the policy to the insured and payment of the first premium. Where the insured, being able to read, having ample opportunity to examine the policy, and not being misled by the company as to its terms, nor induced not to read it, neglects to do so, he cannot, after paying the premium, be heard to say that it did not contain the terms of the contract agreed upon. Judgment of the Court of Appeal 27 A. R. 675, 21 C. L. T. 17, reversed. *Moffat* v. *Provident Savings Life Assce. Soc.*, 22 C. L. T. 221, 32 S. C. R. 147.

Delivery of policy — *Payment of premium — Evidence.*]—The production from the custody of representatives of the insured of a policy of life insurance raises a *prima facie* presumption that it was duly delivered and the premium paid, but where the consideration of the policy is therein declared to be the payment of the first premium upon the delivery of the policy, parol testimony may be adduced to shew that, as a matter of fact, the premium was not so paid, and that the delivery of the policy to the person therein named as the insured was merely provisional and conditional. The reception of such proof cannot, under the circumstances, be considered as the admission of oral testimony in contradiction of a written instrument, and in the province of Quebec, in commercial matters, such evidence is admissible under the provisions of Art. 1233, C. C. *Mutual Life Assce. Co.* v. *Giroux*, 22 C. L. T. 276, 32 S. C. R. 348.

Delivery of policy—*Time—Operation of conditions — Incontestability.*]—An application for life insurance, dated 16th September, 1894, and made part of the contract, provided that the issue and delivery of a policy in the usual form should be the only acceptance thereof, and that the place of contract for all purposes should be the head office at Toronto. The policy issued provided that it should not be in force until the first premium had been paid and accepted and the receipt delivered to the insured, and the attesting clause stated that it was delivered at Toronto on the 27th September, 1894. The insured lived in British Columbia. The policy and receipt were mailed at Toronto on the 27th September, 1894, to the company's agent at Winnipeg, and forwarded by him on the 1st October to the insured, who could not have received it before the 7th October. The insured died on the 30th September, 1897. The policy provided that, after being in force for three years, it should be indisputable. The insured violated a condition that would have avoided the policy but for this clause:—*Held*, that the policy and receipt were delivered and the contract of insurance completed on 27th September, 1894, and was indisputable three days before the

insured died. The provision as to indisputability covered a breach of condition made during the three years. *North American Life Assce. Co.* v. *Elson*, 33 S. C. R. 383; *Elson* v. *North American Life Assce. Co.*, 9 B. C. R. 474.

Deposit with Provincial Treasurer—*Withdrawal — Action — Petition.*] — In order to withdraw a sum of money deposited with the Treasurer of the Province, representing the amount of a life insurance policy, an action must be brought; a petition is not sufficient. *Ex p. Lacombe*, 6 Que. P. R. 301.

Designation of insurance moneys in favour of wife—*Identification of policies—Marriage contract — Alteration in notarial copy with signature of assured — R. S. O. 1897, c. 203, s. 169.*]—At the time deceased, who died intestate, entered into a marriage contract he held $3,000 insurance in Royal Arcanum. This he dropped and took two policies of $2,500 each in The Canada Life. In the presence of his father as a witness he changed the notarial copy of the marriage contract so far as to read "5,000" instead of "3,000," and "Canada Life" instead of "Royal Arcanum":—*Held*, that widow entitled to insurance as it had been identified beyond doubt. *Re Roger* (1909), 14 O. W. R. 267, 18 O. L. R. 649.

Designation of policy in favour of named person as "wife"—*Claim by true wife.*]—The legitimate wife cannot demand payment to her of a policy of insurance upon the life of her husband made out in favour of a third person whom the insured has designated his wife, although she was really his mistress. *Deere* v. *Beauvais*, 7 Que. P. R. 448.

Disposition of proceeds of policy — Friendly society — Claimants — Two wives both living — "Dependent" — Judgment *ex æquo et bono*. *Crosby* v. *Ball*, 4 O. L. R. 496, 1 O. W. R. 545.

Distribution policy—*Guaranteed value — Profits — Agent furnished plaintiff table of, in writing—Profits realised did not equal representations made by agent—Action to rescind contract and for return of premiums paid.*]—Defendants' agent induced plaintiff to take out two policies of insurance for $1,000 each, on the representations furnished in writing on forms supplied by defendants, that their value would equal certain amount at the end of 20 years. Plaintiff paid his premiums for the 20 years, but the company did not realise the amount of profits represented by agent and plaintiff brought action to rescind the contracts and to recover amount of premiums paid with costs. — Latchford, J., *held*, that the contract had been entered into under the representations made by agent and was entitled to have contracts rescinded and premiums returned with interest and costs. *Shaw* v. *Mutual Life Ins. Co.* (1910), 17 O. W. R. 33, 2 O. W. N. 89.

Endorsement of policy in favour of beneficiary for value — *Advances to assured—Debt barred by Statute of Limitations.*]—T. was indebted to J., and as security, endorsed a benefit society certificate, making $686 payable to J., balance to T.'s wife. On the latter's death, T. made the full amount payable to J., and this was noted in the books of the society. Subsequently T., who had retained the certificate by memorandum endorsed on the certificate, certified that he wished it payable to his daughters, but this was not entered in society's books. The endorsements in favour of J. were before 1 Edw. VII. c. 21, s. 2, s.-ss. 5 and 6:—*Held*, that the Statute of Limitations is no answer to the claim on the security, even though the original debt is barred. J.'s executors are therefore entitled to the fund. *Re Commercial Travellers Mutual Benefit Society & Tune*, 13 O. W. R. 932.

Endowment policy—*Assignment of — Revocation of assignment.*]—Plaintiff placed an endowment insurance on his life for $5,000, and by a subsequent writing appointed defendant beneficiary under said policy, but later desired to change the appointment to his niece, as beneficiary, but was told that the policy was already assigned and it could not be changed. The policy matured and defendant claimed the amount, being $6,799.30. Plaintiff asked for a declaration that he was entitled to be paid said moneys, and that the assignment to the defendant had been revoked. Britton, J., *held* (15 O. W. R. 369), that plaintiff was entitled to the money due and that the paper called the assignment had been revoked. Divisional Court *held* (16 O. W. R. 857, 21 O. L. R. 623, 1 O. W. N. 1138), that the gift was complete; that the assignment and registration thereof with the company and notice by the company to defendant of the registration were sufficient to entitle defendant to the money. Judgment below set aside and judgment entered for defendant, with declaration that she was entitled to receive the money payable under the policy in question. Court of Appeal varied judgment of Divisional Court by allowing plaintiff the premiums paid after the assignment was made. *Wilson* v. *Hicks* (1911), 18 O. W. R. 987, 2 O. W. N. 962.

Failure to pay premiums on due date—*Technical triviality to escape payment.*]—In an action to recover $250 alleged to be due on an insurance policy in defendant company, the defendants plead that plaintiff had failed to pay all the premiums on certain days when due. The evidence shewed that the plaintiff had paid the premiums in driblets and that there was but 10 cents due on the premiums which had not been paid:—*Held*, that the company was invoking a technical triviality to escape payment. Judgment for plaintiff with costs. *Whitehorn* v. *Can. Guardian Life* (1909), 14 O. W. R. 804, 1 O. W. N. 114, 19 O. L. R. 535.

First premiums — *Promissory note — Condition avoiding policy.*] — On the 20th April, 1900, G. applied to the defendants for life insurance; the defendants accepted the risk and issued and delivered their policy to G. in May. The premium was $40, payable half-yearly in advance. On account of the first half year's premiums G. paid $5 in cash and gave his promissory note for $15.38 at two months. Nothing further was paid, and the note was overdue in the defendants' hands when G. died on the 7th August, 1900. The application (forming part of the contract)

contained a clause by which G. agreed that if a note given for the first premium or any part thereof should not be paid when due, the policy would cease to be in force without any notice or action on the part of the company. This provision was not set out in full or at all on the face or back of the policy, as required by R. S. C. c. 124, s. 27:—*Held*, that the cash and note were accepted as payment of the first premium, and the statute not being complied with, the policy was in force at the time of the death. *Greenwood* v. *Home Life Ins. Co.*, 21 C. L. T. 90.

Foreign company — *Heir of beneficiary—Proof of heirship—Action—Tender—Payment into Court—Costs.*]—A foreign company is not presumed to know the law of succession of this province, and, before suing such a company upon a benefit certificate, the plaintiff ought to make known legally to the company and state upon competent authority his position as legitimate heir of the beneficiary, by obtaining from a Judge of the Superior Court letters of verification such as are provided for by Arts. 1411 *et seq.*, C. P.—2. In an action taken without these formalities, offers of the amount due to whatever person has the right to it, and a deposit in Court of the amount, will be declared good and valid, and the action will be dismissed without costs up to the plea in which the company declares that it submits its right to the Court, and with costs subsequent to such plea. *Roy* v. *Supreme Council Catholic Benevolent Legion*, 4 Que. P. R. 277.

Forfeiture of policy—Non-payment of premium—Agent—Notice—Waiver. *Edwards* v. *Imperial Life Assce. Co. of Canada*, 6 O. W. R. 170.

Husband and wife — *Life assurance policy—Wife's chose in action—Administration.*]—R. Orr effected a policy of life assurance for $1,000 for sole use of his wife (payable in New York) if living and her children, and if no children to the administrators of R. Orr, 60 days after notice of death. R. Orr died 21st December, 1878, his wife one week later, both in Colorado, U. S., and each intestate. Plaintiff was administratrix of the wife, defendant was administrator of the husband. The assurance company paid the money into a bank to the joint account of both administrators. A special case was agreed upon to decide who was entitled to the money. Plaintiff urged that it belonged to her as administratrix of the wife. Defendant contended it belonged to him as administrator of the husband under the law of New York, the *locus contracti*, as no notice had been given of the husband's death to the Assurance Company before the wife died, and as the husband's creditors would otherwise suffer:—*Held*, Palmer C.J., that the cause should be decided according to the law of P. E. Island and not of New York—2. That the policy was a chose in action of the wife's not reduced into possession by the husband and that her administratrix was entitled to the money. *Gilchrist* v. *McPhee* (1880), 2 P. E. I. R. 356.

Identification of policy — *Revocation of will by second marriage.*]—In 1888 W. made his will bequeathing $1,000 each to two daughters, to be paid out of his insurance moneys. Then and subsequently he had only one policy. Four years later W. re-married, and later died intestate: — *Held*, that the policy was sufficiently identified under s. 160, c. 203, R. S. O. 1896, but revocation of the will by the second marriage annulled the declaration of trust previously made by will. *Re Watters*, 13 O. W. R. 385.

Increase of death benefit—*By-law.*]—Where a by-law of a mutual benefit society was passed, increasing the amount payable at death of members of the society, such by-law applies to those who were members at the time it was passed as well as to those who became members subsequently, more particularly where the new by-law was not accompanied by any change in the scale of weekly payments either by prior or subsequent members. *Lacianer* v. *L'Union Mutuelle de Bienfaisance*, 16 Que. S. C. 588.

Infant en ventre sa mere—Period of distribution—Trustee Relief Act. *Re Lethbridge*, 1 O. W. R. 553.

Information withheld by insured—*Value of words used in the questions and answers in an application for insurance — Conditions attached to the policy relative to the beneficiary's claim—Condition that the decision of an officer shall be final—Decision given without notice to the interested party and without allowing her an opportunity to be heard.*]—A general expression joined to a question upon a specific point, in a series of questions in an application for insurance, should be interpreted as referring to other things of the same quality or nature as the one specified. Thus, in the question, "have you had chronic dyspepsia or any other malady," the latter words refer to and intend to mean maladies as serious and of the nature of chronic dyspepsia, or which might, in the way it might, increase the nature of the risk. Hence, a negative answer by the applicant for insurance, although he may have attacks of acute dyspepsia, ordinary indigestion, is not information withheld sufficient to annul the policy. The same principle applies to the answer "never been sick," to the question "for what disease or diseases have you consulted or been attended by a physician, or taken any other treatment during the last five years?" The condition that, in a contract of life insurance, resulting from the admission of the applicant to a mutual insurance society, the member or the beneficiary will have no other claim but that recognised by the by-laws, and, particularly, that failure to appeal within twenty days from an unfavourable decision of the officer appointed for the purpose will have the effect of extinguishing all claim, does not provide the society with a good ground of defence to an action upon the policy, if it is shewn that the officer's decision was reached and given without notice to the beneficiary and without giving her the opportunity of asserting her claim. *I. O. F.* v. *Turmelle* (1910), 19 Que. K. B. 261.

Insolvent company — *Claim of policy holder — Ascertainment of amount.*]—The amount for which the holder of an unmatured policy, payable at the death of the insured, is to rank against an insolvent life assurance

company, in liquidation under the Ontario Insurance Act, is the difference, if any, at the date of the commencement of the winding-up between the present value of the sum assured at the decease of the life assured and the present value of a life annuity of an amount equal to the future premiums which would become payable during the estimated duration of such life. *Re Merchants' Life Association of Toronto—Vernon's Cases*, 21 C. L. T. 232, 1 O. L. R. 256.

Insolvent foreign company — Deposit —Surplus—Interest. *Re Covenant Mutual Life Assn. of Illinois*, 1 O. W. R. 392.

Interest — *Preferred beneficiaries—Survivorship—Onus of proof.*]—The insured in a policy effected by him in favour of his wife and two of his children, which had not been varied by him, perished with his wife in a storm on one of the great lakes, and there was no evidence of survivorship. The personal representatives of the wife claimed a third share of the policy moneys, which had been paid into Court:—*Held*, that, apart from the operation of s.-s. 8 of s. 159, R. S. O. 1897, c. 203, as amended, a preferred beneficiary under a policy within s.-s. 1 of that section, only acquires an interest contingent upon being alive when the insured dies; and that the wife's representatives, being unable to prove that she was living at the time her husband died, were not entitled to the share claimed by them.—Order made declaring the fund to be the property of the two children in equal shares. *Re Phillips & Can. Order of Chosen Friends*, 12 O. L. R. 48, 7 O. W. R. 765.

"Legal heirs" — *Wife and children — Executor — Ontario Insurance Act.*]—In a life insurance certificate of the Canadian Order of Foresters the money secured was expressed to be payable at the death of the insured to his "legal heirs:"—*Held*, that the money was payable to the widow and each of the eight children of the insured in equal shares, and not to his executors to be disposed of as part of his estate. *Re Hamilton & Canadian Order of Foresters*, 18 O. L. R. 121, 13 O. W. R. 410.

Lien for moneys advanced to pay premium—*Evidence—Written memorandum —Filing — Conservatory attachment.*] — A party claiming a lien on the proceeds of a life insurance policy for moneys advanced for the payment of the premiums thereon must allege that the loans were evidenced by a writing of which a duplicate was filed with the insurance company and noted by the company on the duplicate retained by the lender, as provided by R. S. Q., s. 5093, and subsequent refusal to give such writing does not create a right of conservatory seizure. *Smith* v. *Smith*, 7 Que. P. R. 229.

Manager of a life assurance company, with its head office in another country, appointed for the purpose of opening a branch in Quebec, acts within the limits of his authority and binds the company by hiring the services of a medical superintendent or referee. *Guerin* v. *State Life Ins. Co.* (1910), 39 Que. S. C. 184.

Medical examination — *Misstatements and concealments — Materiality—Breach of warranty—Cancellation of policy.*] — In the plaintiff's application to the defendants for a policy of life insurance he warranted, amongst other things, that the answers in the medical examination, which formed part thereof, were full, complete, and true, and without any suppression of facts so far as such answers were material to the contract of insurance to be based thereon. In the examination the plaintiff stated that he had not consulted or been attended by a physician for six years prior thereto, whereas he had consulted four physicians within four months immediately before the examination. He also stated that he had not had any illness, except a slight attack of "la grippe," for three years next before his examination, whereas he had been ill for two months immediately before his examination, and had consulted two doctors, who had told him that he was suffering from, at any rate, anæmia. The plaintiff also concealed several symptoms of phthisis or tuberculosis from the examining doctor, which he afterwards admitted to him that he had at the time of the examination. He also warranted that he was free from disease, whereas he had phthisis or tuberculosis, which, though undeveloped by physical signs, were existing:—*Held*, that these statements and concealments were material and constituted a breach of the warranty; and therefore the policy was void. Judgment was given for the defendants on their counterclaim for delivery up of the policy to be cancelled. *Smith* v. *Orange Lodge*, 24 C. L. T. 16, 6 O. L. R. 588, 2 O. W. R. 965.

Medical referee.]—Inscribing the name of a physician, followed by the title "medical referee," upon the office door of a life assurance company, constitutes a commencement of proof in writing permitting the introduction of oral testimony to establish the contract of hire and its conditions, *Guerin* v. *State Life Ins. Co.* (1910), 39 Que. S. C. 184.

Misrepresentations — Application for insurance—Answers to questions — Unintentional misstatements — Absence of fraud — Interest on insurance moneys — Date of commencement. *Pearce* v. *National Life Assurance Co. of Canada*, 12 O. W. R. 359.

Misrepresentations — *Wagering policy —Question for jury — Evidence — Misdirection—New trial.*]—An action by an insurance company for the cancellation of a policy of life insurance was maintained and an action by the insured to recover the amount of the policy was dismissed by the Superior Court of Quebec after trial of both actions together by a jury; the judgment was affirmed by the Court of King's Bench. The insured appealed to the Supreme Court of Canada and asked for a new trial, upon the ground that the trial Judge had erred in his charge to the jury on questions as to the wagering character of the policy and as to certain representations made by the assured being materially incorrect and wilful misstatements:—*Held*, that there was no misdirection by the Judge which occasioned substantial prejudice to the appellant; and, in view of the whole evidence, the jury could reasonably

find the verdict complained of; and the appeal was dismissed. *Lamothe* v. *North American Life Assce. Co.*, 39 S. C. R. 323.

Misstatement in application as to age—*Evidence of bona fides—Admissibility—Burden of proof — Findings of jury.*]—In an action on a policy of life insurance a defence was that the insured in his application, made in 1891, stated that he was 41 years of age, whereas in fact he was 44. The evidence shewed that 44 was his actual age at the time. Evidence of statements made by the insured, many years before the application, tending to shew his belief that he was born in 1850, was rejected: — *Held*, that the evidence should have been admitted for the purpose of shewing that the statement in the application as to age was made in good faith, and without intention to deceive. In answer to questions the jury found that the statement in the application that the insured was born in 1850, was untrue, and was material, but that the insured made the misstatement in good faith, believing it to be true, and without intention to deceive:—*Held*, that on these answers judgment should have been entered for the defendants, if the jury could not properly find that the statement was made in good faith and without intent to deceive; but, as the plaintiff was not allowed to elicit evidence on this point, there should be a new trial. Where the statement as to the age is found to be material and untrue, an avoidance of the contract follows, unless that result is prevented by its being made to appear that the statement was made in good faith and without intent to deceive; and it must lie upon the person seeking to uphold the contract to make proof of it. *Dillon* v. *Mutual Reserve Fund Life Assoc.*, 23 C. L. T. 86, 5 O. L. R. 434, 2 O. W. R. 78, 4 O. W. R. 351.

Money deposited by company — *Recovery — Procedure — Action.*] — Where moneys have been deposited by an insurance company pursuant to Art. 1198, R. S. Q., a claimant must proceed to obtain such moneys by action and not by petition; and in these cases petitions were dismissed without costs. *Coleman* v. *Catholic Order of Foresters*, 3 Que. P. R. 400; *Re Doran & A. O. U. W.*, *ib.* 441.

Money payable for loss covered by fire insurance does not represent the property, but represents a debt resulting from a contract of insurance. *Isaac* v. *Tafler & Guardian Assce Co.* (1910), 11 Que. P. R. 350.

Mutual benefit society — Contract *uberrimae fidei* — Untrue representations in application—Agency. *Ryan* v. *Catholic Order of Foresters*, 1 O. W. R. 547.

Mutual company — *Natural premium system—Rate of assessment—Rating at attained age—Fraud — Puffing statements — Warranty — Rescission of contract—Estoppel.*]—A. took out a policy on his life in a mutual association, relying on statements contained in circulars issued by the association stating that interest on the reserve fund would be sufficient to cover increases in the death rates, and make the policy, after a certain period, self-sustaining. The rates having been increased, A. paid the assessments for some years under protest, and then allowed his policy to lapse, and sued for a return of the payments he had made with interest, and for a declaration that the contracts were void *ab initio*:—*Held*, Sedgewick and Nesbitt, JJ., dissenting, that the statements in the circulars only expressed the expectation of the managers of the association as to the future, and did not prevent the rates being increased in the discretion of the directors. *Mutual Reserve Fund Life Association* v. *Foster*, 20 Times L. R. 715, distinguished. *Provident Savings Life Assurance Society* v. *Mowat*, 32 S. C. R. 147, referred to. *Angers* v. *Mutual Reserve Fund Life Assoc.*, 35 S. C. R. 330.

Non-acceptance of policy—*Damages.*] —By an application for a policy of insurance on the defendant's life he bound himself to pay the first premium on the presentation of the policy; but it was also agreed that the company should not incur any liability until the premium had been actually paid and received by the company. The application was accepted by the company and a policy issued and tendered to the applicant, who refused to accept the same:—*Held*, that the company could not claim the whole amount of the premium as liquidated damages, but were entitled to such damages only as had been occasioned by the defendant's refusal to accept the policy. *Royal Victoria Life Ins. Co*, v. *Richards*, 20 C. L. T. 173, 31 O. R. 483.

Non-payment of dues — *Forfeiture.*] Upon the construction of the special rules of a benevolent society Burton, C.J.O., and Maclennan, J.A., *held*, that a member had, in consequence of non-payment of dues by him, ceased to be a member and had forfeited his right to benefits, while Osler and Moss, JJ.A., took the contrary view. In the result, therefore, the judgment of Boyd, C., in the plaintiff's favour, was affirmed. But see 29 S. C. R. 397. *Hilliker* v. *Knights of the Maccabees*, 20 C. L. T. 2.

Non-payment of premium — Lapse of policy—Revival by subsequent payment — Warranty of good health—Breach. *Seery* v. *Federal Life Assce. Co.*, 5 E. L. R. 406.

Note given for premium—*Part payment—Extension of time — Forfeiture — Waiver—Estoppel.*]—A condition in a policy of life insurance provided that if any premium, or note given therefor, was not paid when due the policy should be void. A note given, payable with interest, in payment of a premium, provided that if it were not paid at maturity the policy should forthwith become void. On the maturity of the note it was partly paid, and an extension was granted, and on a part payment being again made a further extension was granted. The last extension was overdue and balance on note was unpaid at the death of the assured. A receipt by the company, given at the time of taking the note, was of the amount of the premium, but at the bottom of the face of the receipt were these words: "Paid by note in terms thereof." While the note was running the policy was assigned for value, with the assent of the company, to the plaintiff, to whom the receipt was delivered by the assured:—*Held*, that no estoppel was created

by the receipt; that there was no duty upon the company to have afforded the plaintiff an opportunity of paying the premium; and that the policy was void. *Wood* v. *Confederation Life Assoc.*, 21 C. L. T. 149, 2 N. B. Eq. 217.

Payment of overdue premium—*Acceptance — Consent—State of health of assured.*]—Where, by the conditions of a policy of life insurance, the non-payment of a premium when it falls due renders a policy void, and where it is also declared that no premium in arrears will be accepted by the insurance company unless with the consent in writing of the president, vice-president, or secretary, the acceptance of a premium, after it was due, and the sending of a receipt signed by the secretary, are equivalent to the consent required to validate the late payment of the premium.—2. The fact that the assured was dying when the premium in arrear was paid, the insurance company not having inquired as to his state of health, and no false representation as to it having been made, does not invalidate the payment. *Page* v. *Metropolitan Life Ins. Co.*, 23 Que. S. C. 503.

Payment of premium — *Thirty days' grace—Estoppel—Beneficiary.* —*Held*, affirming the judgment of a Divisional Court, 9 O. L. R. 611, 5 O. W. R. 307, that, under the circumstances there fully set out, the plaintiff was a beneficiary under the contract and entitled to claim under the policy; that under R. S. O. 1897 c. 203, s. 148 (1), a policy is kept alive or renewed by payment of the premium by any one entitled to pay it within 30 days after default, although the insured may have died before payment during such period of grace, and that here the assured was "unable to pay" the renewal premium within the meaning of condition 5 of the policy by their conduct from setting up the non-payment of the premium. *Tattersall* v. *People's Life Ins. Co.*, 11 O. L. R. 326, 6 O. W. R. 756. Affirmed by the Supreme Court of Canada: *People's Life Ins. Co.* v. *Tattersall*, 37 S. C. R. 690.

Place of payment — *Foreign country —Demand—Title to insurance moneys—Ancillary probate—Jury—Inconsistent findings —New trial.*]—In an action against an insurance company on a life policy, a verdict was entered for the plaintiff on answers of the jury to questions submitted by the Court and counsel. Some of the answers on material issues were inconsistent and unsatisfactory, and some pertinent and relevant questions were not answered:—*Held*, *per* Tuck, C.J., Hannington and Barker, JJ., that there should be a new trial, on the ground that the findings were incomplete, unsatisfactory, and inconsistent.—By the terms of the policy the defendants agreed to pay at their head office at the city of Hamilton in the province of Ontario.—*Held*, *per* Tuck, C.J., that a nonsuit should not be granted on the ground that the plaintiff had failed to prove a demand at the head office, or on the ground that no ancillary probate had been taken out in Ontario before action brought. *Seery* v. *Federal Life Assce. Co.*, 3 E. L. R. 59, 38 N. B. R. 96.

Pleading—*Foreign law—Cause of death.*]—To the two counts of a declaration upon a policy or certificate of life insurance defendants pleaded 34 pleas. The 1st and 18th were alike and were as follows: "The defendants say that no demand of the said sum of $2,000 was made at the association's office in Galesburg, Illinois, and by reason thereof, and by the laws of the State of Illinois, the plaintiff cannot recover upon the said certificate." The 3rd and 20th pleas were also alike and were as follows: "The defendants say that the death of the said August P. B. LeBlanc was from a cause exempted by the provisions and agreements contained in the said certificate." An order was made in Chambers striking out these four pleas as being embarrassing. Upon a motion to rescind the order:—*Held*, that the 1st and 18th pleas were bad for not averring what the law of the State of Illinois was by reason of which the plaintiff could not recover; and (2) that the 3rd and 20th pleas were good—it being unnecessary to specify the particular cause relied upon by the defendants as exempting them from liability. *LeBlanc* v. *Covenant Mutual Benefit Assoc.*, 34 N. B. R. 444.

Policy — *Assignment by will — Identification.*]—The assignment of a policy of life insurance under Arts. 5581 and 5584, R. S. Q., may be by will. It is not necessary that the will should be annexed to the policy; it is sufficient if the will refers to the policy in such a way as to establish its identity beyond contest. *Hardy* v. *Shannon*, 19 Que. S. C. 325.

Policy — *Beneficiary named in policy— Death of before death of assured—Vested interest of beneficiary—Insurance moneys payable in Ontario.*]—The North American Life Assurance Company, with head office at Toronto, issued a policy on life of M., payable to his mother should his death occur within the investment period thereof, otherwise to his estate. The mother predeceased her son within the investment period, dying intestate: —*Held*, that the proceeds of the policy went to the estate of the mother, and that the insurance being payable within and subject to the law of Manitoba, the administrator must distribute the proceeds in accordance with that law. *Re McGregor*, 10 W. L. R. 435.

Policy—*Claim by assignee — Fraudulent representations of assured in application — Sickness at time of application.*]—Action on a life insurance policy, dismissed, on the grounds that insured had made misrepresentations as to other insurance, state of health and cause of death of other members of her family. The insurance was not genuine in favour of insured, but rather obtained so that plaintiff might give same to his creditors as collateral security. *Dupere* v. *London*, 6 E. L. R. 232.

Policy — *Options — Guaranteed cash surrender and loan values — "Years"—Construction of.*]—Riddell, J., *held*, 17 O. W. R. 982, 2 O. W. N. 431, that the word "years" mentioned in tables of guaranteed cash surrender and loan values contained in a policy of life insurance, means complete years.—Divisional Court *held*, that, when a policy holder pays all premiums due on a policy and the sum payable on surrender does not appear on the contract, but may be computed from the table printed upon it, and if the policy holder elects to accept this value before

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it is tendered to him he has lost his legal rights and the contract is then to do what he has elected to be done. Election under mistake probably binding the law. Judgment of Riddell, J., affirmed. *Fountain* v. *Can. Guardian Life Ins. Co.* (1911), 19 O. W. R. 273, 2 O. W. N. 1120.

Policy for 6 months—*Homans plan of level insurance discussed — Changed nature of policy in no way prejudicial — Bona fides on part of company — Costs.*]—Plaintiff, a policy-holder in defendant company on what is known as the Homans plan, by which his assessments increase from year to year during its currency, sued for a rescission of the contract on the ground of fraud or misrepresentation inducing the contract. Middleton, J., *held*, in a Homans plan of insurance, where the schedule in the contracts ceases at 60 years of age, that the right to renewal also ceases, and an action by a policy-holder on the contract will not lie unless he alleges and proves grounds as fraud or misrepresentation. Action dismissed without costs. *Eckersley* v. *Federal Life Assce Co.* (1911), 19 O. W. R. 507, 2 O. W. N. 1274.

Policy in favour of mother—Advance by mother on faith of—Subsequent marriage of insured—Apportionment in favour of wife —Claim by mother as beneficiary for value. *Re Excelsior Life Ins. Co. & De Geer*, 1 O. W. R. 702, 771.

Policy inconsistent with application —*Repayment of premium — Laches.*]—The plaintiff applied to the defendants for insurance at a fixed annual premium for life, but the policy sent to him contained a provision that the premium might be increased. He did not read the policy, and, pursuant to notices from the defendants, paid them seven annual premiums at the original rate. In the eighth year the defendants demanded a larger premium:—*Held*, that the policy, not being in accordance with the application, was a mere counter-proposal, and that there was no contract; that the plaintiff was under no obligation to read the policy, which he was entitled to assume, in the absence of anything done by the company to call his attention to the provision in question, to be in accordance with the application; that he was, therefore, not barred by acquiescence or delay; and that he was entitled to repayment of the premiums with interest; Macdonald, J.A., dissenting. *Mowat* v. *Provident Savings Life Assce. Socy.*, 21 C. L. T. 17, 27 A. R. 675.

Policy on life of one person for benefit of another — Assignment — Death of assured—Claim by administrator. *Bain* v. *Copp*, 1 O. W. R. 706, 784, 804.

Policy payable to assured's surviving children share and share alike—*Variation by will — Provision for division when youngest child attains 21—Substituting children in event of death of children—Right of each child to be paid on attaining majority.*]—Deceased had policies of life insurance payable to surviving children share and share alike. By her will the insurance moneys were to be held in trust to be divided amongst her children *per stirpes* on youngest attaining 21. Grandchildren to take in place of any deceased child. At her death, as the law then stood, there was no provision to take insurance moneys from children to give them to grandchildren:—*Held*, that she could not convert a vested interest into a contingent interest, and that each child on attaining 21 was entitled to be paid his or her share. *Re Dicks*, 13 O. W. R. 645, 18 O. L. R. 657.

Policy payable to beneficiary in case of insured's death within named period—*Death of beneficiary before insured —Conflict of laws—Manitoba Insurance Act, R. S. M. 1902 c. 82, s. 40—Insurable interest in life.*]—A life insurance policy (not coming within the Act respecting Life Insurance for the benefit of Wives and Children, R. S. M. 1902 c. 83) and the money to become due under it belong, the moment it is issued, to the person or persons named in it as the beneficiary or beneficiaries, and there is no power in the insured by any act of his, by deed or by will, to transfer to any other person the interest of the beneficiary, which is a vested right in him or her; and, therefore, when the beneficiary dies before the insured, the right to the money passes over to the personal representatives of the beneficiary to the exclusion of the insured or his personal representatives at his death.—*Central Bank of Washington* v. *Hume*, 128 U. S. R. 195, and Am. & Eng. Encyc. of Law, vol. 3, p. 980, followed.—*Wicksteed* v. *Munro*, 13 A. R. 486, distinguished because based on special Ontario legislation.—A policy may be made payable to a person or beneficiary who is without any insurable interest in the life of the insured.—*North American Life Assurance Co.* v. *Craigen*, 13 S. C. R. 278, followed.—By virtue of s. 40 of the Manitoba Insurance Act, R. S. M. 1902 c. 82, the money payable under a policy of life insurance, issued by a company licensed under the Act, when the insured resides in Manitoba, is payable there, although the policy itself provides for payment at the head office of the company in another province, and in such a case the contract of insurance is subject to the laws of Manitoba, and the money must be distributed in accordance therewith. *Re McGregor*, 18 Man. L. R. 432, 10 W. L. R. 435.

Policy payable to wife—*Wife died—Re-married — Death of insured — Moneys claimed by widow and by children—Right of representation by grandchildren—Who entitled to money?—Costs.*]—Insured in application for life insurance, directed that the money should be payable to Isabella, his wife. She died in 1898. He married again Marilla, who survived him. The moneys were claimed by the surviving children and by the widow, and the infant children of a son, who predeceased insured, claimed to be entitled to the share which their father would have taken had he survived.—Teetzel, J., *held*, that the words "his wife" meant the person who was his wife at the date of the certificate; that the grandchildren were necessarily excluded by the express provision providing only for surviving children; that the moneys should be paid to the children who survived the insured. All costs out of fund. *Re Sons of Scotland Benevolent Assoc. & Davidson* (1910), 17 O. W. R. 300, 2 O. W. N. 200.

Policy payable to wife of assured—*Assignment of policy by insured to creditors in trust for himself and another—Consent of wife by letter to assignee—Wife domiciled in*

Quebec.]—Appeal from judgment dismissed. A life insurance policy was assigned by M. for an advance to B., who held in trust for himself and plaintiff. B. subsequently assigned to defendants:—*Held*, that latter were *bona fide* purchasers for value without notice of plaintiff's claim. At the time of the assignment M. and his wife were domiciled in Quebec, so that the assignment was a nullity. *Crawford* v. *Can. Bank of Commerce*, 13 O. W. R. 957.

Preferred beneficiary — *Widow—Declaration by will — Claims of creditors.*]—Motion by executors under Rule 938 to determine the respective rights of the widow and the creditors of W. F. R. Wrighton, deceased, in regard to the proceeds of two policies of insurance upon his life, aggregating $5,000. The deceased made a will containing this provision: "I devise, give, and bequeath to my dear wife Amelia Wrighton, her heirs and assigns, absolutely, all my real and personal estate and effects of every nature and description whatsoever and wheresoever situate and being, and including therein any and all policy and policies of life and other assurance." In an earlier clause the testator directed his executors to pay his just debts and funeral and testamentary expenses out of his personal estate and cash on hand. The widow contended that she was entitled as a preferred beneficiary to the insurance moneys in question, to the exclusion of any claim thereupon of her late husband's creditors:—*Held*, the contention of the widow could not prevail. The very instrument conferring title upon the widow made that title subject to the payment of the debts of the testator. The insurance moneys were in the gift itself blended with and treated as forming part of the general estate out of which debts were expressly directed to be paid. The testator unmistakably expressed his intention that these insurance moneys should remain part of his general estate available to meet the claims of his creditors. *Re Wrighton*, 4 O. W. R. 261, 25 C. L. T. 44, 8 O. L. R. 630.

Preferred beneficiary—Will—Trust — Estate. *Re Duncombe*, 3 O. L. R. 510, 1 O. W. R. 153.

Premium—*Failure of insured to pay* — Payment by company's agent on insured's behalf — Recovery against insured. *Zwicker* v. *Pearl* (1911), 9 E. L. R. 427, N. S. R.

Premium note — *Contract — Amendment—Infant.*]—Where an infant insured his life and gave a promissory note for the first year's premium, which note, as to amount, and time of payment, did not correspond with the policy issued:—*Held*, that the policy, and not the note, was the contract within the meaning of s. 150 (6) of the Insurance Act, R. S. O. c. 203; and the insurers could not recover upon the note by virtue of that section or otherwise:—*Semble*, that if the insurers were allowed to amend and sue on the policy, they could recover only a small part of the premium, because, by a condition indorsed upon the policy, it became void if the premium was not paid within a month. *Continental Life Ins. Co.* v. *Bowling*, 21 C. L. T. 246.

Premium note — *Non-payment — Forfeiture — Extended insurance.*] — A life policy was issued on the 27th June, 1894, for $5,000, an annual premium of $84.50 being payable on the 20th March in each year. The second premium was paid on the 20th March, 1895, but the third was not paid, the insured giving a promissory note dated 20th March, 1896, at ninety days, the note providing that if it was not paid at maturity the policy should become null and void, but subject, on subsequent payment, to reinstatement under the rules for lapsed policies. Payments on account of the note were made, and in February, 1898, the insured died:—*Held*, in an action by the beneficiary, that the giving of the note was not a payment of the premium such as would entitle the insured to the extended insurance allowed in case three full annual premiums had been paid. *Tilley* v. *Confederation Life Assoc.*, 20 C. L. T. 184, 7 B. C. R. 144.

Presumption of death.]—The material filed satisfied the Court that the presumption of death of the assured had been established, and insurance company was directed to pay amount of policies to claimants. *Re Pilgrim*, 12 O. W. R. 1086.

Presumption of death from absence —Rebuttal. *Roderick* v. *Knights of Maccabees*, 2 O. W. R. 493.

Presumption of death of insured—Ontario Insurance Act, s. 148, sub-s. 3—7 Edw. VII. c. 34—Evidence—Costs. *Re Pilgrim*, 12 O. W. R. 1086.

Presumption of death — *Proof of — Evidence on which presumption will be declared—Statute of Limitations—Ontario Insurance Act.*]—Action by Mary I. Somerville, wife of Wm. J. Somerville, who was insured in defendant company for $6,000, for an order declaring that the said Wm. J. Somerville, who had not been heard from by his family since Dec., 1897, should be deemed to have died, within one year after 20th December, 1899, and for judgment against defendants for $7,055.90 and interest from 1st April, 1907, being amount of policies and premiums paid subsequent to alleged death. Defendants denied due notice and proof of death of the insured. Magee, J., *held*, that judgment should be entered, declaring that Wm. J. Somerville should be, and is, legally presumed to have died before 15th May, 1908, but that the defendant company had not received sufficient proof of his death before the action, and dismissed the action, but without prejudice to another action. *Somerville* v. *Ætna Life Ins. Co.* (1910), 16 O. W. R. 301, 21 O. L. R. 276.

Proceeds of policy — *Payment by instalments—Beneficiary — Vested rights.*]—The insured applied for a policy of $5,000 on his life, payable in the event of his death in fifteen instalments of $333.33 each. Being asked in the application: "In event of death of beneficiaries" (his three daughters) "do you desire that the assurance shall be made payable to your executors, administrators, or assigns?" he answered: "No; make to my two sons." This policy was drawn payable in fifteen annual instalments to the three daughters, or, in the event of their death, to the two sons. The three daughters applied to accelerate the payments and obtain the

whole amount insured forthwith: — *Held*, that it was not desirable to incorporate the somewhat technical and not always satisfactory doctrine as to the vesting of legacies into policies of insurance. The intention of the insured was certainly to eke out the amount insured, so far as possible, by means of annual payments for the benefit of his daughters if alive at the date of payment, and, if not, for the benefit of his sons who might survive the deceased daughters. *Re McKellar*, 21 C. L. T. 381.

Profits — *Beneficiary.*]—The wife of the assured, the beneficiary in a policy of life insurance "with participation in profits," is not entitled to receive the profit in the lifetime of the assured. *Colleret* v. *Ætna Life Ins. Co.*, 3 Que. P. R. 394.

Promissory note for first premium—*Liability on note when policy voided by non-payment.*]—A person who applies for and receives a policy of life insurance and gives his promissory note for the amount of the first premium, payable in three months, cannot, by refusing to pay the note, and returning the policy, avoid liability for the full amount of the note, although the policy becomes void by reason of such non-payment. —*Manufacturers Life Insurance Co.* v. *Gordon*, 20 A. R., *per* Maclennan, J., at p. 325, followed.—*Royal Victoria Life Insurance Co.* v. *Richards*, 31 O. R. 483, distinguished. *Manufacturers Life Ins. Co.* v. *Rouse*, 5 W. L. R. 405, 16 Man. L. R. 540.

Promissory note for premium—Withdrawal of application before acceptance by company — Liability of applicant on note. *Lesperance* v. *Brisson*, 4 E. L. R. 97.

Promissory note given for premium —*Right to recover on, notwithstanding forfeiture—Consideration.*]—An application for a policy of life insurance in the plaintiff company contained the following provision: "In consideration of the acceptance of this application and the expense incurred in connection therewith, I will accept said policy, when issued, and pay the first annual premium thereon, and if any note . . . or renewal or renewals thereof, given for the first or any subsequent premium, or any part thereof, be not paid when due, any policy issued hereunder will cease to be in force without any notice or action on the part of the company, but nevertheless the liability to pay such note . . shall continue and be enforceable, provided the company will revive the policy in its terms, on production of satisfactory evidence of continued good health." A promissory note, given by the defendant, for one-half of the premium on the policy issued by the plaintiff company, was not paid at maturity, and the company notified the plaintiff that the policy was forfeited, and made an entry to that effect on their books. It appearing that, in addition to the consideration mentioned in the application, the defendant had been insured for at least five months:—*Held*, that there was valuable consideration for the note, and that the plaintiffs were entitled to recover upon it. The effect of the words in the application "provided the company will revive," etc., was merely to signify the terms upon which a policy forfeited under the rules of the company could be revived, and formed an agreement on the part of the company independent of the payment of the premium. *Home Life Assoc.* v. *Walsh*, 36 N. S. R. 73.

Promissory note given for premium —*Right to recover on, notwithstanding forfeiture—Consideration—Verdict of jury.*] — Where a promissory note was given to the agent of an insurance company in payment of a first premium on a policy; and a policy was issued and sent to the insured and retained by him, containing provisions to the effect that the insurance should not take effect or be binding until the first premium had been paid to the company or a duly authorised agent; also, that if a promissory note or obligation were given for the premium, and should not be paid at maturity, the policy should not be in force while the default continued, but the party should be liable on the note; the Court refused to set aside a verdict for the agent of the company on the note, on the ground that there was no consideration, holding that the defendant (appellant) was bound to shew affirmatively that the verdict was wrong. *Crawford* v. *Sipprell*, 35 N. B. R. 344.

Promissory note given for premium —*Part payment — Extension of time — Waiver—Assignment of policy—Receipt—Estoppel—Duty to assignee.*]—A condition in a policy of life insurance provided that if any premium, or note given therefor, was not paid when due, the policy should be void. A note given, payable with interest, in payment of a premium, provided that if it were not paid at maturity the policy should forthwith become void. On the maturity of the note, it was partly paid and an extension was granted, and on a part payment being again made a further extension was granted. The last extension was overdue, and the balance on the note was unpaid at the death of the assured. A receipt by the company, given at the time of taking the note, was for the amount of the premium, but at the bottom of the face of the receipt were these words: "Paid by note in terms thereof." While the note was running the policy was assigned for value, with the assent of the company, to the plaintiff, to whom the receipt was delivered by the assured:—*Held*, that the company were estopped by the receipt, and by the extensions of the time for payment to the assured, from setting up against the plaintiff that the policy was void for non-payment of the premium. *Wood* v. *Confederation Life Assoc.*, 35 N. B. R. 512.

Promissory note given to agent for premium — *Authority of agent of life insurance company — Principal and agent—Warranty of authority — Implication.*] — An insurance company sent to an agent commissioned to solicit insurance, printed blanks, or forms, in which was found, among others, the following clause: "If a cheque, draft, or other obligation has been given for the first or some subsequent premium, or part thereof, and if it is not paid on maturity, it is expressly agreed that any assurance or policy made on such application (*sic*) shall become void and shall be annulled, but nevertheless the cheque or the obligation must be paid;" and in the margin of this clause the

question: "What cash premium has been paid to make the assurance, under this application, binding from this date, providing the risk be assumed by the delivery of the company's policy? $?"—*Held*, that the insurance company did not by sending the blanks to the agent afford reasonable ground for the belief that the person thus employed was their mandatory to receive the first premium on an insurance applied for by a client. Therefore, when the latter, in signing his application, gives at the same time his promissory note for the first premium, payable to the agent by name, who negotiates it and appropriates the amount of it, the insurance company incur no responsibility, either as principals, or as warrantors of the act of their officer in the exercise of his functions. *Beaudoin* v. *Charruau & Federal Life Assce. Co.*, 35 Que. S. C. 236.

Right to money payable under policy—*Beneficiary and executors — Interpleader issue—Debtor and creditor—Policy regarded as security for debt.*]—Appeal from the judgment of Drysdale, J., in favour of plaintiff in an interpleader issue as to plaintiff's right to receive and retain money payable under a life insurance policy. *Robinson* v. *Imperial Life Assce. Co.* (N. S. 1910), 9 E. L. R. 164.

Surrender of policy — *Benefit—Loan—Lapse — Restoration — Death of insured — Application by representatives.*] — When a policy of life insurance provides for a benefit to the insured or his representatives upon surrender of the policy, such a surrender means a giving up of the policy with an express or implied consent that it be cancelled. The deposit of the policy in the hands of the insurer for the purposes of a loan will not avail as a surrender under the covenant.—When it is provided in a policy that after the insurance has been maintained for 2 years, if it lapses by non-payment of the premium, and application is made within 6 months thereafter, a benefit will still accrue, at the death of the insured, to his representatives, and if the insured dies and his representatives apply for payment of the insurance within 6 months of the lapse thereof, such an application is sufficient to entitle them to the benefit of the proviso, though not made specifically therefor. *Beaudette* v. *Provident Savings Life Assce. Soc.*, 30 Que. S. C. 160.

Surrender of policy — Inducement — Misstatement of agent — Release — Subsequent repudiation — Fraud. *Hamilton* v. *Mutual Reserve Life Ins. Co.*, 2 O. W. R. 155, 806, 3 O. W. R. 851, 4 O. W. R. 299, 416, 5 O. W. R. 162.

Tender of premium — *Refusal to accept—Necessity for tender of future premiums.*]—In an action by the widow of a man whose life was insured by the defendants for $1,000, upon payment of a monthly premium of $1.34, to recover the amount of the insurance upon proof of his death, the plaintiff alleged that she tendered the monthly premium for January, 1892, but the defendants refused to accept it, or any future premium, unless the insured should be re-examined. He died in June, 1895:—*Held*, upon the evidence at the trial, that the plaintiff had not discharged the burden of proving the tender; but, in any case, one tender would not have been sufficient, the circumstances not being such as to justify a reasonable belief that future tenders would be rejected. *Webb* v. *New York Life Ins. Co.*, 22 C. L. T. 179.

Terms of policy not according to application.] — Defendant applied for a $10,000 policy in an insurance company, giving a note for first premium. When the policy was presented to defendant he found that it was for only $7,452, and otherwise not in accordance with the policy for which he contracted. He sent the company a cheque to cover the time he had retained the policy and repudiated the contract. The company transferred the note to their agent, who brought action to recover the balance:—*Held*, that there had been no consideration given for the note, and that the transferee having notice was in no better position to recover thereon than the company. Action dismissed. *Pearlman* v. *Sutcliffe* (1910), 15 O. W. R. 140.

Transfer of policy—*Gift—Civil Code.*] —The provisions of the Civil Code as to gifts *inter vivos* and their acceptance do not apply to transfers of life insurance policies. *Montreal Coal & Towing Co.* v. *British Empire Mutual Life Assce. Co.*, 5 Que. P. R. 302.

Twenty-year distribution policy — *Guaranteed value—Profits—Agent furnished plaintiff table of, in writing — Profits realized did not equal quotation given in table made by agent — Action to rescind contract and for return of premiums.*]—Plaintiff applied for two policies of insurance for $1,000 each, after which defendants' agent supplied him with a table shewing guaranteed values and estimated profits, together with options available at end of 20 years. Plaintiff paid his premiums for 20 years, but the policies did not produce the amount of the reserve and profits as set out in the table furnished by the agent. Plaintiff brought action to enforce his contracts, but later amended and asked for rescission of the contract with a return of premiums paid with interest. Latchford, J. (17 O. W. R. 33, 2 O. W. N. 89), *held*, that the contracts were entered into under the representations made by the agent, and plaintiff was entitled to have them rescinded and premiums with interest returned and costs of action. Court of Appeal, *held*, that there were no misrepresentations made to plaintiff which induced him to enter into the contract. Appeal allowed. *Shaw* v. *Mutual Life Ins. Co.* (1911), 18 O. W. R. 925, 2 O. W. N. 967.

Unmatured policy — *Present value of reversion—Mode of calculating — Statute—Amendment—Declaration as to former law.*] —The ascertainment of the present value of the reversion in the sum assured by the policy at the decease of the life insured, as directed by the judgment in 21 C. L. T. 252, 1 O. L. R. 256, is a matter of simple calculation from the ordinary life insurance tables; the premium actually paid by the insured has nothing to do with the calculation. The statute 1 Edw. VII. c. 21 (O.), assented to on the 15th April, 1901, altering the manner of valuing unmatured policies, and enacting that the alterations declared the law of the pro-

vince as it existed on the 14th April, 1892, did not affect the rights of the claimants under their policies, because those rights had been declared (by the judgment referred to above) before the Act was passed, and judgments are not re-opened even by such legislation. *Re Merchants' Life Assn. of Toronto, Vernon's Claims*, 22 C. L. T. 19, 2 O. L. R. 682.

See, also, S. C. (Master in Ordinary), 22 C. L. T. 65.

Unmatured policy—Mode of calculating present value of reversion. *Re Merchants' Life Assoc., Vernon's Claims*, 7 O. W. R. 631.

Validity of policy—Lien against transferred policy—Acceptance of premiums—Evidence of contract — Foreign companies — License to do business in Canada. *Spooner v. Mutual Reserve Fund Life Assoc.*, 1 O. W. R. 566, 583, 2 O. W. R. 363.

Varying apportionment — *Postponing payment till after full age—Ineffective provision—Will.*]—By her will a testatrix assumed to reapportion her insurance, reducing the interest of a "preferred beneficiary" from $500 to $250, and further directed that he should not be paid his share till the age of 25. At the age of 21, however, he claimed the right to immediate payment: — *Held*, that, even if s. 160 of the Insurance Act as to altering or varying apportionments of insurance moneys authorised such attempted postponement of payment, the provision was ineffective, for all persons who attain 21 are entitled to enter upon the absolute enjoyment of property given to them by will, notwithstanding any direction by the testator to the contrary, unless between 21 and the specified later age the property is given for the benefit of another, or so clearly taken away from the legatees up to the time of their attaining such greater age as to constitute an intestacy as to the previous rents and profits; and it is impossible to distinguish between such a provision in regard to insurance and a like provision in regard to personal property bequeathed by will. *Re Canadian Order of Home Circles & Smith*, 9 O. W. R. 738, 14 O. L. R. 322.

Wager policy — *Endowment — Action for cancellation—Return of premiums.*]—If the beneficiary of a life insurance policy has no interest in the life of the insured, has effected the insurance for his own benefit, and pays all the premiums himself, the policy is a wagering policy and void under 14 Geo. III. c. 48, s. 1 (Imp.). The Act applies to an endowment as well as to an all life policy. Judgment of the Court of Appeal, 2 O. L. R. 553, 21 C. L. T. 357, affirmed. In an action by the company for cancellation of the policy under the Act, a return of the premiums paid will not be made a condition of obtaining cancellation. Judgment of the Court of Appeal reversed. *North American Life Assce. Co. v. Brophy*, 22 C. L. T. 250, 32 S. C. R. 261.

Wagering policy — *Invalidity—Applications — Misstatements in — Preparation by agent — Adoption — Avoidance of policy.*]—A contract of insurance of the life of a person who makes application for it without the intention of benefiting by it himself or of fulfilling the obligations of an assured, but with the object of speculating by transferring the policy to a third person, is void. —An assured who signs the application for insurance, prepared or drawn up by the agent of the insurer, makes the agent his agent for the purposes of the application. Therefore, he is liable for misstatements and false declarations which it contains, involving the avoidance of the policy. *Lamothe v. North American Life Assce. Co.*, 16 Que. K. B. 178.

War risk — *Extra premium — Special condition — Waiver — Consideration.*] — Policies on the lives of members of the fourth contingent for the war in South Africa were issued and accepted on condition of payment in each case of an extra annual premium "whenever and as long as the occupation of the assured shall be that of soldier in the army of Great Britain in time of war." Each policy also provided that "the assured has hereby consented to engage in military service in South Africa in the army of Great Britain, any restriction in the policy contract to the contrary notwithstanding." The restrictions were against engaging in naval or military service without a permit and travelling or residing in any part of the torrid zone. The contingent arrived at South Africa after hostilities ceased, and an action was brought against the company for return of the extra premium, on the ground that the insured had never been soldiers of the army of Great Britain in time of war:— *Held*, Davies, J., dissenting, that the risk taken by the company of the war continuing for a long time and the insurance remaining in force so long as the annual premiums were paid, was a sufficient consideration for the extra premiums, and it could not be recovered back:—*Held*, also, that the permission to engage in war in South Africa was a waiver of the restriction against travelling in the torrid zone. Judgment in 14 Que. K. B. 8, reversed. *Provident Savings Life Society v. Bellew*, 24 C. L. T. 391, 35 S. C. R. 25.

Widow — *Marriage contract — Child of former marriage.*]—The benefits accorded by a benefit society to the widow of one of its members, who was at liberty to dispose of such benefits by will, gift, or otherwise, and did not do so, are not incompatible with a clause in the marriage contract by which the wife renounced all matrimonial advantages; and the widow is entitled to such benefits to the exclusion of the children of the deceased, even where the latter, at the time he became a member of the society, was married to a former wife by whom he had children living at the time of his decease. *Dauphinais v. Bousquet*, 2 Que. P. R. 414.

Wife of assured designated as sole beneficiary — Death of wife during lifetime of assured—Failure to make new designation—Children entitled in equal shares. *Re Henderson & C. O. O. F.*, 8 O. W. R. 117.

Will — *Bequest of proceeds of policy on testator's life — Existence of several policies answering description — Insurance Act — Preferred beneficiaries — Designation —*

Identification by number or otherwise.]—A testator by his will bequeathed all his estate to his wife, subject to payment of his debts and four legacies of $50,000 each to his four children. The will also contained the following provision: "I also bequeath to each of the above named children one-quarter of the proceeds from a 5 per cent. gold bond policy issued by the Travellers of Hartford, Conn." The testator had four such policies, bearing the same date and in identical terms, in the Travellers Insurance Company of Hartford, each for $25,000. Evidence was tendered to shew that the testator regarded the insurance as one contract for $100,000:—*Held*, that, even if such evidence were admissible, the bequest must be regarded as a gift of a single policy:—*Held*, also, that a bequest of one of four policies, any one of which may be selected to answer the bequest, is not such a designation, even in favour of preferred beneficiaries, as meets the requirement of the Insurance Act, R. S. O. 1897, c. 203, s. 159, that in a designation by will the policy shall be identified "by number or otherwise." *MacLaren* v. *MacLaren*, 10 O. W. R. 835, 15 O. L. R. 142.

Will — Fund for payment of legacies — Life Insurance Act, 5 Edw. VII. c. 4—Reapportionment — Election — General estate. *Boyne* v. *Boyne*, 5 E. L. R. 84.

Will — *Life Insurance Act, 5 Edw. VII. c. 4 — Re-apportionment — Election — Bequest in nature of specific legacy.*]—B. died in 1907, having made a will in 1905, by which he left, among other legacies, one for $1,100 to his wife, the defendant in this suit. B. had insured his life some years previous to 1905 for $1,500, the policy being made payable to his wife. In his will B. created a fund for the payment of the several legacies, and included as part of this fund the policy for $1,500 above mentioned:—*Held*, that this provision in the will did not operate as a re-apportionment of the insurance money as regards this policy for $1,500, under the New Brunswick Life Insurance Act, 5 Edw. VII. c. 4, s. 13; and that the proceeds of the same were payable to the defendant as sole beneficiary thereunder. — *Held*, that the widow was not bound to make an election, and that she was entitled to be paid the legacy for $1,100.—*Held*, that in case the fund created by the will was insufficient, the specific legatees were entitled to rank for any unpaid balance upon the general estate. *Boyne* v. *Boyne*, 4 N. B. Eq. 48, 5 E. L. R. 84.

Winding-up of company — *Distribution of deposits and trust assets—Dominion Winding-up Act—Dominion Insurance Act—Ontario Insurance Act — Rights of policyholders and beneficiaries—Preferred class — Payment into Court—Payment on death of assured.*]—Where an order has been made for the winding-up of a life insurance company under the Dominion Winding-up Act, and the deposits of the company held by the Minister of Finance and the assets held by trustees under the Dominion Insurance Act were in the hands of the liquidator and were being distributed by him, a question arose as to whether payment should be made, under policies issued by the company, to the assured or to the beneficiaries:—*Held*, that the intention of the Insurance Act is to provide funds to meet the claims of persons who were resident in Canada at the time the contract with the company was made, and that, both under that Act and the Winding-up Act, the provisions for the distribution of the fund are directed entirely to questions arising as between the company and the assured and between the Canadian policy-holders themselves; there is no interference with rights which may have been acquired by third persons against policy-holders; and the liquidator is bound to take notice of assignments of the policies in respect of which he is making a distribution of the fund, and also of declarations in favour of preferred beneficiaries.—Under the Ontario Insurance Act, the assured may make changes in the members of the class of preferred beneficiaries who are to take; the right of any beneficiary is not absolute until he shall have survived the assured; and the mere accident that moneys become payable in respect of the policy in the lifetime of the assured, while it does not impair, does not accelerate, the right of the beneficiaries.—In this case the moneys payable in respect of a policy were ordered to be paid into Court, there to be subject to control of the assured as of a trust fund created under s. 159 of the Ontario Insurance Act; and, subject thereto, to be paid out, on the death of the assured, to the named beneficiaries then surviving. *Re Mutual Life Assoc., Wellington's Claim*, 18 O. L. R. 413, 13 O. W. R. 1109.

Withdrawal of application—*Promissory note for premium—Failure of consideration.*]—The defendants signed an application to the Mutual Life Insurance Company of New York for insurance on the lives of S. F., R. F., E. F., and G. H. W., members and directors of the defendant company. When the application was given, the plaintiff, the agent of the company, took from the defendants their promissory note, payable to his own order, for the amount of the premium, and gave the defendants a receipt on one of the company's forms which contained this provision: "The insurance so applied for shall be in force from this date, provided that the said application shall be accepted and approved by the said company at its head office in the city of New York, and a policy thereon duly issued. In case the application is not so accepted and approved and no policy is issued, or should the applicant receive no notification from the company, within 30 days from the date of this receipt, of any application, then in every such case no insurance shall be effected, and it shall be understood and agreed that the company declines the risk, whereupon all moneys paid hereunder shall be returned on the delivery of this receipt." The plaintiff discounted the note and placed the amount to his own credit, and paid the amount of the premiums, less his commission, to his principals after the note was discounted, but before the application was accepted the defendants notified the plaintiff and his principals at their head office in New York that they withdrew the application:—*Held*, in an action on the note by the agent, that the application was a mere proposal for insurance and might be withdrawn at any time before acceptance; that the consideration for the note having failed, the defendants were not liable in an action by the payee. *Johnson* v. *G. and G. Flewelling Mfg. Co.*, 36 N. B. R. 397.

9. Live Stock Insurance.

Animal not in good health when contract made — *Premium paid only in part — Application to the other of two animals insured—County Court—Territorial jurisdiction — Cause of action.*]—In an action in the County Court of Victoria upon a policy of insurance of live stock, it appeared that the defendants' head office was at Vancouver, but that the plaintiff lived at Victoria, where he signed the application, paid a part of the premium, and received the policy; there was nothing in the policy to indicate that payment should be made at any place other than that at which the plaintiff lived:—*Held*, that the cause of action arose at least partly in Victoria (County Courts Act, s. 57), and the County Court of Victoria had jurisdiction.—By the terms of the policy it was to come into force at noon on the 18th July. According to the application, which was a part of the contract, the stock must be in perfect health and condition at the time the contract takes effect:—*Held*, on the evidence, that one of the two horses insured (the one that first died), was, before noon on the 18th July, inoculated with the disease from which it died, although the symptoms were not noticed till the following day; and, therefore, the plaintiff was not entitled to recover in respect to this horse.—The plaintiff paid only half of the premium in cash, and made a promissory note in favour of the agent for the other half. In the application it was stated that the premium was to be paid in cash, and the defendants did not in fact know until after both horses were dead that it had not all been paid in cash. The defendants said that the policy was never in force:—*Held*, that, as there never was any risk as to the horse which died first, payment of half the premium brought the policy into force in respect to the other; and the plaintiff was entitled to recover in respect to that horse. *Demal* v. *Br. Am. Live Stock Assoc.* (1910), 14 W. L. R. 250.

10. Marine.

Action by receiver of company in liquidation for premiums — Promissory note —Defendant's liability for unearned portion of premiums—Fraud — Insolvency — Jury notice—Defence — Setting aside — Costs. *China Mutual Ins. Co.* v. *Pickles* (N.S. 1910), 9 E. L. R. 269.

Action by underwriters in their own name — Defence of indemnity by receipts of insurance—Pleading. *Northern Elevator Co.* v. *Richelieu & Ontario Navigation Co.*, 3 E. L. R. 311.

Assurance broker — *Change in policy —Authorisation — Deviation — Custom — Necessity.*]—When an insurance company has insured a cargo for a voyage from Montreal to New Carlyle, and the assurance broker has of his own motion changed the description of such voyage by adding to it the words "and to Bonaventure River," which was the voyage the ship was to make, the contract of insurance is void *ab initio*, even when the loss takes place between Montreal and New Carlyle, the insurance broker not being able to change the description of the voyage without a special authorisation, and the parties not being agreed upon a port of destination. Judgment in Q. R. 15 S. C. 469 affirmed on this point. When a cargo is insured for a voyage described as "from Montreal to New Carlyle and Bonaventure River," without indication that the ship will touch at intermediate ports, the fact that the ship is delayed at Levis for six or seven hours, and for four days and six hours at St. Michel de Bellechasse, constitutes a deviation and vitiates the contract of assurance. Judgment in Q. R. 15 S. C. 476 reversed on this point. In order that custom or necessity may be invoked as authorising such delay, the custom must be universally recognised or at least notorious enough to be known to the assurers, and the necessity must be such as could not be foreseen before the departure of the vessel; and in this case no such custom or necessity was proved. *Mandelin Ins. Co.* v. *Atlantic & Lake Superior Ry. Co.*, Q. R. 21 S. C. 200.

Cargo — *Total loss of vessel — Constructive total loss of vessel—Civil Code of Lower Canada, s. 2522.*]—A cargo of cement shipped by barge was insured against total loss "by total loss of the vessel." During the voyage the barge struck against a snag, in consequence of which a hole was knocked in her bow. She settled down and about 70 feet of her deck was submerged. The cement was completely destroyed as cement:—*Held*, that there had been, within the meaning of the policy, a total loss of the cargo insured, notwithstanding that the barge might be afterwards floated and repaired.—Decision of the Supreme Court of Canada, 41 S. C. R. 639, reversed. *Montreal Light, Heat & Power Co.* v. *Sedgwick* (1910), 30 C. L. T. 821.

Condition to sail not later than 15th December — *Underwriters not liable if vessel sails on 17th December, though lost outside prohibited waters.*]—By a policy dated 4th April, defendants insured plaintiff's ship for ten months, with liberty to sail from Charlottetown not later than 15th December. Except this liberty to sail from Charlottetown not later than 15th December, the vessel was not allowed, under the policy, to be in the Gulf of St. Lawrence after 15th November, without payment of additional premium and leave first obtained, which was not done. The ship did not sail from Charlottetown until 17th December, but passed safely out of the Gulf of St. Lawrence, and was subsequently lost during the voyage on the English coast:—*Held*, Peters, J., that the contract was to insure the vessel on condition that she sailed from Charlottetown not later than 15th December, that time was of the essence of the contract and that the condition was not performed, and, therefore, the plaintiff could not recover. *Duncan & Co.* v. *Brit. Am. Ins. Co.* (1871), 1 P. E. I. R. 379.

Contract made by Montreal company, through its agent, at Quebec, is completed in the latter city if such agent is authorised to close the risk, the policy being delivered to defendant at Quebec and paid by a cheque to the order of said agent. *Tanguay* v. *Dale* (1910), Que. P. R. 245.

Goods ordered to be "shipped and insured" — *Placed on deck where policy*

would not cover them—Purchaser not liable for price of goods lost.]—Large ordered plaintiff to "insure and ship him" certain goods by first vessel. On the trial it appeared that plaintiff sent the goods to the wharf and caused them to be insured by a policy which only covered goods if shipped under deck. The goods were placed without plaintiff's knowledge, on deck, and on the voyage were lost. Large refused to pay for them on the ground that they had not been "shipped and insured" as ordered. The Judge told the jury the order was one transaction, though consisting of two parts, viz., to ship, and to insure, and that the plaintiff must shew he both shipped and insured the goods so as to cover them where they were, viz., on the deck, and not having done so there was no insurance and plaintiff was not entitled to recover. The jury found for defendant. The plaintiff now moved to set aside the verdict and for a new trial on the ground of misdirection:—*Held*, Hensley, J., Peters, J., concurring, that the direction was right. *Room* v. *Large* (1870), 1 P. E. I. R. 310.

Partial loss — *Abandonment* — *New trial.*]—Plaintiffs shipped a cargo of fish to the West Indies, but the vessel was caught in the ice and remained there all winter, whereby the cargo was damaged. She got into Halifax in May, and the owners gave the underwriters notice of abandonment, and the captain sold the cargo for the benefit of all concerned, and the plaintiff claimed for a constructive loss. The fish were re-dried and repacked by the purchaser and shipped to the West Indies, and, though discoloured, were not much injured. The jury found a total loss, and defendants moved to set the verdict aside and for a new trial, on the ground that the evidence shewed there was only a partial loss:—*Held*, Peters, J., Hodgson, C.J., and Hensley, J., concurring, that the finding of the jury was wrong, the loss being partial and not total, and that there must be a new trial. *Heard & Hall* v. *P. E. I. Marine Ins. C.* (1871), 1 P. E. I. R. 381.

Policy on freight — *Constructive total loss — Frustration of object of voyage by peril insured against.*]—Plaintiff's steamer, while on a voyage from Halifax to Havana with a cargo of fish and potatoes, was disabled by the breaking of her shaft, and was towed into Hamilton, Bermuda. It was found impossible to repair the ship in time to enable her to carry the cargo forward, and, at the request of the shippers, the cargo was returned to them and brought back to Halifax. The ship was sold and towed to Philadelphia, where she was repaired. Plaintiff brought action against the defendant company to recover the amount insured upon freight to be earned. The jury found, in answer to questions submitted to them, that the ship could not have been repaired at Bermuda in time to have carried the cargo forward to Havana, without material deterioration of the cargo, or its becoming worthless, and that the shaft was broken by perils of the sea:—*Held*, that plaintiff was entitled to recover, the cargo being one that required to be carried forward to its destination without delay, and the object of the voyage having been wholly frustrated by a peril insured against.—*Held*, also, the venture having been made of no effect by a peril insured against, that there was a constructive total loss of the freight. *Musgrave* v. *Mannheim Insurance Co.*, 32 N. S. R. 405.

Prohibited waters — *Breach of warranty avoiding policy — Time — Port.*]—A policy of insurance issued by the defendants on the plaintiffs' steamer "Richard" covered the steamer for the period of one year, from the 6th July, 1905, to the 6th July, 1906. By a clause in the policy, the steamer was prohibited from using certain waters, including Cape Breton, between the 1st December and the 1st May, but, by a clause written in on the face of the policy, permission was given to use Cape Breton ports until the 1st January, 1906. The steamer left Halifax in ballast on the 31st December, 1905, for Port Hastings, in the island of Cape Breton, and arrived there on the 1st January, 1906. She took in a cargo of coal on the 2nd January, and left for Yarmouth on the 3rd, having been prevented from leaving sooner:—*Held*, that the use of the Cape Breton port after the 1st January was a breach of a plain term in the policy, and a breach of warranty that avoided the policy. *Richard S. S. Co.* v. *China Mutual Insurance Co.*, 42 N. S. R. 240, 4 E. L. R. 269.

Prohibited waters — Making port for shelter — Breach of warranty — Waiver — Estopped. *Hackett* v. *China Mutual Insurance Co.*, 4 E. L. R. 103.

Re-insurance — *Salvage — "Special charges" — Contribution — Constructive total loss.*]—The plaintiffs, having insured a large number of cattle and sheep, for the voyage from Montreal to Manchester, re-insured part of the risk with the defendants—the re-insurance policy or certificate containing the following clause: — "Insured against absolute total loss of vessel and animals, but to pay general average, and special charges." The ship carrying the animals struck a reef, and was finally abandoned three weeks later. In the meantime part of the animals had been landed on an island, whence they were carried to Halifax and other places. The amount payable for salvage of the live stock so transported was fixed at one-third of the gross proceeds of the sale thereof. A large sum was also paid for maintenance of the animals and other expenses until they were sold. The insured then assigned all right in the live stock to the plaintiffs, and were paid as for a constructive total loss. The plaintiffs alleged that all the expenditure for salvage, transportation, and maintenance of the animals, constituted "special charges," within the meaning of the re-insurance policy, and sued the defendants for their proportion of the amount:—*Held*, that the term "special charges" is equivalent to "particular charges" and includes expenses for salvage, preservation, and sale of the object insured. The word "special" merely distinguishes an expense incurred in a particular interest from an expense incurred in the general interest, which latter gives rise to general average contribution. Special charges cover all expenses occasioned by a peril insured against, when they have been necessarily incurred in consequence of such peril.—2. The fact that the plaintiff had paid the principal insured as for a total loss, and the circumstance that the defendants may not have been interested in incurring all or any of the charges, did not relieve the de-

fendants from liability for contribution to such charges. *Western Assce. Co.* v. *Baden Marine Assce. Co.*, 22 Que. S. C. 374.

Shipwreck — *Abandonment — Refusal to accept — Acceptance by conduct — Powers of master — Arrival of owner's agent — Misdirection — Waiver — Evidence — Understanding of witness — Special jury — Demeanour of witnesses — Services of crew and of agent.*]—The plaintiff's vessel having put into port damaged, notice of abandonment was given to the insurers, all of whom declined to accept. By direction of the agent for the insurers, the cargo was taken out and stored, and the vessel repaired, after which a portion was reloaded, when it was discovered that the vessel was leaking. The cost of repairs up to this time was over $4,000, and the vessel was valued at only $5,000. The persons who had made the repairs, in order to preserve their lien, refused to allow the cargo to be taken out a second time, and, in default of payment, took proceedings against the ship and cargo, under which they were finally sold:—*Held*, that the refusal to accept the abandonment did not prevent the working of an acceptance, and what was done constituted an acceptance of the abandonment, or, if not an abandonment, such a wrongful conversion of the ship as would preclude the insurers from setting up non-acceptance. 2. That the direction to the jury that the powers of the master in case of shipwreck were displaced upon the arrival of the owner, or of an agent having express authority to represent him, was right. 3. That misdirection as to the particular agent who waived proofs of loss was immaterial, if there was an acceptance of the abandonment. 4. That a mistake of the trial Judge as to a matter of fact about which there was no dispute was not ground for a new trial unless it was shewn that his attention had been directed to the mistake. 5. That under Order 37, Rule 6, the misdirection must have been such as to have occasioned some substantial wrong or miscarriage. 6. That evidence of a witness as to what he understood or did not understand generally was properly rejected, where the memory of the witness appeared to be defective as to conversations. 7. That where the underwriter was wrongfully interfering with the control of the ship, the insured might elect at the last moment to hold that the underwriter had accepted the abandonment. 8. That if the renewal of the notice of abandonment, when the project of the insurers to repair failed, did not conclude the matter, the vessel was lost to the insured by the sale. 9. That the Court, even if dissatisfied with the verdict, especially after a second trial, will defer to the opinion of a special jury of men peculiarly able to understand the subject matter. 10. That where such jurors were furnished with a shorthand report of the evidence of witnesses on a former trial, it was not important that they did not have an opportunity of observing the demeanour of the witnesses. 11. That the amount claimed by the plaintiff for services of the master and crew, while the vessel was in the hands of the underwriters, did not come within the "sue and labour" clause, and was not recoverable; nor was an amount sought for services of the plaintiff's special agent, who was acting adversely to the underwriters. *McLeod* v. *Ins. Co. of North America*, 34 N. S. R. 88.

Total loss of cargo—*Constructive total loss of vessel—C. C. Art. 2522.*]—The plaintiff shipped on a barge a cargo of cement on which they effected an insurance with the defendants against loss "by total loss of the vessel." The vessel was wrecked and the cargo totally destroyed as cement.—Privy Council, *held*, that the defendants were liable on the policy, although the jury had not found in so many words that the barge was a total loss, as the insurance was on the cargo, and it was not a matter for decision whether or not the barge was a constructive total loss within the meaning of C. C. Art. 2522, which defines the "absolute or constructive" loss of "the thing insured."—Judgment of the Supreme Court of Canada, 41 S. C. R. 639, reversed; judgment of the Superior Court of Quebec, 34 Que. S. C. 127 and Hutchinson J., at trial affirmed. *Montreal L. H. & P. Co.* v. *Sedgwick*, C. R. [1910] A. C. 485.

Voyage partly accomplished—*Freight pro rata—Salvage.*]—The vessel in this case was owned by Heard, and the cargo by Heard and Hall jointly. The cargo was insured from Charlottetown to Cuba. The vessel and cargo having received sea damage put into Halifax where the master sold the cargo for the benefit of all concerned, and the proceeds of sale were received by plaintiffs, who, under the head of salvage, claimed to retain therefrom freight *pro rata* to Halifax. The jury found damages for plaintiffs to the full amount of their claim, and defendants moved to reduce the amount of damages found. The question was whether the owners of the goods on adjustment could make this salvage charge against the underwriters:—*Held*, Peters, J., Hensley, J., concurring, that the owners could not charge the underwriters, and that the damages must be reduced. *Heard & Hall* v. *Marine Ins. Co.* (1873), 1 P. E. I. R. 428.

"When clear of the ice," meaning of — *Policy differing from application — Mistake — New trial — Construction of policy.*]—Plaintiff had filled up a slip for insurance on a vessel from Charlottetown to Hawkesbury, C.B., and swore that the defendant's agent, N., agreed to the terms mentioned in the slip, and that he then left it with N., who, after plaintiff left the office, added to it the words, "when clear of the ice," and a few hours later gave a policy containing those words to plaintiff, who put it away without examination. The vessel was driven on shore and run over by ice that night. N. denied having agreed to insure without the condition, or that he accepted the slip filled up by plaintiff as the contract; on the contrary he said he had refused to accept it without the condition as to ice, and that he filled in the words "when clear of the ice" in the slip as a guide to his clerk in making out the policy. Plaintiff brought his action on the policy and on the agreement alleged to be contained in the slip. On the latter point the jury found for defendant but found for plaintiff on the policy, and defendants took out a rule for a new trial:—*Held* (Peters, J., Palmer, C.J., and Hensley, J., concurring), making the rule absolute, that the agreement in the slip (if any), was for insurance and not one of insurance.—2. That the words, "when clear of the ice" in this policy meant that the vessel must arrive at some point on her voyage, where and from which the ordinary risks of the

voyage would not be sensibly increased by ice. *Hyndman* v. *Montreal Ins. Co.* (1876), 2 P. E. I. R. 132.

See SHIP.

11. PLATE GLASS.

See NEGLIGENCE.

12. SPRINKLER LEAKAGE INSURANCE.

Policy — *Construction — Exception — Damage from leakage or discharge — Injury from frost — Application—Interim receipt.*] A policy of insurance covered loss by leakage or discharge from a sprinkler system for protection against fire, but provided that it would not cover injury resulting, *inter alia*, from freezing. The water in a pipe connected with the system froze, and, the pipe having burst, damage was caused by the consequent escape of water:—*Held*, affirming the judgment of the Court of Appeal, *Boulter* v. *Canadian Casualty and Boiler Insurance Co.*, *Hawthorne* v. *Canadian Casualty and Boiler Insurance Co.*, 9 O. W. R. 809, 816, 14 O. L. R. 166, Davies, J., dissenting, that the damage did not result from freezing and the insured could recover on the policy.—In the Hawthorne case the majority of the Court dismissed the appeal on the same grounds. The policy in that case was sent to the brokers who had applied for it on behalf of the assured shortly before, and the latter did not see it until the loss occurred:—*Held*, *per* Davies, J., that the contract of insurance was not contained in the policy, which the assured had no opportunity to accept, but in what took place between the brokers and the agent of the insurers on applying for it, and, as the latter informed the brokers that damage by frost was insured against, the insured could recover. *Can. Casualty & Boiler Ins. Co.* v. *Boulter*, *Can. Casualty & Boiler Ins. Co.* v. *Hawthorne*, 39 S. C. R. 558.

INTERCOLONIAL RAILWAY.

See CROWN.

INTERDICTION.

Action against — *Parties — Curator—Amendment.*] — Interdiction for prodigality renders the interdict incapable of administering his estate, or of being lawfully served with or of lawfully appearing in judicial proceedings. 2. Where a writ has issued against an interdict for prodigality instead of against his curator, the defect cannot be cured by adding his curator as a defendant. *Greene* v. *Mapin*, Man. L. R. 5 Q. B. 108, followed. *Leroux* v. *De Beaujeu*, 20 Que. S. C. 235, 4 Que. P. R. 35.

Action by — *Husband and wife—Family council—Curator.*]—If a woman, interdicted for drunkenness, wishes to bring an action for separation from bed and board, against her husband and curator, and the grounds stated in the petition are sufficient to justify such an action, the Court will order that a family council be held to advise as to the appointment of a curator *ad hoc*. *Clermont* v. *Charest*, 4 Que. P. R. 427.

Action to set aside — *Fraud — Time-limit — New domicil — Pleading — Res gestæ.*]—The claim in an action to set aside an interdiction on the ground that it was obtained by fraudulent practices and without regular service upon the interdict (plaintiff in the cause), is not subject to the prescription of six months provided by Art. 1178, C. C.—Although a judgment of interdiction cannot be set aside by the subsequent acquisition by the interdict of a new domicil by residence abroad, that circumstance may, nevertheless, be properly alleged in the action to set aside the interdiction, as forming part *rerum gestarum*. *Cantlie* v. *Cantlie*, 15 Que. K. B. 530.

Curator—*Account.*]—The curator to an interdict may be ordered, upon petition to that effect, to produce a summary account of his administration, certified by him, containing and setting forth the date, amount, and character of each loan made on behalf of the interdict, the time at which it is payable, the security held therefor, and the name and residence of the borrower; also the several deposits made on his behalf, and the name and residence of the persons or institutions with whom they are made. *Cardinal* v. *Cardinal*, 7 Que. P. R. 153.

Curator — *Removal — Pension—Family council.*]—The curator of a person interdicted for habitual drunkenness has power to sue for an alimentary pension due to the interdict, and his refusal to do so when the interdict is in absolute need of the pension, is a ground for removing him from the curatorship. 2. The advice of a family council as to the expediency of removing the curator is useless where the council was not represented when evidence was given upon the demand for removal, or where such evidence was not communicated to the council. *Gagnon* v. *Gauthier*, 22 Que. S. C. 310.

Curator — *Solvency — Security — Breach of trust—Neglect to invest moneys —Removal.*] — A curator who becomes indebted in a sum of money to the interdict committed to his care, is bound, under Arts. 295 and 981*o*, C. C., to invest it in the same manner as all capital sums which are paid into his hands, and failure to do so, within the prescribed delay, amounts to the breach of duty (*infidélité*) which, under Art. 285, renders him liable to removal from office. The Court, upon suit brought for that purpose, may order him to make the investment within a fixed delay, reserving further adjudication in case of his failure to do so. Judgment in 33 Que. S. C. 198 reversed. *Prudhomme* v. *Beaulieu*, 18 Que. K. B. 97.

Curator — *Solvency—Security—Breach of trust—Neglect to invest moneys — Removal.*]—Where the curator of an interdict is solvent, and is the owner of sufficient immovable property charged with a legal hypothec in favour of the interdict by the regis-

tration of the letters of guardianship, his omission, for six months or more, to invest a sum of money, a part of the capital of the interdict, does not shew such incapacity or breach of trust in his management of the estate as to warrant his removal. *Prudhomme* v. *Beaulieu*, 33 Que. S. C. 198.

Curator ad hoc — *Family council.*] — Where it appears that an interdict has matters to litigate with his curator he is entitled to have a curator *ad hoc* appointed to him for the purpose of such litigation, and the Judge ought to reject the advice of the family council not to name a curator *ad hoc* to the interdict. *Cantlie* v. *Cantlie*, 7 Que. P. R. 193.

Drunkard — *Family council — Judicial proceeding — Privilege.*]—The advice given by a family council on a petition for interdiction for habitual drunkenness, is a judicial proceeding, and the occasion is privileged, so that no liability for their statements can be incurred by those taking part in it. *Coulter* v. *St. Denis*, 30 Que. S. C. 340.

Drunkenness — *Removal of interdiction — Period of sobriety — Petition.*]—A person interdicted for drunkenness cannot be relieved of the interdiction until after a year of habitual sobriety.—A petition to remove an interdiction for drunkenness must allege that the interdict has been habitually sober for a year. *Morency* v. *Gleason*, 9 Que. P. R. 230.

Imbecility — *Judgment of interdiction — Review — Formal objections — Grounds for interdiction — Examination before Judge — Opinion of Judge — Expert witnesses.*]—1. An interdiction pronounced out of Court cannot be reviewed on the ground of defects of form which do not import an absolute nullity and which were not sufficient to prevent the Judge being fully seised of the cause.—2. Mental weakening, not amounting to lunacy or dementia, the decay of the faculties to the point of rendering one who is thus injured incapable of taking care of himself and his affairs, is a cause of interdiction.—3. It is the office of the Judge to pass upon the facts; and the examination that he makes of the person sought to be interdicted, the bearing, the actions, etc., of the latter in the course of this examination, are of a value and of an importance more considerable than the opinions of witnesses, even specialists, whom he allows the parties to call, without being bound to do so. Judgment in 34 Que. S. C. 62 affirmed. *Gingras* v. *Richard*, 18 Que. K. B. 154.

Intoxicating liquors — *Excessive use — Husband and wife.*]—A husband has the right and it is his duty to apply for an interdiction (Art. 336 (a), C. C.), against his wife who is addicted to the excessive use of intoxicating liquors. *Archambault* v. *Camiraud*, 27 Que. S. C. 30.

Mania for spending money — *Purchase on credit — Necessaries — Loss of records of Court.*]—Where a person to whom a judicial adviser has been apointed because of her mania for spending money, and with a prohibition against incurring any debts, buys, on credit, the creditor must prove that the goods sold were necessary and useful before he can recover: — *Quare*, when the records of Court are burnt (*force majeure*), is it necessary to re-inscribe the name on a new list of interdicts? *Borbridge* v. *Eddy*, 26 Que. S. C. 81.

Procedure — *Dismissal of petition — Appeal to Superior Court in review — Conseil judiciaire — Signature of petition by notary — Pleading — Specific allegations — Service — Notary delegated to summon family council — Examination of witnesses.*] — Since the promulgation of the Code of Civil Procedure of 1897, the order of a Judge dismissing a demand for interdiction or for the nomination of a *conseil judiciaire*, is, by the combined effect of Arts. 72 and 52 (2), the subject of an appeal to or review by the Superior Court.—Notaries have a status to sign, as attorneys for the petitioners, demands for the appointment of *conseils judiciaires*.—A petition for the appointment of a *conseil judiciaire* to a prodigal, which is so framed as to set out the prodigality in general terms, without alleging specific facts, is informal and insufficient.—A petition of this kind must be served before presentation to a Judge, and service made after presentation and order of reference to a notary to take the opinion of a family council, is irregular.—A Judge seised of a petition for the nomination of a *conseil judiciaire* may authorise a notary to call a family council and take its opinion, in the case provided for by Art. 256, C. C., as in the matter of the nomination of a tutor.—The notary so delegated has no power to examine witnesses or allow witnesses to be examined before the family council.—*Semble*, that in this case the petitioner, being indebted to the respondent in the sum of $3,400 (nearly the whole fortune of the latter), should not have been appointed curator. *Ste. Marie* v. *Bourelle*, 21 Que. S. C. 343, 8 Que. P. R. 221.

See Husband and Wife — Intoxicating Liquors—Lunatic—Will.

INTEREST.

Covenant to pay—*See* Mortgage.

Merger in judgment—*See* Judgment.

On arrears of rent—*See* Landlord and Tenant.

On chattel mortgages — *See* Chattel Mortgages and Bills of Sale.

On costs—*See* Costs.

On debentures—*See* Company—Municipal Corporations.

On judgments—*See* Judgments.

On mortgages—*See* Mortgages.

On notes—*See* Bills of Exchange and Promissory Notes.

On sale of land—*See* Vendor and Purchaser.

On trust funds—*See* Trusts and Trustees.

Proof for, in winding-up—*See* COMPANY.

Usurious rate—*See* CRIMINAL LAW.

Assignment of insurance policy in trust to secure debt and future premiums — Contract for payment of interest — Construction — Rate and mode of computing interest — Interest Act — Application — Statute of Limitations — Trustee—Costs — Subrogation — Counsel fees — Question between defendants. *Robinson* v. *Ætna Ins. Co.*, 8 O. W. R. 949, 9 O. W. R. 283.

Bank Act, ss. 80, 81 — *Bank stipulating for usurious rate—Reduction to maximum legal rate.*]—In an action to recover principal and interest on certain promissory notes, bearing interest at 12 per centum "as well after as before maturity," the defendant pleaded s. 80 of the Bank Act:—*Held*, reading ss. 80 and 81 together, that such a contract between the bank and the customer is merely invalid in so far as it stipulates for more than 7 per cent. *Bank of Montreal* v. *Hartman*, 12 B. C. R. 375, 2 W. L. R. 57.

Claim for price of goods sold — Interest not claimed in writ of summons—Report — Appeal — Items — Costs. *Kelly* v. *Smith*, 1 O. W. R. 752.

Contract — *Absence of stipulation for interest—60 V. c. 24, s. 175 (N.B.)—Rate of interest.*]—A contract between the defendant, a contractor with the department of railways and canals of the Dominion government, and the plaintiff, a sub-contractor, provided that for $145,000 to be paid to him he was to complete certain work for the defendant, and that the payments should be made (less ten per cent.) monthly as the work progressed according to the estimate of the government engineer in charge. The work on the principal contract was to be completed on the 30th September, 1899. It was not completed for more than one year after that date, but the delay was not the fault of the plaintiff. There was no stipulation in the contract in reference to the payment of interest on any sums due but not paid. M.'s claim was disputed. On an action being brought, it was established that he was entitled substantially to what he claimed:—*Held*, that the plaintiff was not entitled to interest, his claim not being for a sum certain payable by virtue of a written instrument at a time certain, within the meaning of s. 175 of 60 V. c. 24 (N.B.).—*Semble*, that if the plaintiff had been entitled to interest, the rate would not be restricted to 5 per cent. under 63 & 64 V. c. 29 (D.), the contract having been entered into before the passing of the Act. *Mayes* v. *Connolly*, 35 N. B. R. 701.

Contract — *Chattel mortgage — Statement of rate—Interest Act, 1897—Statutes —Waiver.*] — A chattel mortgage provided for the payment of $125, the principal money, in consecutive monthly instalments of $5 each, and for payment of $5 more with each instalment, for interest. The yearly rate to which this was equivalent was not stated, but there was a clause in the mortgage waiving in explicit terms the necessity for stating the yearly rate and waiving also the benefit of the Interest Act, 1897:—*Held*, that this being an Act passed on the ground of public policy for the benefit of borrowers, its application could not be waived, and that the mortgagee was entitled to interest only at the legal rate. *Dunn* v. *Malone*, 23 C. L. T. 328, 6 O. L. R. 484, 2 O. W. R. 1036.

Contract — *Sum certain — Rental of track — Interest by way of damages—Demand of payment.*]—By the agreement in question in the action the defendants agreed to pay to the plaintiffs $800 per annum per mile of single track and $1,000 per mile of double track occupied by the defendants' railway, not including "turnouts," in four equal quarterly instalments, on the 1st January, April, July, and October in each year. Disputes arose between the parties as to the meaning of the word "turnouts" and as to what tracks were to be measured and as to the manner in which they were to be measured, and this action was brought in reference to these questions, and was finally determined on appeal to the Judicial Committee. In the result the contention of neither party was given effect to, the mileage in respect of which rental was payable being held to be less than that contended for by the plaintiffs and greater than that contended for by the defendants. The plaintiffs had from time to time demanded payment of the sums payable to them according to their construction of the agreement. The mileage and the sums consequently payable were fixed by the Master in accordance with the principles laid down in the judgments:—*Held*, that the defendants were bound at their peril to ascertain the sums properly payable and to pay or tender these sums to the plaintiffs; that not having done so the plaintiffs were entitled to interest upon these sums from the times at which they should have been paid; not, under s. 114 of the Judicature Act, R. S. O. 1897 c. 51, as being sums certain payable by virtue of a written instrument at certain times capable of ascertainment by arithmetical computation, but upon the ground that the case was one in which it would have been usual for a jury to allow interest, and therefore within s. 113 of that Act. Decision of Master in Ordinary, 2 O. W. R. 225, affirmed. *Toronto* v. *Toronto Ry. Co.*, 24 C. L. T. 86, 7 O. L. R. 78, 3 O. W. R. 204, 208, 4 O. W. R. 221, 339, 345, 446, 5 O. W. R. 14, 64, 130, 403, 415, 6 O. W. R. 574, 677, 874.

Disputed accounts — *Federal and provincial governments — Award — Agreement as to date from which interest to be computed.*]—In certain arbitration proceedings between the Dominion of Canada and the provinces of Ontario and Quebec, the first mentioned province was found to be indebted to the Dominion in the sum of $1,815,848.59 on the 31st December, 1892. Upon a case stated to determine whether interest was payable by the province from the 31st December, 1892, when a balance was struck in favour of the Dominion, or from the 1st July, 1894, only:—*Held*, that the correspondence shewed an agreement on the part of the Dominion that interest should only be paid from the date last mentioned. *Dom. of Can.* v. *Prov. of Ont.*, 23 C. L. T. 100, 8 Ex. C. R. 174.

Hypothec — *Several properties—Sale—Distribution of proceeds — Collocation.*] — When two or more immovables hypothecated by the same instrument are sold at different dates, and the amount of the obligation is not entirely paid by the proceeds of the first sale, the interest upon the obligation continues to run, and the creditor has a right to be collocated by virtue of his hypothec upon the proceeds of the second sale. *Garand* v. *Charlebois*, 21 Que. S. C. 488.

Interest is not chargeable upon an account stated unless a fixed time for payment was agreed upon or a demand for payment made, or upon an account rendered shewing that the parties have allowed interest upon balances outstanding, though a jury might and probably would allow such interest as damages. *George* v. *Green* (1907), 8 O. W. R. 247, 787, 13 O. L. R. 189, 10 O. W. R. 292, 14 O. L. R. 578, affirmed: 42 S. C. R. 219.

Irregular judgment — *Moneys retained under—Refund.*] — Where executors, who were also residuary legatees, acting *bona fide* under a judgment afterwards held by the Court of Appeal to be irregular, and not binding on the parties concerned, retained a greater sum of money than they were subsequently held entitled to, but were exonerated from all fraud or misconduct, they were held not chargeable with interest. *Boys' Home* v. *Lewis*, 3 O. L. R. 208.

Judgment — *Date of — Variation in Court of Appeal.*] — *Held*, on consultation of the Judges of the Court of Appeal, that, where any judgment of a Court below has been changed, interest should only be allowed on the judgment from the date of the judgment of the Court of Appeal, notwithstanding s. 2 of the King's Bench Act. *Sheldon* v. *Egan*, 18 Man. L. R. 221.

Judgment for payment of value of bonds — Amount ascertained by Master—Interest on—Amendment of judgment. *Ray* v. *Port Arthur, Duluth, & Western Ry. Co.*, *Ray* v. *Middleton*, 3 O. W. R. 100.

Judgments for costs bear interest only from date of taxation. *Star Mining Co.* v. *White* (1910), 15 B. C. R. 11.

Moneys realized upon execution — *Repayment when judgment reversed — Liability for interest—Claim by stranger—Rate of interest—Costs.*]—After the Court of Appeal (3 O. W. R. 32) had affirmed the decision of the trial Judge (2 O. W. R. 93) in favour of plaintiff, plaintiff issued execution against defendants, and received a sum of $1,358.89, being proceeds of sale of goods of defendant Alice R. Cox. The Supreme Court of Canada on 14th December, 1904, reversed the judgment of the Court of Appeal, and plaintiff thereupon became liable to repay the $1,358.89. Some delay arose about this, as the money was claimed by another execution creditor. The plaintiff thereupon notified the claimants that he would apply for an interpleader order, and prepared the necessary material, but did not proceed further. Ultimately on 20th February, 1905, the money was paid by consent of all parties to the solicitors for the defendants, but without interest, though interest was asked for before payment of the principal. Defendant Alice R. Cox moved for an order for payment by plaintiff of interest at 5 per cent. from date of payment to plaintiff to date of repayment, nearly 11 months:—*Held*, the *prima facie* right to interest, in the circumstances of this case, is established by *Rodger* v. *Comptoir d'Escompte de Paris*, L. R. 3 P. C. 465, where the whole question is discussed by Lord Cairns. This was followed by Bacon, V.-C., in *Merchant Banking Co.* v. *Maud*, L. R. 18 Eq. 650, and by our own Court of Appeal in *Sherk* v. *Evans*, 22 A. R. 242 (see especially judgment of Osler, J.A., at p. 248). Counsel for plaintiff contended that, in view of the conflict as to who was entitled to the principal, interest should not be allowed. But it was open to him to have guarded himself either by an order to pay the money into Court, or by getting a waiver of any right to interest from the rival claimants. The present lawful rate being 5 per cent., I think defendant Alice R. Cox is entitled to what she asks. *Adams* v. *Cox*, 5 O. W. R. 419, 10 O. L. R. 96.

Order on further directions to pay interest on amount decreed — *Power of Court—Discretion overruled — Interest intentionally omitted from final judgment.*]—Where a decree of the Court of Appeal affirmed by the Judicial Committee had ordered the repayment of moneys received by the appellant in excess of his salary as manager of a company, but was silent as to interest on the sums so overdrawn:—*Held*, that the Court had power to order interest on further directions as a matter of discretion, but that, as it appeared from the judgment of the Judicial Committee that the order in council issued upon their advice intentionally omitted a direction to that effect, the discretion of the Court below should be overruled. As no claim for interest was made at the commencement of the action, it should be charged only on the amount decreed from the date of the decree of the Court of Appeal. Judgment in *Earle* v. *Burland*, 23 C. L. T. 276, 6 O. L. R. 327, reversed. *Burland* v. *Earle*, [1905] A. C. 589.

Promissory note—*Collateral oral agreement to pay interest — Evidence.*] — Oral testimony cannot be received, even where there is "commencement *de preuve par écrit*," to establish an agreement alleged to have been made at the time of giving a promissory note, which does not on its face bear interest, that interest would be payable on it. *Dombroski* v. *Laliberté*, 27 Que. S. C. 57.

Rate of — Chattel mortgage — Interest Act, R. S. C. c. 8—Express waiver of. *Dunn* v. *Malone*, 2 O. W. R. 1096, 6 O. L. R. 484.

Recovery of — *Debt—"Time certain"—Writing.*]—The defendant P., in October, 1889, contracted with C. to build certain fences and gates along the line of the G. N. W. Central Railway, and associated the defendant M. with him. They sublet the contract to the plaintiffs by a written agreement which provided for payment to the plaintiffs as follows: "Estimates for the said work shall be made monthly by the engineer, and shall be paid forthwith upon same being paid

to said P. and M. by said company." After payment of two estimates for part of the plaintiffs' work, difficulties arose, and the engineer, to prevent the bringing of an action, withheld further estimates; but in September, 1891, after litigation between C. and the company had commenced, P. accepted a judgment against the company for the balance due to him by C. upon his fencing contract. This judgment, however, was not paid until 1898, and then it was paid without interest; —*Held*, that the plaintiffs were not entitled to interest on their claim before action, as it was not payable by virtue of a written instrument at a time certain within the meaning of 3 & 4 Wm. IV. c. 42, s. 28. *London, Chatham, and Dover Ry. Co.* v. *South-Eastern Ry. Co.*, [1892] 1 Ch. 120, followed. Judgment in 20 C. L. T. 359, varied. *Sinclair* v. *Preston*, 21 C. L. T. 97, 13 Man. L. R. 228.

Solicitor's bill — Compensation for services — *Quantum meruit*. *Murphy* v. *Corry*, 7 O. W. R. 392.

Written contract — *Debt and time certain—3 & 4 Wm. IV. c. 42, s. 28.*]—To entitle a creditor to interest under 3 & 4 Wm. IV. c. 42, s. 28 (Imp.) ,the written instrument under which it is claimed must shew by its terms that there was a debt certain payable at a certain time. It is not sufficient that the same may be made certain by some process of calculation or some act to be performed in the future. Judgment in 21 C. L. T. 97, 12 Man. L. R. 228, affirmed. *Sinclair* v. *Preston*, 22 C. L. T. 9, 31 S. C. R. 408.

See Appeal—Assessment and Taxes — Banks and Banking—Bills and Notes — Bills of Sale and Chattel Mortgages—Chose in Action, Assignment of — Contract—Criminal Law—Insurance—Judgment — Mortgage — Municipal Corporations—Partnership—Railway — Sale of Goods — Schools — Timber — Trusts and Trustees—Vendor and Purchaser—Will.

INTERIM ALIMONY.

See Husband and Wife.

INTERIM INJUNCTION.

See Injunction.

INTERLOCUTORY JUDGMENT.

See Damages—Judgment.

INTERNATIONAL BRIDGE.

See Assessment and Taxes.

INTERNATIONAL COMITY.

See Process.

INTERNATIONAL LAW.

See Aliens—Constitutional Law—Judgment—Master and Servant—Private International Law—Ship.

INTERPLEADER.

Action for — Previous refusal of summary application—Stay of proceedings in separate actions brought against interpleading parties. *Elgie & Co.* v. *Edgar, Edgar* v. *Elgie & Co., Clemens* v. *Elgie & Co.*, 8 O. W. R. 397.

Action for purchase-money of land —*Claim to land adverse to that of vendor's assignee—Stay of proceedings — Parties — Payment into Court.*]—The defendant, being sued in this action for a balance due upon a purchase of land, admitted her liability, but stated that R. claimed the land as against the plaintiff, and had begun an action and registered a certificate of *lis pendens*, and had notified her (the defendant) that he would hold her liable for any moneys paid by her under the agreement for purchase, after notice. Upon this the defendant applied for an interpleader order, and the Referee made an order staying proceedings in this action, pending the result of the action brought by R., making the plaintiff a defendant in that action, and requiring the defendant to pay into Court a part of the purchase-money claimed:—*Held*, on appeal, that there was no ground for an interpleader, and not sufficient material to justify the order actually made; and the order was set aside, without prejudice to R. moving to amend his statement of claim in his own action, and for a stay of proceedings in this action, upon proper grounds. *Davison* v. *Lehberg* (1910), 13 W. L. R. 719.

Application by executor — Adverse claims to estate—Delay in applying for probate—Discretion—Remedy. *Re Smith and Bennett*, 2 O. W. R. 399.

Application by garnishees — *Remedy under Rule 392—Attachment proceedings before judgment—Rules of Court—Discretion—Practice.*]—*Held*, Newlands, J., dissenting, that a garnishee who admits liability to the defendant in respect of a sum of money, which is also claimed by parties other than the plaintiff, is entitled to apply for an interpleader summons in the action in which the garnishee summons issued, to determine the rights of all claimants; but must pay the money into Court with a suggestion that there are other claimants, as provided by Rule 392 of the Judicature Ordinance.—*Per* Newlands, J., dissenting, that when a garnishee summons is issued, it is virtually an action against the garnishee in respect of the debt due to the defendant, and if such debt is claimed by parties other than the plaintiff, the garnishee is, as he would be in an action against him by one of the claimants to recover such debt, entitled to interplead in the action in which the garnishee summons is issued, and to have the rights of all parties determined on the one application, which cannot be done on the trial of an issue under the provisions of Rule 392 of the Judicature Ordinance. *Mears* v. *Arcola Woodworking Co.*, 6 W. L. R. 547, 8 W. L. R. 840, 1 Sask. L. R. 191.

Application by sheriff — Grounds for refusing relief—Sale of goods seized without advertising — Prejudice to claimant—Notice —Delay in applying—Rules of Court—Payment of part of proceeds of sale to execution creditors. *Hogan* v. *Boozan* (Sask.), 8 W. L. R. 548.

Application by sheriff — *Proceedings instituted too soon—Practice—Rules of Court —Facts to be shewn on application.*]—The sheriff, under writs of execution, seized certain goods of the defendant, such goods being claimed by the wife of the defendant. The sheriff thereupon notified the execution creditors of the claim, and applied for an interpleader summons. The material in support of the sheriff's application did not shew when the notices of claim were served, but it appeared by affidavits filed on behalf of one of the execution creditors that such notices were served on the 26th October, while the summons was issued on the 29th October. On the return of the summons objection was taken that the summons was issued too soon: —*Held*, that the provision for interpleader on the part of the sheriff being purely statutory, the sheriff must shew that all notices have been given, and that the time required by the Rules has expired before he is entitled to interplead, and that, as the material did not shew this, and as it appeared that the necessary time had not elapsed, the proceedings were irregular. *Sanderson* v. *Hotham*, *Fitzgerald* v. *Hotham*, 1 Sask. L. R. 501, 9 W. L. R. 434.

Application by sheriff for order — Property seized in apparent possession of execution debtor—Claim by wife—Issue directed—Onus on claimant—Direction that she be plaintiff. *Schwartz* v. *Davison* (Y.T.), 6 W. L. R. 699.

Application by stakeholder — *Contract—Wager.*]—C. deposited $1,250 and W. $250, with H., who was to hold same until it was decided whether a horse owned by C. was the same horse as described by B. H. Stud Book. If so C. won, otherwise W. won. Both now claiming the fund H. obtained an interpleader order. And an issue was directed W. to be plaintiffs. *Re Hyndman* (1909), 12 W. L. R. 166.

Application by stakeholder—*Dispute as to amount due.*]—Applicants for interpleader order admitted owing $2,000, but were sued by a claimant for $2,500. Leave to pay into Court $2,000 on this application refused, part payment not being allowed on an interpleader application. *Re Independent Cash Mutual Fire Insurance Co.*, 13 O. W. R. 1383.

Application for order — Stakeholder —Chattel mortgage — Surplus in hands of mortgagee—Claim under order for payment of part of surplus—Claim under purchase from mortgagor. *Re Elgie, Edgar, and Clemens*, 8 O. W. R. 33, 209.

Claim by execution debtor — *Exemption—Buildings.*]—Where the property seized under a writ of execution against goods consisted of a blacksmith's shop in the occupation of the execution debtor:—*Held*, that the question whether the shop was or was not part of the freehold could not be raised upon an interpleader by the sheriff.—*Held*, also, that the building was not exempt from seizure by virtue of the Exemptions Ordinance, not being the residence of the execution debtor or a building used in connection with his residence. *Eastern Townships Bank* v. *Drysdale* (1905), 6 Terr. L. R. 236.

Conditional sale agreement — *Conflict of laws.*]—A. sold B. a piano in Washington, U.S.A., on a conditional sale agreement, which agreement became an absolute sale according to the law of Washington unless registered in ten days. The agreement was not registered. B. brought the piano to Alberta and sold it to C. A., in default of payment by B., claimed the piano in Alberta from C. under the conditional sale agreement:—*Held*, that the law of Washington applied as to the effect of the contract, but the law of Washington making the sale an absolute sale unless registered within ten days, being a law for the protection of purchasers, was limited in operation to purchasers in Washington and could not be extended so as to protect purchasers in Alberta, and therefore the conditional agreement was still effective against C. *Cline* v. *Russell*, 2 Alta. L. R. 79.

Determining ownership of land seized by sheriff under fi. fa.] — In an interpleader issue directed by the County Court Judge for Lincoln, for determining whether certain lands held under execution by the sheriff under *fi. fa.* were, at the time of placing said execution in sheriff's hands, the property of plaintiff, as against the defendant, who is the execution creditor:—*Held*, in favour of the defendant in the issue with costs if there is any power of disposing of costs. *Lambert* v. *Dillon* (1910), 15 O. W. R. 209.

Employer who is sued under the Workmen's Compensation Act may demand that proceedings be stayed until judgment has been given in another suit against a third party whose liability is alleged for the same *quasi-delictual* damages. *Forget* v. *Baillargeon* (1911), 12 Que. P. R. 270, 17 R. S. n. s. 214.

Execution—*Seizure of cut timber—Crown Timber Act, R. S. O.(1897), c. 32—License to cut—Validity of assignment to bank—Bank Act, ss. 80, 84—Exemption Act, s. 9—Injunction.*]—Plaintiff McP. secured judgment, by default, against McG. & Co., timber licensees. McP. issued execution and secured an injunction restraining the transfer of their license, McG. & Co. assigned their license to Traders Bank as security for their then existing indebtedness. Bank transferred their interest to one Murphy. Later, the defendant company was organised to take over the license in question. After McP. had obtained his injunction, and after the assignment to the bank, but before defendant company acquired the license, four other executions against McG. & Co. were placed in the sheriff's hands. On an interpleader issue to determine whether at the time of seizure of certain logs by the sheriff under

above executions, said logs were exigible under said executions as against defendant company.—Teetzel, J., *held*, that plaintiff McG.'s first execution was protected by the injunction, which prevented defendant company from acquiring any interest in the timber that might be cut except to the satisfaction of that execution, subject to defendants' right to deduct amounts paid to discharge liens of Traders Bank and of the Government for dues.—That so far as the other executions were concerned, the facts of the case brought them within the principle of *Can. Pac. Ry. Co.* v. *Rat Portage Lumber Co.* (1905), 10 O. L. R. 273, 5 O. W. R. 473, and, therefore, as against those executions, judgment must be for the defendants: That banks may lend money upon the security of standing timber and the rights or licenses held by persons to cut or remove such timber, and those transactions are not within s. 84 of the Bank Act, but are under s. 80, although not in form of mortgage.]—*McPherson* v. *Temiskaming Lumber Co.* (1911), 18 O. W. R. 319, 2 O. W. N. 553.

After hearing further evidence upon the question as to whether defendant company had notice of plaintiff Booth's execution, within meaning of Execution Act, 9 Edw. VII. c. 47, s. 9.—Teetzel, J., confirmed above judgment. *McPherson* v. *Temiskaming Lumber Co.* (1911), 18 O. W. R. 811, 2 O. W. N. 854.

Fraud — *Partnership—Execution creditor.*]—Father and son entered into a partnership not reduced to writing. Son supplied the money and father was to get board, clothes and spending money, etc., for use of name and good will of his former business. Two years later an execution creditor of father seized a car load of potatoes belonging to partnership:—*Held*, that there was no evidence of fraud on the part of the son and the execution creditor could not recover. *McMillan* v. *Thorpe* (1909), 14 O. W. R. 808.

Goods seized under execution — *Transfer to wife of execution debtor—Fraud—Evidence of — Admissibility — Exemptions.*]—In an interpleader issue between the wife of the execution debtor and the execution creditors, in which the question was whether the goods seized by the sheriff were then the property of the wife as against the execution creditors, the trial Judge found, and the Court *en banc* sustained his finding, that the goods or their purchase price, being in reality the property of the husband, had been fraudulently transferred by the husband to the wife, and therefore were the property of the execution creditors against the wife:—*Held*, Wetmore, J., dissenting, that, notwithstanding the decision of the Supreme Court of Canada in *Donohoe* v. *Hull*, 24 S. C. R. 683, evidence of fraud as affecting the question of property was admissible on the issue. —*Per* Richardson and McGuire, JJ., that the decision in *Donohoe* v. *Hull* was not applicable; it was not intended or contemplated to apply where, as in an interpleader issue, the question is whether or not a sale or transfer of goods is a mere sham or device to defeat execution creditors.—*Per* Scott, J., that the decision in *Donohoe* v. *Hull* extends only to proceedings by way of attachment of debts, in which, in order to enable the judgment creditor to succeed, it must appear that a debt exists for which the judgment debtor might have brought an action against the garnishee.—Fraudulent transfer of exemptions discussed. *West* v. *Ames Holden & Co.*, 3 Terr. L. R. 17.

Issue — *Parties — Onus.*]—Where the proceeds of a life insurance policy were claimed by the widow of the assured and also by an assignee for value, and it appeared that the assured had first made a declaration in writing on the policy devoting all the benefit to his wife, and had subsequently by writing assumed to limit such benefit to $1, and had then made the assignment to the other claimant:—*Held*, that the latter should be plaintiff in an interpleader issue ordered to be tried between the claimants. *Re Hubbell*, 20 C. L. T. 389, 19 P. R. 240.

Issue — *Party plaintiff — Sheriff remaining in possession—Place of trial — Security for costs—Execution creditor—Insolvency.*] —Where the claimant is in possession of the goods at the time of seizure, the execution creditor is made plaintiff in the interpleader issue directed on the sheriff's application. And this rule applies where the claimant is the wife of the execution debtor, and the goods are seized upon the premises in which a business is carried on by her in which she is assisted by him, but in which he has no interest. Where the goods seized were manufactured materials, the product of a going concern, a direction in the interpleader order that the sheriff should continue in possession until the final disposition of the issue, was upheld against the contention of the execution creditor that the sheriff should be directed to sell the goods, or the claimant to pay into Court or give security for the appraised value. An interpleader issue should ordinarily be tried in the county where the goods are seized, but where the sheriff is to remain in possession of the goods of a going concern, a speedy trial is so important that for the purpose of securing it, the issue may be sent to another county, having regard to considerations of expense and convenience. Under the discretionary powers given by Rule 1122, the execution creditor, being in insolvent circumstances, may be ordered to give security for the sheriff's costs. *Farley* v. *Pedlar*, 21 C. L. T. 294, 1 O. L. R. 570.

Lien for freight — *Disposition of goods pending trial of issue.*]—Certain goods and chattels, some "heirlooms," which had been brought from England, and on which the railway company had a lien for freight, were claimed by rival parties. Should there be a sale and proceeds paid into Court, less the amount of the lien, and then an issue to ascertain the true owner, or should there be an issue first? The latter course adopted. *Re Can. Pac. & Warren*, 13 O. W. R. 225.

Moneys deposited in bank — Death of depositor—Will—Judgment establishing — Rights of executor — Adverse claim under agreement. *Re Dominion Bank & Kennedy*, 8 O. W. R. 755, 834.

Money deposited in bank to credit of three executors — Right of two to withdraw—Dispute—Right of bank to interplead—Bank Act. *Re Bank of Toronto & Dickinson*, 8 O. W. R. 323.

Motion by bank for order—Plaintiff deposited cheque of deceased—Credited on bank's books to plaintiff—Claimed by both plaintiff and executors of deceased—Order granted—Payment into Court within week—Action against bank stayed—Executors to bring action against plaintiff to have cheque cancelled—Costs. *McLellan* v. *Sterling Bank* (1911), 18 O. W. R. 641, 2 O. W. N. 798.

Nature of — *Rights of the plaintiff in an interpleader action.*]—Interpleader is of the nature of an ordinary suit; the plaintiff may allege in an interpleader action, facts which do not appear in his statement of claim. *Tremblay* v. *Thibault* (1909), 10 Que. P. R. 255.

Order attaching goods — *Seizure under—Order set aside—Withdrawal of sheriff—Order reinstated — Re-seizure of part — Judgment subsequently obtained—Proof of—Lapse of issue—Judgment—Limitation.*]—1. When a third person claims goods seized by the sheriff under an attaching order, and the sheriff applies for an interpleader order, any objection by the claimant as to the want or insufficiency of the material on which the attaching order was obtained should be raised in answer to the sheriff's application, and it will be too late to raise such objection at the trial of the interpleader issue.—2. It is not necessary at the trial of such an interpleader issue for the plaintiff, although he is plaintiff in the issue, to prove the defendant's indebtedness, at least in the absence of evidence on the part of the claimant to shew that it did not exist.—*Holden* v. *Langley*, 11 C. P. 407, *Ripstein* v. *British Canadian Loan Co.*, 7 Man. L. R. 119, *Plummer* v. *Price*, 39 L. T. 658, and *Edwards* v. *English*, 7 E. & B. 564, followed.—The attaching order having been set aside by the Referee after the making of the interpleader order, and the sheriff having relinquished possession of the goods, the claimant contended that the latter order then lapsed; but the attaching order had been reinstated on appeal to a Judge, when the sheriff again took possession of such of the goods formerly seized as he found to be still in the claimant's possession:—*Held*, that the plaintiff had a right to have the interpleader issue disposed of, and that, as the merits were in his favour, the verdict for him should stand, but limited in its effect to the goods seized by the sheriff after the attaching order was restored.—*Howe* v. *Martin*, 6 Man. L. R. 616, followed. *Turner* v. *Tymchorak*, 8 W. L. R. 484, 17 Man. L. R. 687.

Payment into Court — Discharge — Costs. *Fraser* v. *Grand Trunk Ry. Co.* (1910), 1 O. W. N. 469, 659.

Promissory note — Adverse claims to possession—Order directing trial of issue—Burden of proof — Who should be plaintiff—Costs. *Clemens* v. *Hyland & Standard Bank*, 12 O. W. R. 719.

Security for goods — *Sole bond of chartered bank.*]—The sole bond (approved by the proper officer of the Court) of a chartered bank, the claimant of the goods in question in an interpleader, is sufficient security for the forthcoming of the goods; it is not necessary to procure sureties, nor to give proof by affidavit of the responsibility of the bank. *Ontario Bank* v. *Merchants Bank*, 21 C. L. T. 188, 1 O. L. R. 235.

Shares — *Certificate and transfer — Claim for damages—Parties out of jurisdiction—Laches — Collusion.*]—A transfer of shares in a company having been made, the transferor set up that it was procured by fraud, and the transferor and transferee each brought an action against the company:—*Held*, that the company were entitled to relief by way of interpleader, notwithstanding the claim against them for damages made by one of the claimants:—*Held*, also, that, although both claimants were out of the province, and the company's head office was also outside of the province, there was jurisdiction to make an interpleader order, the claimants themselves having brought the company into the jurisdiction, and the documents being within the jurisdiction:—*Held*, also, that the laches of the company had not been so great as to disentitle them to the relief claimed, and the charge of collusion between the company and the transferor was not sustained:—*Held*, also, that the transferee was entitled to have preserved to him any claim he might have for damages against the company. *Re Underfeed Stoker Co. of America*, 21 C. L. T. 146, 1 O. L. R. 42.

Sheriff — *Delay — Indemnity.*]—A delay of three weeks after receipt of the claimant's notice before making interpleader application will not disentitle the sheriff to relief, unless the party objecting has been prejudiced. *Quære*, whether a sheriff who has taken indemnity from one of the parties after seizure would now be held by that fact alone to have lost his right to interplead:—*Held*, that in any event it is not open to the party giving the indemnity to take such objection. *McCallum* v. *Schwan, Gould* v. *Schwan*, 5 Terr. L. R. 471.

Sheriff — Goods exigible in possession of third person—No actual seizure. *Brown* v. *Markland Publishing Co.*, 6 O. W. R. 142.

Sheriff — Seizure — Inconsistent claims to goods seized—Form of order—Sale of goods by sheriff—Separate issues. *Nisbet* v. *Hill*, 5 O. W. R. 155, 293, 377, 402.

Sheriff — Seizure of goods under execution—Claim by wife of execution debtor—Right to interpleader order—Issue—Burden of proof — Parties — Plaintiff in issue. *Brownlee* v. *Eads* (Y.T.), 2 W. L. R. 123, 216.

Sheriff's application—*Claim by execution debtor — Exemption — Buildings.*] — Where the property seized under a writ of execution against goods consisted of a blacksmith's shop, in the occupation of the execution debtor:—*Held*, that the question whether the shop was or was not part of the freehold could not be raised upon an interpleader by the sheriff.—*Held*, also, that the building was not exempt from seizure by virtue of the Exemptions Ordinance, not being the residence of the execution debtor or a building used in connection with his residence. *Eastern Townships Bank* v. *Drysdale*, 6 Terr. L. R. 236, 2 W. L. R. 423.

Stakeholder — Demand and refusal of indemnity—Replevin — Nominal damages—Costs. *McCallum* v. *Williams* (N.W.T.), 1 W. L. R. 257.

Stakeholder — Promissory notes—Payment—Costs. *Miller* v. *McCurdy*, 6 O. W. R. 433.

Stakeholder — *Rival claimants—Issue—Plaintiff—Insurance moneys—Security for costs.*]—By the terms of an insurance policy it was made payable to the wife of the insured, giving her name. The insured had lived for many years in this province with a person who passed as his wife, and by whom he had a family, and who had possession of the policy; but shortly before his death he made a will whereby he left the policy in question to a person of the same name, who resided out of the province, whom he described as his wife, and to a daughter by name. In directing an interpleader issue to try the right to the policy, it was ordered that the legatees under the will should be plaintiffs, and they were not required to give security for costs; the difficulty having been caused by the deceased himself, it might be assumed that the costs of all parties would be made payable out of the fund. *Bruce* v. *Ancient Order of United Workmen*, 25 C. L. T. 45, 4 O. W. R. 241.

Summary application — *Insurance moneys—Adverse claims—Foreign claimants—Notice of motion—Service out of jurisdiction.*]—Certain moneys were payable by an insurance company under several life policies in favour of the assured, his executors, administrators, or assigns. The moneys were claimed by the executors, who resided in Manitoba, where the assured died, and who were threatening suit there, and also by the widow, who resided in Quebec, and had brought an action against the company there. The company's head office was in Ontario, and they launched an application in the High Court for a summary interpleader order:—*Held*, reversing the decision in 19 P. R. 16, 19 C. L. T. 313, that the company were entitled to avail themselves of the provisions of Rule 1103 (*a*), as persons under liability for a debt in respect of which they were, or expected to be, sued by two or more persons; and service out of Ontario of the company's notice of motion for the interpleader order was properly allowed under Rule 162 (3). *Re Confederation Life Association & Cordingly*, 20 C. L. T. 32, 19 P. R. 89.

Summary application — *Money in bank—Adverse claims—Foreign claimants—Jurisdiction.*]—A summary application under Rule 1103 (*a*) for an interpleader order in respect of certain moneys deposited with the defendants and claimed by the plaintiff by this action brought in Ontario, and also by an English corporation by an action brought in England, was dismissed:—*Held*, that the mere fact that an action was possible here because a branch office of the bank was in Toronto, was not enough to attract to this forum the extraordinary or special remedy by way of interpleader, as against the English corporations; and a salutary discretion was exercised in refusing the application. *Harris* v. *Bank of British North America*, 20 C. L. T. 15, 38, 19 P. R. 51.

Three claim commission *for sale of house.*]—Where three persons all claimed a commission for the sale of one house, it was held that it was not a case for relief by way of interpleader. *Greatorex* v. *Shackle* [1895] 2 Q. B. 284, 64 L. J. Q. B. 634, followed. *Re Scottish American and Rymal* (1909), 14 O. W. R. 685.

Two parties claimed same commission — *Payment into Court.*]—Where two parties claimed the same commission of $50,000 and each brought action to recover the same, the defendants obtained an order to pay the amount into Court and have the actions stayed as against them. An interpleader issue was directed to be tried to ascertain which of the two plaintiffs was entitled to the commission. *Crane* v. *Moore; Eames* v. *McConnell* (1910), 15 O. W. R. 249.

Then purchasers of the property in question moved for leave to intervene and claim the $50,000, alleging that one of the other two claimants had acted as their agent and that they were entitled to the money as it was a secret profit made by their agent. Order granted. *Ibid.* 372.

See Attachment of Debts — Bankruptcy—Bills of Sale and Chattel Mortgages—Choses in Action — Assignment of—Costs—Execution — Equitable Assignment—Fixtures — Fraudulent Conveyances — Husband and Wife — Landlord and Tenant—Injunction—Master and Servant—Sale of Goods—Sheriff—Solicitor—Trial.

INTERROGATORIES.

See Discovery—Evidence — Parliamentary Elections.

INTERVENTION.

Collusive action — *Protection of debtors—Purchase of claims — Rights of creditors.*]—The purchase by a relative of the debtors of a claim against them, at a low price, and an action begun by the relative against the debtors to recover the amount of the debt without the intention of executing the judgment when obtained, but with the view of protecting the debtors, are not lawful acts, and do not afford ground for other creditors to intervene and contest the suit. *Williamson* v. *Bradshaw*, 30 Que. S. C. 166.

Dismissal for non-prosecution.]—If the intervening party, after having declared his intention to intervene, does not cause his intervention to be received by the Judge, it will be dismissed for want of prosecution, as in the case of a writ not returned. *Nadon* v. *Richmond, Drummond, & Yamaska Mutual Ins. Co.*, 3 Que. P. R. 306.

Inscription — *Practice.*]—When an intervener contests the demand of the plaintiff, and the plaintiff has not replied to the intervention, he cannot inscribe *ex parte* in respect of the intervention at the same time as in respect of the principal action. *Williamson* v. *Yates*, 6 Que. P. R. 300.

Motion to strike out — *Settlement.*]—An intervention will not be struck out upon motion for that purpose, even if it is alleged

that the cause was settled between the parties at the time of the filing of the intervention; the question must form the subject of a contestation upon the merits. *Paquette v. Dominion Bridge Co.*, 7 Que. P. R. 391.

Petition for possession of immovable — *Intervention — Parties — Discharge of plaintiff in principal action.*]—If on a petition for the possession of an immovable filed in the principal action, but not served on the principal plaintiff, who is not made a party to it, an intervention is made, the plaintiff will be discharged from said intervention with costs. *Walker (James) Hardware Co. v. Congregation of Oheel Moche, Moldovice Synagogue*, 10 Que. P. R. 28.

Re-opening of cause — *Preliminary exceptions—Deposit.*]—An intervenant has not the right, at any stage of the case and without deposit, to re-open it on questions pleadable only by preliminary exceptions. *Bisaillon v. Curé, &c., of St. Valentin*, 4 Que. P. R. 191.

Service — *Certificate of prothonotary.*]—A certificate of the prothonotary stating that an intervener has not served his intervention within three days after its filing, will be set aside on motion if it is stated that the parties have received a copy of the intervention, the service of the intervention not being necessary. *Montreal Loan and Mortgage Co. v. Heirs of Mathieu*, 6 Que. P. R. 459.

INTESTACY.

See CROWN.

INTOXICATING LIQUORS.

1. CANADA TEMPERANCE ACT.

Absence of accused — Meritorious defence—Disqualification of convicting justice—Bias—Action pending—Interest of accused in. *Rex v. Kay, Ex p. McClearc*, 5 E. L. R. 156, 38 N. B. R. 498, 14 Can. Crim. Cas. 18.

Adoption by county—*City formed out of part of area covered—"County."*]—Where provisions of the second part of Can. Temperance Act have been brought into force by one county in the province, the subsequent passing of an Act by the provincial legislature incorporating a new city out of part of the area comprised in the county, has not the effect of withdrawing the city from operation of Canada Temperance Act. The word "county," for the purposes of the Act, simply means a geographical area, and there is no reason for construing it in such a way as to effect a reduction of the area when a city is carved out of it. *R. v. McMullen* (1906), 38 N. S. R. 129.

Amendment — *Application to localities previously adopting — Sentence of imprisonment—Absence of accused — Conviction — What must be stated—Name of informant.*]—An amendment to the Canada Temperance Act, authorising imprisonment without the option of a fine for a first offence, applies to localities that had adopted the Act prior to the amendment. If the accused has proper notice of the proceedings, and is aware that judgment may be pronounced against him, and he might have been present, it is no objection to the conviction that judgment was pronounced and sentence of imprisonment imposed in his absence. A conviction which states in terms that the accused is convicted of the offence charged, though not in the words of the Act, is sufficient, and will not be quashed on *certiorari*. *Rex v. Kay, Ex p. Landry, Ex p. Tiche, Ex p. Isaac*, 38 N. B. R. 332, 4 E. L. R. 221.

Amendment—*Penalty for first offence — Application to localities previously adopting —Previous conviction for same offence—Information — Jurisdiction — Onus of identifying offences.*]—The amendment to the Canada Temperance Act, R. S. C. 1906, c. 152, s. 127, authorises imprisonment for a term not exceeding one month, with or without hard labour, without the option of a fine for a first offence, and applies to localities that had adopted the Act prior to the amendment. Where information is laid before a magistrate, he acquires jurisdiction over the offence charged, and his jurisdiction is not ousted by a subsequent information before and determined by another magistrate of the same offence. If a party charged with an offence sets up as a defence a previous conviction for the same offence, the onus is on him to prove the identity of the offences. *Rex v. Kay, Ex p. Gallagher*, 38 N. B. R. 325, 4 E. L. R. 216.

Beer — *Evidence of nature — Convictions.*]—Rules *nisi* to quash convictions under Canada Temperance Act, discharged. The *bona fides* of the parties is immaterial: —*Held*, that the beer sold was a malt liquor. Whether or not it was intoxicating is solely a question for the magistrate. *Rex v. Marsh, Ex p. Lindsay; Rex v. Marsh, Ex p. Belyea*, 6 E. L. R. 259, 39 N. B. R. 119.

Constitutionality of Act — Governor-General's proclamation—Evidence—Conflicting provisions of later local Act *ultra vires*. *Stone v. Nash* (1881), 2 P. E. I. R. 415.

Contract — *Sale of goods — Illegality — Intoxicating liquors — Principal and agent.*]—Appeal from a judgment of Laurence, J., in favour of plaintiff, in an action for goods sold and delivered. The defence was that the

goods in question, being intoxicating liquors, were sold by plaintiff company through an agent, plaintiffs through such agent having knowledge that they were to be disposed of in a place where the Canada Temperance Act was in force at the time. Appeal allowed and action dismissed. The contract void for illegality. *St. Charles* v. *Vasallo* (1911), 9 E. L. R. 355. N. S. R.

Conviction for first offence—*Costs—Mode of enforcing penalty—Dom. Acts, 1888, c. 34, s. 14, c. 51.*]—Defendant was convicted before a stipendiary magistrate for unlawfully selling intoxicating liquor contrary to the provisions of the second part of the Canada Temperance Act, being a first offence, and was adjudged for such offence, to forfeit and pay the sum of $50 penalty and $23.05 costs, and in default of payment to be imprisoned for the term of two months: —*Held*, that the conviction was good, and that the application to set the same aside must be dismissed. The proceedings being under the Liberty of the Subject Act, no costs were allowed. Since the amendment of the Canada Temperance Act, Acts of 1888, c. 51, and c. 34, s. 14, it is clear that the mode of enforcing payment of the penalty is to be fixed and included in the conviction. *R.* v. *Whiting*, 43 N. S. R. 332.

Conviction—*Absence of accused—Meritorious defence—Bias—Action pending against justice—Interest of accused in.*]—A defendant seeking to quash a conviction for an offence against the Canada Temperance Act, by setting up that by reason of being misled as to the date of the return of the summons she was convicted in her absence, and was prevented from making her defence, should satisfy the Court that there is a meritorious defence to the charge. The Court refused to quash a conviction on the ground of bias of the presiding justice by reason of an action pending against him, where it appeared that the action was commenced and declaration and plea filed more than eight years before the conviction; that the action was by the husband (since deceased) of the accused against the justice, and arose out of a trespass committed under a search warrant issued by the justice for the examination of the husband's premises for liquor alleged to have been unlawfully stored; that no further proceedings had been taken, but it was stated in an affidavit of the accused read on the argument that it was not her husband's intention, as she believed, and it was and is not her intention, to allow the suit to abate. *Quære*, whether the action survives to the wife as administratrix. And, if so, and it is proceeded with, has she such an interest as will disqualify the justice on the ground of bias? *Rex* v. *Kay Ex p. McCleave*, 38 N. B. R. 498, 5 E. L. R. 156.

Conviction — *Autrefois acquit — Commencement of prosecution—Sale by agent—Consent of defendant—Constitutional law—Jurisdiction of parish Court Commissioners.*] —Where a person is convicted of an offence under the Canada Temperance Act, committed at a time falling within the period covered by a previous information upon which he was acquitted, in order to sustain a plea of *autrefois acquit* he must shew that the offence for which he was convicted and that for which he was acquitted were identical. The laying of the information is the commencement of the prosecution. Whether the sale of the liquor was by the consent or contrary to the order of the defendant is a question for the magistrate. Section 103 (d) of the Canada Temperance Act, R. S. C. c. 106, in so far as it attempts to confer upon parish Court Commissioners jurisdiction to try offences against the Act, is *ultra vires* of the Parliament of Canada. *Ex p. Flanagan*, 34 N. B. R. 577.

Conviction—Bias of magistrate—Refusal of magistrate to give evidence—Variance between conviction and commitment—Curative sections—Costs. *R.* v. *Johnson* (1906), 1 E. L. R. 95.

Conviction—*Certiorari—Sale of liquors—Delivery by agent.*]— Trenholm was the agent of the Dominion Express Company at Botsford in the county of Westmoreland. One S. T. had ordered from L., a merchant residing and doing business in Amherst, Nova Scotia, some whiskey, directing that it should be forwarded to him at Botsford, by express C.O.D. The company in due course of business sent the package to S. T., the purchaser, and it was delivered to him at Botsford by Trenholm, the company's agent, to whom S. T. paid the price and charges, which were remitted in the ordinary way to the company's agent at Amherst. Upon these facts Trenholm was charged and convicted for selling liquor contrary to the provisions of the Canada Temperance Act:—*Held*, that there was no sale by Trenholm, and, even if a delivery was necessary to complete the sale, it only completed a sale which took place in Amherst, and with which Trenholm was in no way concerned. *Ex p. Trenholm*, 21 C. L. T. 55.

Conviction—*Costs and expenses — Variance between minute and conviction—Conveyance to goal—Criminal Code.*]—A conviction for selling intoxicating liquors, contrary to the provisions of the Canada Temperance Act, provided for the imprisonment of defendant for the period of forty days "unless the said sums (the penalties and costs of conviction) and the costs and charges of the said distress and of the conveying of the said M. D. V. to the common gaol shall be sooner paid:"—*Held*, that the expression "costs and charges" in the conviction, and the expression "costs and the expenses" in the Criminal Code, s. 872 (a), mean the same thing. There was a variance between the minute of conviction and the conviction —the minute providing for payment of the costs of conveying to gaol, and the conviction for the "costs and charges of the said distress and of the conveying," &c.:—*Held*, that as the provision was properly set out in the conviction, and its insertion in the minute was unnecessary, the variance was immaterial. A second conviction for a similar offence omitted the provision as to the costs of conveyance to gaol:—*Held*, Meagher, J., dissenting, that the conviction was bad and must be set aside with costs, not having been made in conformity with the terms of the Code, s. 872 (a). *Regina* v. *McDonald*, 26 N. S. R. 94 (where the imposition of costs under the provisions of the Summary Convictions Act, R. S. C. c. 178, s. 66, was held discretionary), distinguished. *Regina* v. *Vantassel*, 34 N. S. R. 79.

Conviction — "*Criminal case*"—*R. S. C. c. 135, s. 32—Penalty "not less than $50"*— *Habeas corpus — Judge in Chambers — Reference to Court.*] — A commitment on conviction for an offence against Part II. of the Canada Temperance Act is "a commitment in a criminal case," under s. 32 of R. S. C. c. 135 (R. S. C. 1906, c. 139, s. 62), which gives a Judge of the Supreme Court of Canada power to issue a writ of *habeas corpus*. By 4 Edw. VII. c. 41 (R. S. C. 1906, c. 152, s. 127), for a first offence against Part II. of the Canada Temperance Act a fine may be imposed of "not less than $50" and for a second offence "of not less than $100;"—*Held*, that for a first offence the justices cannot impose a fine of more than $50; Maclennan, J., dissenting. On application to a Judge for a writ of *habeas corpus*, he may refer the same to the Court, which has jurisdiction to hear and dispose of it; Idington and Maclennan, JJ., dissenting. Prisoner discharged. *In re Richard*, 27 C. L. T. 317, 38 S. C. R. 394.

Conviction — Defendant fined larger amount than minimum named in the Act. *R. v. Kay, Ex p. Cormier* (1906), 2 E. L. R. 164.

Conviction — *Evidence — Analyst — Agreement of counsel.*]—G., L., and C. were convicted for keeping liquor for sale contrary to the Canada Temperance Act. Orders *nisi* to quash the convictions were granted on the ground that improper evidence was admitted, without which there was no evidence that the beer sold was intoxicating. The evidence objected to was the certificate of one P., an analyst, of the percentage of absolute alcohol in the beer sold. Affidavits of the prosecutor, his counsel, and the magistrate, were read on the return of the orders, stating that on the trial of a prior complaint against one T. P., a chemist and analyst, gave evidence, and it was agreed between the counsel for the prosecution and the counsel for the accused that his evidence might be used in the cases against the accused. In affidavits in reply the accused denied the alleged agreement, and no reference was made to it in the magistrate's return:—*Held*, that there being some evidence to justify the conviction, the orders under the decision in *Ex p. Daley*, 27 N. B. R. 129, must be discharged. *Per* Landry, J., dissenting, that the agreement having been denied, and not having been referred to in the return, the Court should treat it as not existing; that, if it existed, there was nothing in the affidavits or the return to shew what the evidence of the analyst in the case against T. was, and, therefore, no evidence upon which to base the convictions against the accused, and the orders should be made absolute. *Rex* v. *Kay, Ex p. Gallant, Ex p. Legere, Ex p. Cormier*, 37 N. B. R. 72.

Conviction — *Fine — Imprisonment — Criminal Code, s. 872.*]—A conviction made against the defendant for an offence against the Canada Temperance Act was sought to be quashed because the stipendiary magistrate by whom the same was made ordered that the defendant, in default of paying the fine and costs in the conviction mentioned, should be imprisoned in the common gaol, etc., for the term of three months, unless the several sums in said conviction mentioned were sooner paid:—*Held*, following *The Queen* v. *Horton*, 31 N. S. R. 217, 3 Can. Crim. Cas. 84, that the term of imprisonment being imposed by way of punishment, and not as a term of imprisonment to be inflicted in default of payment of the penalty, the provision for enforcing payment of the pecuniary penalty was to be found in the Criminal Code of Canada, s. 872, as amended in 1894 and 1900, and the application to quash must be dismissed with costs. *Rex* v *Blank*, 38 N. S. R. 337.

Conviction — *First offence — Penalty — Amending Act of 1904.*]—A conviction for a first offence against the second part of the Canada Temperance Act, imposing a penalty of $200 under c. 41 of the Acts of the Parliament of Canada (1904), which imposes a penalty for a first offence of not less than $50, is a good conviction.—*Semble*, that such a conviction would not be sustained if it imposed such an exorbitant penalty as to imply that the convicting magistrate acted from motives that were not judicial. *Rex* v. *Kay, Ex p. Cormier*, 2 E. L. R. 164, 38 N. B. R. 3.

Conviction for offence under second part of Canada Temperance Act — *Ex parte proceedings — Service of summons on defendant's brother living in his hotel— "Inmate" — Insufficiency of service—Practice — Criminal Code, s. 658, s.-s. 4 and s. 718.*]—On application for *certiorari*, a conviction for an offence under second part of above Act, quashed. The service of summons was made on defendant's brother in defendant's hotel, the defendant being absent at the time, at 9.30 p.m. on 26th July, and was returnable at 10 a.m. on 28th July. Service held reasonable, but no evidence that service was made on an "inmate" under above sub-section. *R.* v. *Prancy*, 7 E. L. R 411.

Conviction — *Holiday.*] — Easter Monday is not a non-juridical day, and the Court refused to set aside a conviction made on that day for an offence against the Canada Temperance Act. *Rex* v. *Kay, Ex p. Cormier*, 38 N. B. R. 231; *Rex* v. *McKay, Ex p. Cormier*, 3 E. L. R. 407.

Conviction — Imprisonment with hard labour in default of payment of fine. *Rex* v. *Clark*, 2 E. L. R. 67.

Conviction — *Imprisonment without option of fine — Amending Act of 1904.*] — Chapter 41 of the Acts of the Parliament of Canada enacting that "every one who by himself, etc. . . . keeps for sale, etc. . . . any intoxicating liquor in violation of the second part of the Canada Temperance Act shall, on summary conviction, be liable to a penalty for a first offence of not less than $50, or imprisonment for a term not exceeding one month," etc., gives an alternative penalty, so that either a fine or a term of imprisonment may be imposed. *Rex* v. *Kay, Ex p. McDougall, Ex p. Legere, Ex p. Hebert*, 2 E. L. R. 163, 38 N. B. R. 1.

Conviction — Imprisonment without option of fine. *Rex* v. *Kay, Ex p. McDougall, Ex p. Legere, Ex p. Hebert*, 2 E. L. R. 163.

Conviction — Magistrate disqualified by receipt of fines—Prisoner's right to inspect documents—Variance between warrant and conviction—Proof of date of information. *Rex* v. *Donovan*, 2 E. L. R. 214.

Convictions—*Motion to quash—Convictions not properly before Court—Certiorari.*] —An application to quash two convictions for violations of the Canada Temperance Act was made, upon reading an affidavit of the defendant, and an order made by a Judge for a return of papers, and the return thereto. The order and return were made in connection with a previous application of the defendant for his discharge from imprisonment:—*Held*, that there being no writ of *certiorari*, and no proper return thereto, the matter was not properly before the Court, and the Court had no jurisdiction to quash the convictions:—*Held*, that the mere fact of the papers referred to being found on the files of the Court was not sufficient to constitute a cause in Court, in respect to which the application to quash the convictions could be made:—*Semble*, that a writ which required the sending up of papers in two distinct causes would be liable to attack on the ground of multifariousness. *Rex* v. *McDonald*, 35 N. S. R. 323.

Conviction—R. S. C. 1906, c. 152, s. 127 — Certiorari — Rule *nisi* to quash—Applicability of 4 Edw. VII., c. 41 (amending Canada Temperance Act) to county of Westmoreland, N. B.—Fine and imprisonment—Discretion of magistrate. *Rex* v. *Kay, Ex p. Gallagher*, 4 E. L. R. 216.

Conviction—R. S. C. 1906, c. 152, s. 127 — Imprisonment — Certiorari — Rule *nisi* to quash. *Rex* v. *Kay, Ex p. Landry, Ex. p. Tighe, Ex p. Isnor*, 4 E. L. R. 221.

Conviction — *Several prosecutions pending at same time—Evidence—Influence on magistrate.*]—The defendant was summoned to appear before a stipendiary magistrate to answer two informations for selling intoxicating liquor, in violation of the second part of the Canada Temperance Act. Evidence was heard in both cases, and both cases were then adjourned until a subsequent day, when judgment was given, convicting the defendant under one information, and quashing the other:—*Held*, that the conviction must be quashed, the magistrate having heard evidence in both cases, and had them pending before him when he made the conviction; the evidence in the one case, although dismissed, being calculated, in the circumstances disclosed, to influence the magistrate in the case in which the defendant was convicted. *Regina* v. *McBerney*, 26 N. S. R. 327, followed. *Rex* v. *Burke*, 36 N. S. R. 695.

Conviction — *Stipendiary magistrate — Jurisdiction — Statutes — Amendment.*] — The defendant was convicted at Canning, in the county of Kings, of an offence against the Canada Temperance Act alleged to have been committed at Aldershot, in that county. The stipendiary magistrate who made the conviction was appointed under the authority of R. S. C., c. 33, in which it was provided that "one or more stipendiary magistrates may be appointed by the Governor-in-Council, for each county in the province, to hold office during pleasure." Subsequent to the appointment, and before the making of the conviction, the Act respecting the appointment of stipendiary magistrates was amended by the Acts of 1905, c. 11, by striking out the word "county" and substituting therefor the word "municipality." No new appointment was made for the municipality of Kings under the amending Act, and the boundaries of the municipality were the same as those of the county:—*Held*, Weatherbe, C.J., dissenting, that the stipendiary magistrate before whom the matter was heard had not lost jurisdiction to act, and that the application for a *certiorari* and to set aside the conviction made by him must be dismissed. *Rex* v. *Townshend* (No. 1), 39 N. S. R. 172.

Conviction — *Stipendiary magistrate of county—Offence in town—Jurisdiction.*] — The defendant was convicted of a violation of the Canada Temperance Act by selling intoxicating liquor at Sydney in the county of Cape Breton. Sydney is an incorporated town within the county of Cape Breton. The convicting magistrate was appointed to be "a stipendiary magistrate in the county of Cape Breton:"—*Held*, that the magistrate had jurisdiction. *Rex* v. *Conway*, 21 C. L. T. 396:—*Held*, that the provisions of the statute having been complied with, although it was not so stated in the conviction, the conviction in form "V" provided by the Dominion Act, 1888, c. 34, s. 14, was sufficient. *Regina* v. *Brine*, 33 N. S. R. 43, and *Regina* v. *Ettinger*, 32 N. S. R. 181, referred to.—*Held*, also, that the conviction was not invalid although it did not therein appear that the second and third convictions were for separate offences. *Rex* v. *Swan*, 24 C. L. T. 239.

Conviction—*Third offence — Date of — Conviction for second offence.*] — An information for a first offence against the Canada Temperance Act was laid on the 13th May, and a conviction had thereon on the 27th May, for an offence on the 8th May. Information for a second offence was laid on the 6th August, and a conviction had thereon on the 19th August for an offence between the 1st June and the 11th July. An information for a third offence was laid on the 10th October, and a conviction had thereon on the 2nd November for an offence on the 12th July:—*Held, per* Hannington and Landry, J.J., that a third offence to be punishable as such must be one committed after a conviction for the second offence, and the third conviction in this case was bad. *Per* Barker and Gregory, JJ., that the conviction was bad because the information for a second offence had not been laid before the commission of the offence for which the third conviction was made. *Per* McLeod, J., that, as the conviction was for an offence committed on a different day from the first and second offences, and after information was laid for a first offence, it was good. *Reid v. Marsh, Ex p. McCoy*, 36 N. B. R. 186.

Conviction — *Third offence—Failure to shew offence committed after information for first offence—Affidavits—Form of conviction—Separate offences.*]—The defendant was convicted by a magistrate for unlawfully selling intoxicating liquor within a town, between the 15th March, 1904, and the 5th April, 1904, contrary to the provisions of the

second part of the Canada Temperance Act, then in force in and throughout the county of Cumberland, the conviction being a conviction as and for a third offence against the second part of the Canada Temperance Act. On application for a writ of *certiorari* the chief point argued was that it did not appear from the conviction that the offence for which the defendant was convicted, was committed after an information laid for the first offence, as required by R. S. C. c. 106, s. 115 (d). Affidavits were read in reply shewing that, although it was not so stated in the conviction, such in fact was the case:—*Held*, that the affidavits were receivable:—*Held*, that the provisions of the statute having been complied with, although it was not so stated in the conviction, the conviction in form "V" provided by the Dominion Act, 1888, c. 34, s. 14, was sufficient. *Regina* v. *Brine*, 33 N. S. R. 43, and *Regina* v. *Ettinger*, 32 N. S. R. 181, referred to.—*Held*, also, that the conviction was not invalid although it did not therein appear that the second and third convictions were for separate offences. *Rex* v. *Swan*, 24 C. L. T. 239.

Conviction—*Variance between information and summons—Absence of accused — Jurisdiction—Criminal Code, ss. 669, 724.*]—On an information for keeping intoxicating liquor for sale contrary to the Canada Temperance Act, the accused was summoned to answer a charge of selling, but did not appear, and a conviction was made for keeping for sale:—*Held*, that, as the accused had not been summoned to answer the information laid, the magistrate had never acquired jurisdiction over the person, and the conviction was bad, and was not cured by s. 669 or s. 724 of the Criminal Code. *Rex* v. *Kay, Ex p. Melanson*, 38 N. B. R. 362, 4 E. L. R. 514.

Conviction by two justices—*Information taken by one—Jurisdiction—Motion to quash—Affidavits.*]—A conviction under 51 V. c. 34, s. 8, amending s. 105 of the Canada Temperance Act, made by two justices of the peace, on an information purporting on its face to have been taken and signed by only one of them, was affirmed on argument on the return of a rule *nisi* to quash the conviction removed by *certiorari*: per Tuck, C.J., Hanington, and Landry, JJ.: McLeod, J., doubting.—*Quære*, whether affidavits can be read on the return of a rule *nisi* to quash a conviction removed by *certiorari*, to establish facts necessary to jurisdiction not appearing on the face of the proceedings. *Rex* v. *Hennessy, Ex p. Pallen, Ex p. Durick*, 3 E. L. R. 427, 38 N. B. R. 103.

Conviction for third offence—Proof of previous convictions—Certificates of convicting magistrates—Oral evidence of contents of previous informations. *Rex* v. *Hoare*, 2 E. L. R. 314.

"County"—*Incorporation of city — Reduction of area.*]—The word "county," for the purposes of the Canada Temperance Act, simply means "geographical area," and there is therefore no reason for construing the Act in such a way as to effect a reduction of the prohibited area, when a city incorporated under provincial legislation is carved out of it.—By order in council dated the 15th October, 1881, the second part of the Canada Temperance Act, 1878, was declared to be in force and take effect in the county of Cape Breton. In the year 1904, by Act of the legislature of Nova Scotia passed in that year, the city of Sydney was incorporated. The defendant was convicted of having unlawfully kept intoxicating liquor for sale in the city of Sydney, contrary to the provisions of the second part of the Canada Temperance Act, then in force in said city:—*Held*, affirming the conviction, that, so far as the Canada Temperance Act was concerned, the word "county" was to be read as applying to the county as it existed when the Act was brought into force by order in council, and that the incorporation by the provincial legislature of a portion of the territory as a town or city would not have the effect of displacing the operation of the Act. *Rex* v. *McMullin*, 25 Occ. N. 108.

Date of offence—*Date of information—Jurisdiction.*]—A conviction under the Canada Temperance Act for selling between two dates, where one day in such period would be more than three months before the date of laying the information, is bad. (See s. 134.) *Rex* v. *Kay, Ex p. Hebert*, 39 N. B. R. 67, 6 E. L. R. 376.

Dismissal of charge—*Appeal to County Court—Costs of appeal—Addition of to penalty.*]— Upon the trial of an information charging the defendant with a violation of the provisions of the second part of the Canada Temperance Act, before two justices of the peace, the justices dismissed the charge and made a formal order of dismissal. From the order so made the prosecutor appealed to a County Court, which quashed the order made by the justices, convicted the defendant of the offence charged, and ordered that he pay, in addition to the fine imposed, etc., the prosecutor's costs, amounting in the sum of $27.10, and that the same be levied by distress, etc.:—*Held* (Ritchie and Henry, JJ., dissenting), that the County Court Judge had jurisdiction to include in the penalty imposed the costs of appeal to that Court. *Regina* v. *Hawbolt*, 33 N. S. R. 165.

Fourth conviction — *Imprisonment — Release on bail—Re-arrest—Process—Discharge.*] — D. was originally imprisoned under a warrant of two justices on a conviction for a fourth offence against the provisions of the second part of the Canada Temperance Act. He applied for an order for his discharge to a Judge, who referred the matter to the Court for advice, bailing the prisoner to appear on a day certain in term, to submit to whatever order the Court might make. The Court, by a majority of its members, advised the Judge that D. was illegally imprisoned and to refuse the application. It appeared on the day and at the place mentioned in his recognizance before the Judge, sitting as the Court, who made an order recommitting D. to goal, "there to remain until discharged according to the condition of the said warrant" (original warrant of the justices) "and according to the condition of the recognizance and the course of the Court."—D. was by consent of counsel allowed to go at large from Saturday until Tuesday, on which day he surrendered himself to the gaoler, who refused to take or retain him. On the following day D.

was arrested by a provincial constable on the order of the Court, without any process, and lodged in gaol:—*Held*, that the Judge had no power on the first application to bail D., as there were not any facts upon which the Judge had any doubts, the grounds of the application being matters of law, and there being no facts the truth or falsity of which were to be pronounced upon.—If the Judge could order the bailing of D., no order was made by the Court, as the matter was referred back to the Judge, and any order he made should have been under his hand. Assuming that the Judge was right in making the order as an order of the Court, D. being at large could not be arrested on the order without a process of the Court to enforce it. *Ex p. Doherty*, 20 C. L. T. 20.

Gin sold by bottle—*Medical certificate.*] Order *nisi* to quash conviction discharged. A physician had given S. a prescription for 10 oz. of gin to be used for medicine only, and to be repeated once only. Such a certificate is faulty. *Rex* v. *Kay, Ex p. Nugent*, 6 E. L. R. 272, 39 N. B. R. 135.

Habeas corpus — *Certiorari* — *Actions against magistrate* — *Defendant convicted a second time by magistrate pending actions for taking excessive fees and for false imprisonment—Discharge of prisoner.*]—On return of order in the nature of writs of *habeas corpus* and *certiorari*, defendant, who had been in prison under a warrant of commitment issued on a conviction made by an additional stipendiary magistrate for the town of Westville, prisoner was discharged, it appearing that the justice was disqualified by reason of pending litigation between the prisoner and the justice. There was no proof that there were any licenses in force in the county in question at the time when the proclamation was made bringing the Canada Temperance Act into effect. *Rex* v. *Lorrimer*, 7 E. L. R. 117.

Illegal sale of liquor—*Conviction — Habeas corpus.*]—Defendant convicted for illegally selling liquor. As the information, which charged a second offence, did not allege a previous conviction, conviction held to be bad. It will not do merely to allege a previous offence or a previous information for an offence. *Rex* v. *Jordan*, 7 E. L. R. 53.

Illegal sale of liquors — *Action for price.*]—In an action for the price of intoxicating liquors sold by the plaintiff to the defendant at North Sydney, in the county of Cape Breton, it was admitted that the plaintiff knew that the Canada Temperance Act was in force in North Sydney, that the defendant was then carrying on a business in intoxicating liquors, that the order for the liquors was given by the defendant to an agent of the plaintiff at North Sydney, but subject to the approval of the plaintiff, and that the defendant purchased the liquors as a retail dealer for sale in that county:—*Held*, that there was sufficient ground to justify a judgment for the defendant. *Ross* v. *Morrison*, 36 N. S. R. 518.

Information — *Amendment* — *Adjournment.*]—On the trial of a person for an offence against the Canada Temperance Act, the information may be amended or altered and any other offence under the Act substituted, and the trial continued to conviction without an adjournment, if the defendant is present and does not allege that he is misled and does not ask for an adjournment. *Rex* v. *Byron, Ex p. P. Batson*, 37 N. B. R. 386; *Rex* v. *P. Batson*, 1 E. L. R. 363.

Information—*Conviction — Date of offence—Uncertainty.*]—Where an information for an offence against the Canada Temperance Act was laid on the 11th March, 1908, and the defendant was convicted for an offence committed between the 8th and 11th days of that month, the conviction was held not bad for uncertainty as to whether the offence had been committed before the information was laid. *Rex* v. *Kay, Ex p. Wilson (No. 2)*, 38 N. B. R. 503, 5 W. L. R. 160.

Information — *Time of commission of offence.*] — Conviction for illegally selling liquor between 1st December, 1907, and 1st March, 1908. Conviction quashed, it not appearing that the prosecution was commenced within the three months' limit under s. 134 of the above Act, the information having been laid on the third day of March, 1908. *Rex* v. *Kay, Ex p. Wilson*, 5 E. L. R. 160, 38 N. B. R. 533, 14 Can. Crim. Cas. 32.

Infraction — *Conviction* — *Non-intoxicating beverages.*]—Orders *nisi* to quash convictions discharged. Whether or not certain beverages are intoxicating is purely a question of fact and one solely for the decision of the magistrate. His decision cannot be reviewed. *Rex* v. *Kay, Ex p. Chrisman*; *Rex* v. *Kay, Ex p. Legere*; *Rex* v. *Kay, Ex p. Hodge*, 5 E. L. R. 153, 38 N. B. R. 498, 14 Can. Crim. Cas. 38, 6 E. L. R. 262, 39 N. B. R. 129.

Jurisdiction of provincial magistrates — *Conviction—Justices of the peace—Adjournment—Proof of service — Delay in hearing.*]—The defendant was convicted before two justices of the peace for the county of Kings of the offence of having unlawfully kept for sale in his hotel at K., in said county, intoxicating liquors, contrary to the provisions of the second part of the Canada Temperance Act then in force in said county:—*Held*, that the Provincial Legislature having made provision for the appointment of justices of peace, and having conferred jurisdiction upon them to impose penalties and punishments for the enforcement of provincial statutes, it was competent for the parliament of Canada, by statute, to provide that punishments and penalties for the enforcement of laws of the parliament of Canada might be recovered and inflicted before these Courts. Therefore the magistrates had jurisdiction. The justices having met at the hour appointed did not lose jurisdiction by the fact of their having adjourned the hearing until a later hour of the same day. Proof of the service of summons being a part of the hearing, it was not necessary that the justices should have had such proof before them as a preliminary to making the adjournment. The delay in the hearing of the case from the hour of ten o'clock in the morning until two o'clock in the afternoon of the same day was not unreasonable. *Rex* v. *Wipper*, 34 N. S. R. 202.

Jurisdiction of stipendiary magistrates—*County and town.*]—The defendant was convicted by the stipendiary magistrate for the county of Cape Breton, of the offence of having kept for sale upon his premises intoxicating liquors contrary to the provisions of the second part of the Canada Temperance Act. The offence was committed within the limits of the town of Sydney, an incorporated town in the county of Cape Breton. Under the provisions of R. S. N. S. 1900, c. 33, relative to the appointment and authority of stipendiary magistrates, it is enacted that "every stipendiary magistrate shall have jurisdiction, power, and authority throughout the whole of the county for which he is appointed:"—*Held*, that, in the absence of legislation giving exclusive jurisdiction to the stipendiary magistrate for the town of Sydney, the words of the statute must be construed as including that part of the county embraced within the limits of the town. Section 14 of c. 33, which was relied upon as indicating a contrary intention, was not to be given such a construction, but was merely intended to give certain powers to stipendiary magistrates for the counties, where exclusive jurisdiction had been conferred upon the magistrates for incoporated towns. *Rex* v. *Giovanetti*, 34 N. S. R. 505.

Keeping for sale — *Search warrant—Execution of by the prosecutor of the charge of keeping for sale.*]—A conviction under the Canada Temperance Act, R. S. C. 1906, c. 152, for keeping liquor for sale, on an information laid by W., will not be set aside because W. also laid the information for and executed a search warrant by which the evidence in support of the conviction was obtained. (*Ex p. McCleave*, 35 N. R. R. 100, distinguished.) *Ex p. Dewar* (1909), 39 N. B. R. 143.

Liberty of subject — *Discharge of person imprisoned for offence against Canada Temperance Act—Warrant of commitment—Irregularity—Amendment—Judicial notice of facts necessary to valid conviction—Effect of recital in complaint.*]—On the return of a *habeas corpus* the prisoner was discharged. Warrant held bad as the evidence shewed that the penalty might have been made by distress. It was also defective in not alleging non-payment "of the several sums or part thereof." It was not shewn that above Act was in force and that no licenses were in force. *Rex* v. *McGillivray*, 7 E. L. R. 240.

Liquor License Act of Nova Scotia.]—Inspector—Appointment by municipal council—Term of office—Action for salary for full year from date of appointment—Liability. *Lawson* v. *Town of Glace Bay*, 4 E. L. R. 49.

Liquor seized under search warrant—*Replevin—Practice.*]—Certain liquor had been seized under the above Act by the sheriff under a warrant. The liquor was given into custody of Colpitts, the license inspector. McKeen, a druggist, claiming the liquor, replevied same:—*Held*, on interlocutory trial that Colpitts entitled to hold liquor. *Colpitts* v. *McKeen*, 7 E. L. R. 184.

Mandamus to compel County Court Judge to hear appeal from conviction.]—Criminal Code, s. 749 (c.) — "Next sittings"—"District" and "county"—Computation of time within which appeal to be taken. *Rex ex rel. Johnson* v. *Judge of County Court of District No. 5*, 4 E. L. R. 396.

Offence — *Conviction — Bias of magistrate—Search warrant—Insufficiency — Unauthorised execution of warrant.*]— Order *nisi* to quash conviction under Canada Temperance Act, discharged, as there was ample evidence for the conclusion of the magistrate. The magistrate was not disqualified on the ground of bias because he was chairman of the Police Commissioners. *Rex* v. *Kay, Ex p. Wilson*, 6 E. L. R. 257, 39 N. B. R. 124.

Offence against—*Hearing of complaint—Omission to read evidence over to witness—Jurisdiction of magistrate—Bias—Disqualification of justice—Litigation pending—Notice of action.*]—The provision of s. 721, s.-s. 3, of the Criminal Code, requiring the evidence to be read over to a witness on the hearing of an information or complaint, is a matter of procedure, and its omission does not go to the jurisdiction of the magistrate. *Ex p. Doherty*, 32 N. B. R. 479, followed.—If the mere fact of existing litigation is relied on as the disqualification of a presiding justice on the ground of bias, the litigation must be really pending. Service of a notice of action not followed by an action is not sufficient. *Rex* v. *Byron*, 37 N. B. R. 382, followed. *Rex* v. *Kay, Ex p. Gallagher, Ex p. Wilson (No. 1), Ex p. Melanson, Ex p. Albapare, Ex p. Hebert, Ex p. Le Blanc*, 38 N. B. R. 498, 5 W. L. R. 153.

Offences against—*Sale of liquor outside county—Delivery and collection of price — Agent.*]—The agent of an express company in the county of W., where the Canada Temperance Act was in force, in the ordinary course of business, delivered a parcel containing intoxicating liquor to the person to whom it was addressed, and collected from him the price thereof, the liquor, by the buyer's instructions, having been sent to him by express, c. o. d. The sale of the liquor was effected at a place outside of the county of W.:—*Held*, that the agent could not be convicted of selling intoxicating liquor contrary to the provisions of the Act. *Regina* v. *Cahill, Ex p. Trenholm, Ex p. Milton*, 21 C. L. T. 55, 35 N. B. R. 240.

Penalty and imprisonment—Application for a writ of certiorari to remove a conviction for a third offence against the Canada Temperance Act—"Calendar months"—Deputy stipendiary magistrate—Jurisdiction—Amendment—Evidence. *Re Neilly* (1911), 9 E. L. R. 345. N. S. R. Can. Cr. Cas.

Police magistrate—*Disqualification—Interest in fines—Bias — Imprisonment — Distress.*]—Both the police and the sitting magistrate for the city of M. were residents and ratepayers thereof, and the police magistrate was in receipt of a fixed salary from the city as city Court commissioner. Fines imposed for violation of the Canada Temperance Act therein were paid over to the treasurer of the city, by him placed to the credit of its general funds, and used to meet unforeseen expenses. The city, by one of its

policemen employed for the purpose of enforcing the Act, was the prosecutor in all the cases:— *Held* (Hannington, J., *dissentiente*, and Landry, J., *dubitante*), that there was no disqualification of either the police or the sitting magistrate by reason of pecuniary interest, nor was there such a probability of bias on the part of either by reason of their being corporators of the city, which was the virtual prosecutor, as to invalidate convictions made by them for violations of the Canada Temperance Act in the said city of M.—*Ex p. Driscoll*, 27 N. B. Reps. 216, considered.—Section 872 of the Criminal Code, 1892, allows imprisonment without the awarding of distress. *Ex p. Gorman*, 34 N. B. R. 397.

Police magistrate—*Disqualification — Litigation with husband—Bias.*]— A *bona fide* action brought by the husband of a defendant against a stipendiary magistrate, before whom an information is laid for a violation of the second part of the Canada Temperance Act, is sufficient to disqualify him. — *Ex p. Scribner*, 32 N. B. R. 175, distinguished. *Ex p. Gallagher*, 34 N. B. R. 413.

Previous conviction — *Evidence — Defendant represented by counsel.*]—On application to quash a conviction for a fourth offence against the provisions of the Canada Temperance Act, on the ground that the question whether the defendant had been previously convicted was not addressed to him, as required by s. 115 (a) of the Act:—*Held*, dismissing the application with costs, that it was not necessary that the question referred to should be addressed to the defendant in a case where he was represented by counsel:—*Held*, that, if the defendant could be adequately represented by counsel in pleading to and trying the main case (which it was clear he might be, under ss. 850, 854, 855, 856 and 857 of the Code), he could equally be represented by counsel in respect to this inquiry. *Rex* v. *O'Hearon*, 34 N. S. R. 491.

Repeal.]—Enforcing prior convictions — Magistrate suspending execution of sentence. *In re Lynch*, 1 E. L. R. 134.

Sale by agent — *Conviction of principal.*]—The principal may be convicted under the Canada Temperance Act for selling liquor, although his agent who actually made the sale is unknown, and therefore cannot be convicted. *Ex p. Johnson*, 39 N. B. R. 73.

Search warrant—*Execution by informant—Order for destruction of liquors.*] — One B. laid an information before the stipendiary magistrate for Moncton under the provisions of the Canada Temperance Act, and obtained a warrant to search the premises of the applicant, which he executed himself, and took the liquor seized before the magistrate. Subsequently, on the information of B., the applicant was convicted before the magistrate of unlawfully keeping the liquor for sale, and the liquor seized was condemned and its destruction ordered, which order was executed by B.:—*Held*, on an application for a *certiorari* to remove the order for condemnation and destruction, that the informant could not lawfully execute his own warrant, and that the liquor was not lawfully before the magistrate, and the order for destruction was void. *Ex p. McCleave*, 20 C. L. T. 89.

Search warrant—*Execution by prosecutor—Order for destruction of liquors.*] — The prosecutor of a charge of keeping liquor for sale contrary to the Canada Temperance Act, being personally liable for costs in the event of the prosecution failing, is, though a peace officer, disqualified from executing a search warrant or an order for the destruction of the liquor for the keeping of which for sale the information was laid. *Ex p. McCleave*, 20 C. L. T. 89, 35 N. B. R. 100.

Search warrant—*Issue before prosecution—Information—Form of—Causes of suspicion—Amended Act.*]—On motion for writ of *certiorari* to remove into Supreme Court a record of search warrant made by two justices of the peace authorising and requiring constables to whom the warrant was directed to enter premises of defendant and search for intoxicating liquor, and also an order for destruction of liquor made by the same justices of the peace three days later:—*Held*, Weatherbe, C.J., dissenting, that under the provisions of the Canada Temperance Act, ss. 108, 109, as amended by the statutes of Canada, 1888, c. 34, the warrant to search for liquor unlawfully kept for sale may preclude prosecution for the penalty for unlawfully keeping for sale.—2. That it is not necessary under amended Act to set out causes of suspicion or particulars of offence in the information upon which the warrant is issued, such particulars not being ascertainable until after the goods are seized.—3. That the sense of the enactment in this respect being at variance with the form given in the statute, the direction in the form is not to be followed. If otherwise, the direction was sufficiently complied with, there being an allegation that the liquor was unlawfully kept for sale, and the place being sufficiently indicated. *Rex* v. *Townshend* (No. 2), (1906), 39 N. S. R. 189.

Search warrant—*Issue before prosecution—Writ of certiorari refused—Practice as to special leave to appeal in criminal cases—Privy Council.*]—Under the Canada Temperance Act, 1888 (51 V. c. 34), a search warrant was issued and duly executed, and large quantities of intoxicating liquor found in the hotel and premises searched, and a conviction of the appellant subsequently obtained in regard thereto, with a consequent order for the destruction of the liquor:—*Held*, that, the Supreme Court having dismissed applications for writs of *certiorari* to remove into the said Court the record of the said search warrant and destruction order, special leave to appeal therefrom must be refused. The decision was plainly right, having regard to s. 10 of the Act under which the warrant was issued. Judgment in *Rex* v. *Townshend*, 39 N. S. R. 189, affirmed. *Townshend* v. *Cox*, [1907] A. C. 514.

Search warrant and order for destruction of liquors — *Action against justices — Condition precedent — Quashing order.*]—Under the Canada Temperance Act Amendment Act of 1888, justices of the peace have jurisdiction to issue a search warrant

to search for and seize liquors, on information laid therefor, notwithstanding that no prosecution in relation thereto has been brought or is pending. And an order under which liquors seized under such warrant were destroyed, following a conviction consequent on such search, must be quashed before an action can be brought or maintained against the justices who made such warrant and order. *Townsend* v. *Beckwith*, 42 N. S. R. 307, 3 E. L. R. 501, 14 Can. Crim. Cas. 353.

Second arrest on same warrant.] — The prisoner, who had been arrested under a warrant to serve a sentence of imprisonment for an offence against the Canada Temperance Act, was, upon his own request, suffered to go at large for a time by the officer who had the execution of the warrant. Shortly afterwards he was again arrested upon the same warrant and conveyed to the county gaol to serve his term of imprisonment. Upon an application for an order in the nature of a *habeas corpus*:—*Held*, by the full Court, that the second arrest upon the same warrant was legal, and that the order should be refused. *Ex p. Doherty*, 35 N. B. Reps. 43. [But see a subsequent decision in the same case, 20 C. L. T. 20.]

Second offence — *Conviction — Irregularity — Costs of conveyance to jail — Discharge of prisoner.*]—The costs of conveyance to gaol not having been included in the warrant of commitment, prisoner discharged. *Re Alfred LeBlanc*, 7 E. L. R. 94.

Second offence—*Conviction for — Proof of previous conviction.*]— A certificate that defendant had been convicted for keeping intoxicating liquor for sale contrary to the Canada Temperance Act was held sufficient proof under the Act of a previous offence upon which to base a second conviction for keeping for sale, though it did not appear from the certificate, and was not otherwise proved, that such previous conviction was for a first offence. *Rex* v. *Byron, Ex p. Batson* (1906), 37 N. B. R. 83.

Seizure of liquors—*Search warrant — Conviction—Destruction of liquor—Capacity of magistrate—Disqualification—Interest.*] — On the 7th December information was laid against M. for keeping intoxicating liquors for sale on or about the 6th, and on the 11th a search warrant was granted, under which the premises of M. were searched and a quantity of liquor claimed by plaintiff seized.—M. was convicted on the 20th December for keeping liquor for sale on the 6th of the same month, in contravention of the provisions of the Canada Temperance Act, and on the 21st an order for the destruction of the liquor was made by the stipendiary magistrate who made the conviction:—*Held*, that it must be assumed that the magistrate was satisfied when he made the order for destruction of the liquor, that the liquor to which the order applied was that which had been the subject of the conviction, and his decision on this point was final; also, that it was not necessary that the information for the search warrant should precede the information for the search.—Objection was taken to the magistrate's acting, on the ground of interest in the result:—*Held*, that the magistrate was not incapacitated from acting on account of interest in the result, there being no other justice who could act in the making of the order, and, if he were held disqualified, the provisions of the Act would be defeated.—*Held*, also, that it made no difference to whom the liquor seized belonged, if it were in fact being kept for sale in violation of the Act. *McNeil* v. *McGillivray*, 42 N. S. R. 133, 4 E. L. R. 187.

Seizure of liquors—Search warrant — Disqualification of magistrate. *McNeil* v. *McGillivray*, 4 E. L. R. 187.

Shipping liquor into place where Canada Temperance Act has been proclaimed is an offence, at least partly committed in that place, and a magistrate there has jurisdiction to summarily convict for the offence, a person resident in another county, who appears before him charged with the offence. Such jurisdiction may be supported under Cr. Code ss. 584 (b) and 707, as well as under s. 127 of the Can. Tem. Act as amended in 1908. *R.* v. *Dibblee, Ex p. McIntyre* (1909), 39 N. B. R. 361, 16 Can. Cr. Cas. 38.

Statute—*Construction of—Imperative or permissive — Penalty.*]—There having been numerous convictions of the respondent, with accumulated penalties, amounting to $1,400, for having on various occasions sold intoxicating liquor, and thereby committed offences under the Canada Temperance Act of 1864, a *certiorari* was granted in one case by the Superior Court, on the ground that, by the true construction of s. 17, which provides that two or more offences by the same person may be included in the same complaint, a penalty of $100 was sufficient for all offences under the Act during the limitation period of three months prescribed by s. 15:—*Held*, that, in the absence of express words to that effect, s. 17 must be construed as permissive merely, and not imperative. *Wentworth* v. *Mathieu*, [1900] A. C. 212.

Summons — Irregularity — Dismissal of information—New summons for same offence — Conviction — Validity. *R.* v. *Johnson* (N.S.), (1910), 9 E. L. R. 37.

Third offence—Conviction for—Prohibition—Act—Proof of previous convictions. *In re Higgins* (1906), 2 E. L. R. 179.

Third offence—*Conviction for—Proof of previous convictions—Certificates—Evidence —Identity of accused.*]—In absence of admission by accused of previous convictions, certificates of such previous convictions are, under s. 115 of the Canada Temperance Act, sufficient proof of such convictions, and it is not necessary that evidence apart from such convictions should be given of the identity of accused with the person formerly convicted, where he was present at the trial and did not raise the question of identity. *R.* v. *Byron, Ex p. O. A. Batson* (1906), 37 N. B. R. 383, 1 E. L. R. 364.

Third offence—Conviction for—Recitals of former convictions—Certificates of former convictions. *R.* v. *Woodlock* (1906), 1 E. L. R. 160.

Third offence—Conviction for—Recitals of former convictions—Dates of informations not given—Amendment of charge at hearing —Adjournment—Waiver. *R.* v. *Clark* (1906), 2 E. L. R. 127.

2. Liquor License Acts.

i. *Alberta Act.*

Allowing liquor to be drunk on premises of restaurant keeper—*Interpretation of s. 115 of that Ordinance.*]—Two persons went into defendant's restaurant and asked permission to drink some beer which they had brought with them. Defendant gave them permission:—*Held*, that defendant who was charged under s. 115, should be acquitted. *Rex* v. *Mo Hong*, 10 W. L. R. 262. Alta. L. R. .

Application for an originating summons issued by a Judge of the Supreme Court of Alberta on an application for cancellation of a license under section 57 of the Liquor License Ordinance, is a judicial proceeding within the meaning of section 37 of the Supreme Court Act, R. S. C. 1906, c. 139, and consequently, the Supreme Court of Canada has jurisdiction to entertain an application for leave to appeal from the judgment of the Supreme Court of Alberta thereon. *Finseth* v. *Ryley Hotel Co.* (1910), 31 C. L. T. 194, 43 S. C. R. 646.

Held, that the provisions of s. 57 of "Liquor License Ordinance" (Con. Ord., 1898, c. 89), confer upon a Judge of the Supreme Court of Alta. power to direct the cancellation of liquor licenses which have been obtained in violation of sub-section 3, of section 37, of that ordinance as amended by section 14 of "The Liquor License Amendment Act, 1907," 7 Edw. VII. c. 9 of the Province of Alberta. *Finseth* v. *Ryley Hotel Co.* (1911), 44 S. C. R. 321.

Board of License Commissioners — *Sections 37 and 57 of above Ordinance.*]—On appeal *held*, that the license in question was improperly granted, should be cancelled and appeal allowed, as written recommendation, which is a condition precedent under s. 37 above, had not been obtained. *Re Richelieu Hotel License*, 10 W. L. R. 402, 2 Alta. L. R. 64.

Cancellation of license — *Order of Court—Appeal to Supreme Court of Canada — Perfecting security — Effect on license—Application for removal—Necessity for recommendation.*] — Where license was cancelled by Court *en banc*. The licensee then appealed to the Supreme Court of Canada. On perfecting the appeal, the licensee claimed that the order cancelling the license was stayed and that being an existing licensee he was entitled to a new license without recommendation:—*Held*, that he was not, and new license issued to him must be cancelled. *Re Richelieu Hotel License*, 12 W. L. R. 72. See 10 W. L. R. 402, 2 Alta. L. R. 64.

Liquor License Ordinance — *Order cancelling hotel license — Jurisdiction of Judge of Supreme Court—Inquiry into compliance with s. 37 (3)—Number of dwelling-houses in village—Interpretation of statute—Headings—Supreme Court en banc—Duty as to following previous decisions.*] — An order of a Judge of the Supreme Court cancelling a license to sell intoxicating liquors in a hotel, upon the ground that the village in which the hotel was situated did not contain 40 dwelling-houses, as required by the Liquor License Ordinance, was set aside on appeal to the Supreme Court *en banc*, who *held* (Stuart, J., dissenting), that, on a complaint laid under s. 57 of the Ordinance, the Judge has no authority to enquire whether the provision of s. 37, s-s. 3, that "no application for a new license shall be entertained in respect of any hotel license in a village containing less than 40 dwelling-houses," has been complied with—in other words, that the decision of the Board of License Commissioners on that matter is final. Section 37 relates to procedure, and is directory only. The reference in s. 57 to "provisions respecting licenses" is confined to those sections of the Ordinance coming under the sub-title "Licenses" in the arrangement of the Act. Such particular headings are legitimately taken into account in the interpretation of statutes. — *Re Yale Hotel License*, 6 W. L. R. 769, considered.—*Re Richelieu Hotel License*, 10 W. L. R. 402, not followed.—The Supreme Court *en banc*, being the final Court of Appeal in such a case, should decline to follow its own earlier, but recent decision, if of opinion that that decision was wrong.—Order of Harvey, J., reversed; Stuart, J., dissenting. *Re Ryley Hotel Co.* (1910), 15 W. L. R. 229.

Municipal licenses.] — The provisions of the charter of the town of Edmonton (N. W. T. Ord. 1904, c. 19), title xxxvii., s. 3 (4), exempting any person assessed in respect of any business from the payment of "a license fee in respect of the same business" does not apply to fees exigible upon licenses issued by the Provincial Government under the Liquor License Ordinance, (Con. Ord. N. W. T., c. 89. *York* v. *Edmonton* (1909), 2 Alta. L. R. 38, 10 W. L. R. 405, affirmed 42 S. C. R. 363, reversing 10 W. L. R. 270.

ii. *British Columbia Act.*

Allowing gambling *on licensed premises —Knowledge of licensee.*]—Conviction for allowing gambling on premises for which there was a retail liquor license quashed, the holder of the license not having allowed the gambling, that is, not having knowledge of it. *Rex* v. *Whelan*, 9 W. L. R. 424, B. C. R. .

By-law — *Conviction — Appeal — Defect in form or substance—B. C. Summary Convictions Act — Legal merits — Motion to quash conviction — Municipal Clauses Act, 1906 — New Westminster Act, 1888.*]—Appeal by defendant from conviction for selling intoxicating liquor without a license dismissed:—*Held*, that the provisions of New Westminster Act above alone are applicable. *Sink Kee* v. *McIntosh*, 10 W. L. R. 103, B. C. R. .

Hotel license granted by Commissioners — Appeal to County Court Judge—Notice of appeal — Proof of decision of commissioners—Notice signed by party affected by decision—Proof of number of licenses—Trial *de nova*—Population of village—Interpretation of statute. *Re Hurel and Handley* (B.C.), 6 W. L. R. 765.

Hotel license granted by Commissioners — *Appeal to County Court Judge—Notice of appeal—Proof of decision of Com-*

missioners—Proof of number of licenses—Trial de novo—Population of village—Construction of statute.] — (1) In an appeal from the decision of Commissioners under the Liquor License Act, 1900, proof of such decision is not necessary.—2. It is not necessary that the notice of appeal be signed by the party or parties affected by the decision. —3. The appellant is not called upon to prove that the Commissioners have exhausted their authority by having granted the full number of licenses.—4. Section 11a of the Act, as enacted by c. 26, 1906, contemplates an actual population of 1,500 before a fourth license may be granted. *Re Hurel and Handley*, 6 W. L. R. 765; *Hurel* v. *Handley*, 13 B. C. R. 278.

Hotel license granted by Commissioners — Number of licenses — Householders—Onus of proof — Interpretation of "population actually resident" — Floating population—Signatures to petition. *Re Bell Liquor Apeal* (B.C.), 7 W. L. R. 250.

Hotel license granted by Commissioners — *Number of licenses — Householders — Petition — Onus — "Actually resident."*]—The onus of proving that the petition called for by s. 22 of the Liquor License Act, 1900, does not comply with the provisions of the Act is on the petitioner.—Where a man enters into the employment of another person for an indefinite period, he thereby becomes, within the meaning of the Liquor License Act, "actually resident." *Re Bell Liquor Appeal*, 7 W. L. R. 250; *Labelle* v. *Bell*, 13 B. C. R. 328.

Interpretation — "Allowing" gambling on licensed premises—Knowledge of licensee. *Rex* v. *Whelan*, 9 W. L. R. 424.

Interpretation — Renewal of license — Discretion of License Commissioners — Refusal of rehearing — Right of appeal. *Re Ross and McCool* (B.C.), 5 W. L. R. 561.

Intoxicating liquors — Sale in prohibited hours—Conviction of licensee—Vancouver Incorporation Act, 1900, ss. 161, 162—Licensing board—Powers of—By-laws passed by board—Conflict with municipal by-laws—Unlawful act of employee—Responsibility of licensee. *Rex* v. *Roberts*, 9 W. L. R. 421.

Powers of city council—*By-law prohibiting issue of saloon licenses — Ultra vires—Sec. 205 of Act.*]—A portion of a by-law passed by the municipal council of a city repealed a provision of a former by-law limiting the number of saloons in the city to 6, and enacted that "no license for the purpose of vending spirituous or fermented liquors by retail (commonly called saloon license), shall hereafter be issued in the city:"—*Held*, that this portion of the by-law was prohibitive, and, having regard to the provisions of the Liquor License Act, and especially sec. 205, that there was power in the council to regulate, but not to prohibit; and this portion of the by-law was quashed.—*City of Toronto* v. *Virgo*, [1896] A. C. 88, followed. *Re Blomberg & Nelson* (1910), 15 W. L. R. 375, B. C. R.

Renewal of license—Powers of license commissioners — Appeal to County Court Judge—Petition under s. 12—Right of appeal. *Re Fernie Liquor Appeal* (B.C.), 8 W. L. R. 394.

Sale after hours — Offence against s. 48 (1)—Penalty under s. 63 (1) (a)—*Prima facie* proof of sale—Light in bar-room —Conviction quashed on appeal because fine imposed less than that fixed by statute—Jurisdiction of magistrate. *Rex* v. *McIntyre* (B.C.), 14 Can. Crim. Cas. 43.

Sale in prohibited hours — *Conflicting by-laws—Offence committed by employee — Vancouver Incorporation Act, 1900, ss. 125 (19), 161, 162.*]—By a by-law passed in November, 1900, the licensing board, pursuant to ss. 161 and 162 of the Vancouver Incorporation Act, 1900, defined the conditions governing the sale of liquor within the municipality. The board again dealt with the subject in August, 1905, forbidding the sale of liquor "from or after the hour of 11 o'clock on Saturday night till six of the o'clock on Monday morning, thereafter," and provided that "such portions of any and all by-laws heretofore passed regulating the sale of intoxicating liquors in the city of Vancuover as conflict with the provisions of this by-law are hereby repealed." Sub-section 19 of s. 125 of the Vancouver Incorporation Act, 1900, empowers the city council to pass by-laws for "the closing of saloons, hotels, and stores and places of business during such hours and on Sunday as may be thought expedient." In pursuance of this sub-section the council, in May, 1902, passed a by-law preventing the sale of liquor between the hours of 11 o'clock on Saturday night and six o'clock on Monday morning:—*Held*, that the council, in passing this last mentioned by-law, had gone beyond the powers meant to be conferred by s.-s. 19 of s. 125. *In re Roberts*, 14 B. C. R. 76, *Rex* v. *Roberts*, 9 W. L. R. 421.

Sale of during prohibited hours — *Hotel keeper employing bartender — Illegal act of latter—Knowledge of employer.*] — Conviction of defendant, a hotel keeper, was held to be good, for unlawfully selling liquor to persons on his premises within prohibited hours, although the liquor was sold by defendant's bartender without defendant's knowledge. *Rex* v. *Gates*, 11 W. L. R. 247.

Wholesale license — *Alien—Mandamus —Change in membership of licensing board.*] —The Vancouver licensing board refused to consider an application for a wholesale liquor license because the applicant was a Japanese. An application for a mandamus was refused by a Judge. Applicant appealed to the full Court, and at the time of hearing of the appeal the personnel of the board had been changed:—*Held*, that the board should have considered the application regardless of the fact that he was a Japanese, but, as the personnel of the board had been changed, no order would be made. *In re Kanamura*, 10 B. C. R. 354.

Wholesale license — "*Person*"—*Firm —Statutes.*]—Unless specially provided, the word "person" does not include a firm; and s. 171, s.-s. 4, of the Municipal Clauses Act, authorising the issue of wholesale liquor licenses and to levy fees therefor from any "person," etc., does not include a firm. *In re Wah Yun & Co.*, 11 B. C. R. 154.

Wholesale licenses — Limitation as to number. *Re Carosella* (B.C.), 6 W. L. R. 705.

iii. *Manitoba Act.*

Furnishing liquor to interdict—*Information — Amendment—Amendment more than thirty days after offence—Jurisdiction of magistrate.*]—The original information alleged that the accused had unlawfully supplied liquor to the interdict. At the trial the information was amended by alleging that the defendant had knowledge of the interdiction:—*Held*, that as the amendment had been made more than thirty days after the date of the offence the magistrate had no jurisdiction to convict. Conviction quashed. *Rex* v. *Guertin*, 11 W. L. R. 98, 19 Man. L. R. 33.

iv. *New Brunswick Act.*

Appeal—*Objection to jurisdiction in factum — Final judgment.*] — An information was laid against defendants, now appellants, in St. John Police Court, for that they had issued more licenses in Prince ward than permitted by the License Act. Before the magistrate dealt with the complaint, a special case was stated for the opinion of the Court, which went "*extra cursum curiæ*" to the N. B. Supreme Court. Appeal to Supreme Court of Canada quashed, the proceedings not originating in a Superior Court under s. 36 of the Supreme Court Act, nor is it an appeal from a final judgment. *Blain* v. *Jamieson*, 6 E. L. R. 71.

Appeal — *Proceedings brought upon certiorari — Habeas corpus — Order of County Court Judge—Right of appeal.*]—Where a party prosecuting an appeal under the Liquor License Act (C. S. N. B. 1903, c. 22) was unable to get the proceedings certified by the clerk of the County Court, as provided by s. 105, and so had them returned under a writ of *certiorari*, the Court heard the matter as an appeal under the section.—No appeal lies under s. 105 from an order of a Judge of a County Court made upon *habeas corpus* proceedings discharging a prisoner in custody for default of payment of fines imposed for offences against the Liquor License Act. *McCrea* v. *Watson*, 2 E. L. R. 170, 37 N. B. R. 623.

Certiorari where right of appeal exists—*Practice.*]—*Orders nisi* to quash convictions discharged. As none of the objections affected the jurisdiction of the magistrate nor were there any exceptional circumstances, the defendant should have appealed to the County Court Judge. *Rex* v. *Murray*, *Ex p. Bamboise*, 7 E. L. R. 167.

Conviction — *Certiorari — Improper arrest.*]—The fact that the defendant was arrested and brought before the magistrate who made the conviction, by a constable who was not qualified as required by C. S. N. B. c. 99, s. 63, is no ground for a *certiorari* under the Liquor License Act, 1896. The improper arrest does not go to the jurisdiction of the convicting magistrate. *Ex p. Gibberson*, 34 N. B. R. 598.

Conviction — *Certiorari — Magistrate—Rejection of evidence — Disqualification — Bias — Ratepayer — Witness.*] — An order *nisi* having been obtained to quash a conviction for selling liquor without a license upon the ground, among others, of the improper rejection of evidence tendered on behalf of the defendant: — *Held*, that this was no ground for *certiorari*. There was a number of other objections going to shew that the magistrate was disqualified by reason of his relationship to the real prosecutor and by reason of bias, etc., but it was held that these objections were not established in point of fact. The defendant applied to call the magistrate as a witness, but, as he declined to state in any other than in a general way what he proposed to prove by him, the magistrate refused to leave the Bench to be sworn. In this he was sustained by the Court, notwithstanding the defendant swore that the application was made in good faith. The magistrate is not disqualified because of his being a ratepayer in the district where the case was tried. *Certiorari* is taken away in cases of convictions for selling without license by the Liquor License Act, 1896, s. 104. *Ex p. Hebert*, 34 N. B. R. 435.

Conviction — *Habeas corpus*—Discharge of prisoner by County Court Judge—No right of appeal by prosecutor to Supreme Court—Judge's duty on *habeas corpus* application to consider evidence — Contemporaneous convictions — Concurrent terms of imprisonment. *McCrea* v. *Watson*, 2 E. L. R. 170.

Conviction — *Jurisdiction of magistrate —Informant in previous prosecution — Disqualification — Opponent of licenses — Imprisonment — Term of — Amendment—Discretion.*]—D., the defendant, was twice convicted for offences against the Liquor License Act. In the first case C. was the informant and prosecutor; in the second he was the convicting magistrate:—*Held*, that while the first case was pending before this Court on *certiorari*, C. had no jurisdiction to try the information in the second case.—The convicting magistrate was not disqualified by reason of his having circulated and obtained signatures to a petition praying that no licenses be granted in the parish where the defendant lived, and in which he was the sole applicant for a license.—A conviction ordering the defendant to be imprisoned for sixty days in default of payment of a fine can not be supported under a section of the Act which authorises imprisonment for not less than three months in case of such default.—*Semble*, the Court will not amend a conviction when by so doing it has to exercise a discretion confided to the justice. *Rex* v. *Charest*, *Ex p. Daigle*, 37 N. B. R. 492; *Rex* v. *Daigle*, 2 E. L. R. 12.

Conviction—*Minute—Period of imprisonment—Seizure of liquor—Disposal of proceeds.*]—A conviction will not be quashed because the minute awarded an imprisonment of thirty days, while the section of the Act under which the conviction was made limited the time of imprisonment to one month. Under 60 V. c. 6, s. 12 (N.B.), it is not necessary for the magistrate to specify in his order any particular public hospital in which the proceeds derived from the sale of liquor

seized by reason of its being illegally kept for sale, are to be paid. *Rex* v. *McQuarrie, Ex p. Rogers*, 36 N. B. R. 39.

Conviction — *Second offence — Date of first.*]—A conviction under the Liquor License Act, C. S. N. B. 1903, c. 22, cannot be made for a second offence without proof of conviction for a first offence committed before the date of the commission of the second. *Rex* v. *O'Brien, Ex p. Chamberlain*, 38 N. B. R. 381, 4 E. L. R. 519.

Conviction for sale without license —Convicting magistrate also clerk of peace and clerk of County Court—Territorial jurisdiction — Form of conviction — Name and style of magistrate—Constitutionality of s. 62 of Liquor License Act. *Rex* v. *Morneault, Rex* v. *Tardiff*, 2 E. L. R. 17.

Conviction for selling to minor — *Penalty — Mode of enforcing — Summary Convictions Act—Forms.*]—A conviction for selling liquor to a minor contrary to s. 67 of the Liquor License Act, C. S. N. B. 1903, c. 22, imposing a fine and in default of payment distress, but which does not award imprisonment, is bad. Section 67 not providing any mode of enforcing the penalty authorised, the conviction should follow the form prescribed in s. 22 of the Summary Convictions Act, C. S. N. B. 1903, c. 123. *Rex* v. *Davis, Ex p. Vanbuskirk*, 38 N. B. R. 526, 5 W. L. R. 159.

Conviction for selling to minor — *Penalty — Mode of enforcing—Summons—Reasonable time between issue and return—Insufficient service.*]—A conviction under s. 67 of the Liquor License Act for selling liquor to a minor, which imposes a fine, and in default of payment distress, but which does not award imprisonment in default of sufficient distress, is bad. — *Per* Hannington, J.: — A justice has no jurisdiction to hear a complaint unless there is evidence before him to shew that the defendant was served with the summons a reasonable time before the return. A summons issued at ten o'clock in the morning, returnable the same day at one, does not allow the defendant a reasonable time to appear and defend, and a conviction in default of appearance founded on such a proceeding should be quashed on *certiorari*. *Rex* v. *Wathen, Ex p. Vanbuskirk*, 38 N. B. R. 529, 5 W. L. R. 159, 463.

Conviction for selling without license — *Right to review.*] — If the convicting magistrate has jurisdiction, there is no right to review a conviction for selling without license, contrary to s. 62 of the Liquor License Act. — *Quære*, whether there is any right to review even if the magistrate acted without jurisdiction. *Rex* v. *Carleton, Ex p. McCrea*, 3 E. L. R. 57, 38 N. B. R. 42.

Conviction under s. 48 — Irregularities —Disqualification of magistrate — Excessive costs — *Certiorari* — Rule *nisi* to quash conviction. *Rex* v. *Davis, Ex p. Vanbuskirk*, 4 E. L. R. 224.

Drunkard—*Allowance to family—Estate —Principal.*]—Where the estate of a drunkard did not yield sufficient income to maintain him and to partly maintain his family, the Court, under 53 V. c. 4, s. 276, ordered a yearly sum to be paid out of principal by the drunkard's committee to the family for their support. *In re Stackhouse*, 2 N. B. Eq. 91.

Exception in statutes creating offences need no longer be negatived, since the amendment of 1909 to s. 717 of the Cr. Code, even if they are specified in the same section of the statute and are negatived in the information. *R.* v. *Dibblee, Ex p. McIntyre* (1909), 39 N. B. R. 361, 16 Can. Cr. Cas. 38.

Extension of license — *Revocation of —Second extension—Power of commissioners — Jurisdiction — Certiorari.*] — The license commissioners, under the Liquor License Act, C. S. N. B. 1903, c. 22, have no power to extend the duration of an existing license under s. 23 for a greater period than three months of the next ensuing license year, or to grant a second extension.—The power of revocation, under s. 31, extends to an extension of the original license by the commissioners under s. 23.—*Per* Gregory, J., that s. 31 does not give the Judges therein named power to revoke an extension of a license granted by the license commissioners under s. 23, but such power is limited to an original license, when proved to have been given contrary to the terms of the Act, or obtained by fraud. *Rex* v. *Wilkinson, Ex p. Cormier*, 37 N. B. R. 53.

Extra-provincial corporation—An action by plaintiffs, wholesale liquor dealers in Montreal, Quebec, against defendant, proprietor of a retail tavern in Richibucto, Kent Co., N.B., for liquors supplied defendant amounting to $300—*Onus probandi*—Special pleading—Nonsuit refused—Judgment. *Leporte Martin Co.* v. *LeBlanc* (N. B. 1910), 9 E. L. R. 216.

Information and conviction for third offence—*Proof of first offence only—Amendment — Distress — Surplusage — Costs of conveying to gaol.*]—Where the accused was charged under the Liquor License Act, C. S. N. B. 1903, c. 22, with a third offence, and the conviction stated it was for a third offence, but was in other respects in the form of a conviction for a first offence, and the only proof was of a first offence, and the prosecution on the trial asked to have a conviction entered for a first offence:—*Held*, on application to quash, that the conviction might be amended under s. 89 of the Act.—Where the conviction ordered a distress in default of payment of the penalty imposed, which order is not authorised by the Act, it was treated as surplusage and struck out of the conviction.—The convicting magistrate, under s. 74 (2), has power to award, in addition to the costs, the charges of commitment and conveying of the defendant to gaol. *Rex* v. *O'Brien, Ex p. Chamberlain*, 38 N. B. R. 385, 4 E. L. R. 532.

Justice of the peace — *Disqualification — Incompatible offices — Territorial jurisdiction — Penalty — Intra vires.*]—A justice of the peace who accepts the office of clerk of the peace and clerk of the County Court is not disqualified from trying an of-

fence charged under the Liquor License Act, on the ground that the offices are incompatible.—A justice appointed for a county has jurisdiction to try in a parish of the county an offence committed in another parish in the county.—Section 62 of the Liquor License Act, authorising as a penalty in default of the fine imposed for a first offence imprisonment for a period of not less than three months, is not *ultra vires*. *Rex* v. *Plant, Ex p. Morneault, Ex p. Tardiff*, 2 E. L. R. 17, 37 N. B. R. 500.

License commissioner—*Issue of license contrary to law—Mens rea.*]—A member of a board of license commissioners who, with a knowledge of all the facts, issues a license contrary to the provisions of the Liquor License Act, C. S. N. B. 1903, c. 22, is guilty under s. 59 of "knowingly" issuing a license contrary to law, though there is no evidence of a corrupt motive or criminal intent. *Rex* v. *Ritchie, Ex p. Blaine*, 37 N. B. R. 213.

License commissioner — *Jurisdiction —Issue of license — Condition precedent— Prohibition — Affidavit — Commissioner.*]— License commissioners under the Liquor License Act (C. S. N. B. 1903, c. 22), have no jurisdiction to grant a certificate for a license unless the inspector has reported the applicant to be a fit and proper person to have a license, and the other requirements provided for in s. 41 of the Act have been complied with.—A writ of prohibition is the proper remedy to restrain the issuing of a license where the commissioners acted without jurisdiction, and may be issued after the certificate for a license had been granted.—*Ex p. Lovely*, T. T., 1909 (unreported), followed. —*Semble*, that an affidavit can not be used in support of an application for a writ of prohibition, if it is sworn before a commissioner who is a partner in a firm of attorneys acting in the matter as attorneys for the applicant. *Ex p. Demmings, Re License Commissioners for Victoria County*, 2 E. L. R. 292, 37 N. B. R. 586. See, also, *Ex p. Lovely, ib.* 589n.

License commissioners — *Grant of license — Time — Special grounds — Revocation — County Court Judge.*]—At a meeting for that purpose, for which notice had been given, a tavern license was granted under the Liquor License Act by commissioners under the Act to one D. on the 8th August, 1904, for the year ending the 30th April, 1905, on a petition of D. dated the 2nd July, 1904, the chairman objecting on the ground that they had no authority to grant a license after the 1st May, except on special grounds, and that no such grounds were either stated in the petition or shewn at the time; on an application to a County Court Judge to revoke the license under s. 31, on these grounds, an order was made revoking the license, the Judge refusing to admit evidence tending to shew that special grounds for the granting of the license existed, and were acted upon by the commissioners, holding that he, and not the commissioners, is the authority who determines as to the sufficiency of the special grounds, and whether the grounds alleged are special grounds within the meaning of the Act; also, on the ground that the petition for a license subsequent to the 1st May should allege the special grounds upon which the application is based:—*Held*, on making absolute the order *nisi* to quash the order revoking the license, that the commissioners, and not the Judge are to determine the sufficiency of the special grounds, and whether the grounds alleged are special; and that the petition need not allege the special grounds upon which the application is based. —*Per* Tuck, C.J., dissenting, that the County Court Judge was right in revoking the license, no special grounds having been shewn. —*Per* Gregory, J., dissenting, that the order should be discharged because the Court has no jurisdiction to review an order made by a Judge acting under s. 31 of the Liquor License Act. *Rex* v. *Wilkinson, Ex p. Duguay*, 37 N. B. R. 90.

Limitation of licenses in city—*Apportionment among wards—Construction of s. 19 (1) of Act.*]—The number of licenses that may issue in the city of St. John under the Liquor License Act, C. S. N. B. 1903, c. 22, is subject to the limitation that they shall in no case exceed seventy-five, exclusive of hotel licenses, and that they shall be apportioned among the several wards in which licenses may issue in a fixed proportion according to the scale provided by s.-s. 1 of s. 19 of the Act: *per* Barker, C.J., Hanington, Landry, McLeod, and Gregory, JJ.; White, J., dissenting.—*Per* White, J., that, while the total number is to be ascertained and is limited as stated there is nothing in the subsection which requires the total number when so ascertained to be apportioned among the several wards in any fixed proportion. *Jamieson* v. *Blaine*, 38 N. B. R. 508, 5 W. L. R. 250.

Offence against — *Rejection of evidence — When ground for quashing conviction — Complete conviction—Minute not necessary— Name of informant not stated—Excessive costs—Objection how made — Signing petition against license — Disqualification of justice.*]—On the trial of an information for an offence against the Liquor License Act, the counsel for the defendant proposed to ask him as to what took place between him and a witness for the prosecution. On objection the evidence was rejected. It did not appear, and the counsel on the argument was unable to state, what was proposed to be proved:—*Held*, no ground, in the circumstances, for quashing the conviction.—*Quære*, whether an objection that evidence was improperly rejected is open to the accused on *certiorari*, where an appeal is given.—If the conviction is complete, there is no necessity for a minute thereof.—It is not necessary to state in the conviction the name of the informant.—The Court will not interfere with a conviction on the ground that the costs are excessive, where it is not shewn in what particular they are excessive.—Signing a petition praying that no license be issued to a party subsequently charged with an offence against the Act does not disqualify a magistrate so signing from trying the charge. *Rex* v. *Davis, Ex p. Vanbuskirk*, 38 N. B. R. 335, 4 E. L. R. 224.

Omission of place of offence in first conviction may be corrected by magistrate and an amended conviction returned, in answer to *certiorari*, if the place of offence appears in the depositions. *R.* v. *McQuarrie, Ex p. Giberson* (1909), 39 N. B. R. 367, 16 Can. Cr. Cas. 66.

Place for appearance was correctly stated in the original summons, but in the copy served it was erroneously stated to be the office of the signing magistrate at P., when in fact his office was at A.—*Held* that a conviction in default of appearance should not be set aside because of the error unless it could be shewn that the accused did not know where the signing magistrate's office was, or that he was misled by the mistake. *R.* v. *McQuarrie, Ex p. Gibertson* (1899), 39 N. B. R. 371. 16 Can. Cr. Cas. 70.

Sale without license — "*Place*" — *Livery stable — Servant of occupant.*] — A livery stable is a "place," within the meaning of s. 99 of the Liquor License Act, C. S. N. B. 1903, c. 22, in which a sale of intoxicating liquor by a person employed by the occupant may make the occupant liable to a penalty under the Act, though there be no proof that the offence was committed with his authority or by his direction. *Rex* v. *McQuarrie, Ex p. Rogers*, 37 N. B. R. 374; *Rex* v. *Rogers*, 1 E. L. R. 354.

Sale without license — *Summons — Uncertainty—Date of offence—Amendment in absence of accused—Conviction.*]—Where a defendant is summoned to answer a charge of selling liquor contrary to the Liquor License Act on a certain day of the month and on a day of the week which would not be the day of the month named, he is bound to attend on the day of the month named, disregarding the day of the week, and may be properly convicted in default of appearance.—A summons charging a sale on the 24th may be amended to a charge for a sale on the 20th, and a conviction made for a sale on that day in the absence of the accused: McLeod, J., *dubitante*. *Ex p. Doherty*, 33 N. B. R. 15, distinguished. *Ex p. Tompkins*, 2 E. L. R. 1, 37 N. B. R. 594.

Sale without license — Summons for day of month with inconsistent day of week—Date of alleged offence changed in accused's absence. *Ex p. Tompkins*, 2 E. L. R. 1.

Town of Woodstock—By-law—"Non-intoxicating beer"—License fee—Disqualification to hold license — Validity of by-law. *Rex* v. *Dibblee, Ex p. Smith*, 4 E. L. R. 226.

Town of Woodstock—*By-law regulating sale of beer—Excessive license fee—Discrimination—Ultra vires.*]—The Act 7 Edw. VII. c. 91 authorises the town of Woodstock to regulate the sale of beer of all kinds (not, however, to include any intoxicating liquor) within the town. Under the authority conferred, a by-law was made, providing in one section a retail license fee of $100, and in another that no license should be granted to any person who had been convicted of an offence against the Canada Temperance Act within one month prior to the date of application. The defendant, who had no license and had not applied for one, was convicted for selling without a license:—*Held*, on an application to quash the conviction, that the section of the by-law imposing the license was not *ultra vires*, as imposing such an excessive tax as to be in effect prohibitive, and not merely regulative; that while the section excluding the persons indicated therein from the privilege of obtaining a license might be beyond the limits of the authority conferred, it was no ground for quashing the conviction against the defendant, he never having applied for a license. *Rex* v. *Dibblee, Ex p. Smith*, 38 N. B. R. 359, 4 E. L. R. 226.

Wholesale license — *Special meeting of commissioners—Absence of notice — Revocation.*]—A wholesale license to sell liquor, granted under the Liquor License Act, 1896, at a special meeting of the license commissioners held after the regular meeting for the issue of licenses, when a license was refused to the applicant, and the license for the previous year was extended to the 1st August then next, of which special meeting no notice had been published, and no proof on oath of any special grounds why the license should issue had been shewn, and the commissioners had refused to hear evidence in proof of objections to the license being granted, is a license issued contrary to the provisions of the Act, and should be revoked on an application to a Judge under s. 31. *Miles* v. *Rogers*, 36 N. B. R. 345.

v. *North-West Territories Ordinance.*

Cancellation of hotel license—Grounds—Fraud—Non-compliance with provisions of Act—Accommodation provided by hotel — Population of city for which license granted—Limitation of number of licenses—Evidence as to population — Affidavits — Information and belief—Appeal from order of Judge cancelling license—Right of appeal to Supreme Court *en banc* — Jurisdiction — *Persona designata*. *Re Yale Hotel License* (Alta.), 6 W. L. R. 769.

Conviction—*Appeal—Condition precedent—Affidavit—Validity of Territorial Ordinance requiring.*]—A Territorial Ordinance enacting that no appeal shall lie from a conviction under the Liquor License Ordinance, unless the appellant shall, within the time limited for giving notice of appeal, make an affidavit before the convicting justice that he did not, by himself or otherwise, commit the offence, is *ultra vires* of the Legislative Assembly. The omission to make such affidavit within the time prescribed is fatal to the jurisdiction of the Court to which the appeal is given, and is an omission which cannot be waived so as to confer jurisdiction. *Cavanagh* v. *McIlmoyle*, 5 Terr. L. R. 235.

Conviction — *Appeal — Forum — Contravention of Ordinance by agent—Presumption—Intra vires—Forfeiture of license.*]—Notice having been given of an appeal from a conviction or an infraction of the Liquor License Ordinance (a consequence of which conviction was a forfeiture of the license of the person convicted), to "the presiding Judge sitting without a jury at the sittings of the Supreme Court for the Judicial District of Western Assiniboia, to be holden at the town of Regina, on Tuesday, the 25th day of March, 1902," the Attorney-General applied to a Judge under Ordinance 1901, c. 33 (amending the Liquor License Ordinance), s. 21, s.-s. 3, to expedite the hearing:—*Held*, that the appeal was to the Supreme Court for the Judicial District named, generally, and not merely to a Court coming into existence only on the day mentioned, and that a Judge had jurisdiction to hear the application. —*Held*, on the hearing of the appeal, that s. 64, s.-s. 5, of the Liquor License Ordinance

(declaring that a contravention by a servant or agent shall be presumed to be the act of the licensee) was *intra vires*, although the effect might be to inflict imprisonment (on non-payment of fine) upon a person who had not personally violated the Ordinance. — *Held*, also, that forfeiture of license results under s. 82 from a second or any subsequent offence against s. 64, notwithstanding that the conviction occurred in different licensing years. *Rex* v. *McLeod*, 5 Terr. L. R. 245.

Conviction — *Appeal — Necessity for affidavit — Statute—Jurisdiction for Legislative Assembly.*]—Section 2 of c. 32 of Ordinances of 1900, amending the Liquor License Ordinance (C. O. 1898 c. 89), requires that a special affidavit of the party appearing shall be transmitted with the conviction to the Court to which the appeal is given:—*Held*, against the contentions (1) that this provision is applicable only where the appeal is based on a denial of the facts established in evidence, and not where a question of law arising on such facts is involved; and (2) that the provision is *ultra vires* of the Legislative Assembly of the Territories—that there was no jurisdiction to entertain an appeal where this provision had not been complied with. *Rex* v. *McLeod*, 4 Terr. L. R. 513.

Conviction — *Being in bar-room during prohibited hours—Liability of employer for act of employee.*]—Section 64 of the Liquor License Ordinance, C. O. 1898 c. 89, forbids (1) sale of liquor during prohibited hours, (2) and on election days, (3) being in a bar-room during prohibited hours, and (4) keeping a bar-room open during prohibited hours; and s.-s. 5 provides that any contravention of these provisions by an employee shall be deemed the act of the employer.—*Held*, that if the act of the employee in being in a bar-room during prohibited hours were to be deemed the act of the employer, then only the employer could be punished, which is not in accordance with the manifest intention of the legislature, which is that those actually present should be punished; and, therefore, the section should be so construed, as to make s.-s. 5 applicable only as to s.-ss. 1, 2 and 4.—3. That a bar-room cannot be entered for any purpose during prohibited hours, except to procure liquors to be used by guests at their meals on Sunday. *Rex* v. *Bell*, 1 Sask. L. R. 1.

Conviction — *Certiorari — Findings of fact—Scienter — Mens rea.*]—The applicant was convicted, under the N.-W. T. Act, s. 95, for having in his possession intoxicating liquor without the special permission in writing of the Lieutenant-Governor. On a motion for a *certiorari* to quash the conviction:—*Held*, following *Barber* v. *Nottingham and Grantham Ry. Co.*, 15 C. B. N. S. 726, and *Regina* v. *Grant*, 11 Q. B. 43, that where the charge is one which, if true, is within the magistrate's jurisdiction, the findings of fact by him are conclusive.—2. That, as the statute does not express knowledge by the accused of the intoxicating character of the liquor to be an essential element of the offence, first, it was not necessary for the prosecution to allege or prove it; second, it was necessary for the accused to prove, not merely that he had no such knowledge, but that he had been misled without fault or carelessness on his part. *Regina* v. *O'Kell*, 1 Terr. L. R. 79.

Conviction — *Jurisdiction—Single justice of the peace — "May" — Criminal Code.*]—The Liquor License Ordinance (No. 18 of 1891-92) provides by s. 105 that "all informations or complaints for prosecution of any offence against this Ordinance, except as herein specially provided, shall be laid or made before a justice of the peace," and by s. 106, that "such prosecution may be brought for hearing and determination before any two justices of the peace." The Criminal Code, part LVIII. (Summary Convictions), which has been made applicable to summary proceedings under the Liquor License Ordinance, provides (s. 842) that "every complaint and information shall be heard, tried, determined and adjudged by one justice or two or more justices as directed by the Act or law upon which the complaint or information is framed or by any other Act or law in that behalf," and that, "if there is no such direction in any Act or law then the complaint or information may be heard, tried, determined and adjudged by one justice:"—*Held*, on an appeal from a conviction, that s. 106 constituted a "direction" that prosecutions should be heard, etc., before two justices of the peace, and that, therefore, one justice had no jurisdiction to convict, except in the certain cases specially provided for in the Ordinance. *Regina* v. *Wilson*, 2 Terr. L. R. 79.

Conviction—*Prohibited hours—Proof of liquor license.*]—A conviction under the Liquor License Ordinance against a hotel-keeper, for allowing his bar to be open during prohibited hours, is invalid, if the informant does not allege, nor is proof made, that the accused held a liquor license for the hotel premises. *Regina* v. *Henderson*, 4 Terr. L. R. 146; *Regina* v. *Davidson*, 21 C. L. T. 98.

Conviction — *Supplying liquor to interdict—Forfeiture of license—Appeal—Stay of proceedings.*]—*Held*, that where a licensee is convicted under s. 122 (3) of the Liquor License Ordinance, of supplying liquor to an interdicted person, with a knowledge of such interdiction, the effect of such conviction being that "his license shall be forfeited," an appeal from such conviction is a stay of proceedings and suspends all the consequences of the conviction, including the forfeiture of the license. *Simington* v. *Colbourne*, 4 Terr. L. R. 372.

Conviction for illegal sale of liquor —Motion to quash — Penalty less than prescribed—Invalidity — Saving enactment — Criminal Code, s. 896—Application of conditions—Appeal. *Rex* v. *Hostyn* (N.W.T.), 1 W. L. R. 113.

Hotel license—*Sale or barter of intoxicating liquors in wholesale quantities by licensee—Loan—Contract for return in kind —Illegality — Bailment.*]—The holder of a hotel license who lends to another hotel licensee liquors in quantities greater than the quantity he is permitted by the Liquor License Ordinance to sell, upon terms requiring the borrower to return goods of like quality and quantity, is thereby guilty of an infraction of the Ordinance, which imposes a penalty for the infraction, and, as the contract is therefore avoided, he cannot recover the value of the goods so lent.—2. Such a transaction constitutes a sale or barter, and not a bailment. *O'Flynn* v. *Carson*, 7 W. L. R. 463, 1 Sask. L. R. 47.

Information — *Several offences — One conviction—Fines—Forfeiture—Hard labour —Certiorari—Return—Amended conviction— Minutes of adjudication — Depositions — Costs.*]—The Liquor License Ordinance (C. O. 1898 c. 89, s. 102) expressly provides that several charges of contravention of the Ordinance committed by the same person may be included in one and the same information or complaint.—1. Where the magistrate adjudges the accused guilty upon each charge it is not necessary that separate convictions should be drawn up; and the fines may be imposed in and by one and the same conviction, which may also adjudge a forfeiture in respect of each offence.—2. Where on a summary conviction the magistrate imposes imprisonment at hard labour on default in paying the fine, upon a charge in respect of which the law does not authorise hard labour to be imposed, the magistrate may return to a *certiorari* an amended conviction omitting the unauthorised part of his adjudication, and the amended conviction will not be bad by reason of such variance from the original adjudication.—3. A conviction in due form will not be quashed because it is founded upon a minute of adjudication which does not disclose an offence in law, if the Court is satisfied upon perusal of the depositions that the offence for which the formal conviction was made was in fact committed.—4. Under Criminal Code, s. 889, the Court may adjudicate *de novo* on the evidence given before the magistrate in cases removed by *certiorari*; but the Court should not amend a conviction if in so doing it has to exercise the discretion of the magistrate.—5. Where a magistrate returns an amended conviction in *certiorari* proceedings, and the conviction is sustained only by reason of the amendment, costs of the *certiorari* proceedings should not be awarded against the applicant. *Regina* v. *Whiffin*, 3 Terr. L. R. 3.

Interdicted person — *Conviction for — Liquor License Ordinance—Defects in conviction — Quashing conviction on appeal.*]—On an appeal by defendant from a conviction for selling liquor to an interdicted person:—*Held*, that the conviction was bad because it did not disclose on its face that the liquor was sold or given "during the period of interdiction," and also because it did not state the period for which defendant should be imprisoned in default of payment of the fine imposed. *Rex* v. *Harris* (1906), 6 Terr. L. R. 249.

Magistrate's conviction for second offence—*No allegation or proof of previous conviction—Amendment—Act of servant of licensee contrary to explicit instructions — Section 78 of Ordinance—Criminal Code, s. 1124.*]—Conviction for selling liquor on Sunday quashed. The accused was found guilty of a second offence. There was no evidence shewing a previous conviction. Doubtful if any right to amend under s. 1124 above where there was no right to make the conviction. Amendment refused as under s. 78 above, there could not be a conviction for a first offence, defendant's servant who made the sale having been explicitly forbidden to sell. *Rex* v. *Ole Tystad*, 11 W. L. R. 561.

Municipal by-law — *Amount of license fee in city — Territorial duty—Construction of Ordinance — Amendment.*]—Where, under s. 46 of the Liquor License Ordinance, the council of an incorporated city has passed a by-law requiring each licensee to pay towards its municipal revenue a sum equal to the Territorial license fee, the amount so fixed is not automatically increased in proportion to the increase in the amount of the Territorial fee effected by a statute subsequently passed amending s. 46 by increasing the Territorial (or provincial) fees. — Remarks on the construction of statutes and by-laws imposing a charge on the subject. *Goode* v. *City of Edmonton*, 7 W. L. R. 608, 1 Alta. L. R. 259.

Permit—*Municipal Ordinance — By-law — License — Police regulation — Revenue— License fee.*]—The North-West Territories Act, R. S. C. c. 50, s. 92, enacts, *inter alia*, that no intoxicant shall be imported into the territories, or be sold, exchanged, traded, or bartered, or had in possession therein, except by special permission in writing of the Lieutenant-Governor. The Municipal Ordinance authorises municipal councils to make by-laws for licensing, regulating, and governing, *inter alia*, hotels, places of public resort, and places where liquid refreshments are sold; and for fixing the sum to be paid for a license:—*Held*, that a permit from the Lieutenant-Governor did not dispense the holder from a compliance with a municipal by-law passed under the above-mentioned provision of the Municipal Ordinance.—*Held*, that, assuming that the power to impose a license under the Ordinance was intended as a power to make a police regulation, and not for the purpose of raising a revenue (but *semble*, *contra*), a by-law imposing a license fee of $100 was valid as against the objection that the fee was excessive. *Regina* v. *Salterio*, *Regina* v. *McKenzie*, *Regina* v. *Tumulty*, 11 C. L. T. 27, 1 Terr. L. R. 301.

Refusal by license commissioners of application for wholesale license — Complaint — Procedure of commissioners — Adjournment—Fraud—Violation of provisions respecting licenses—Jurisdiction of Judge to hear complaint—Bond—Security—Occupant of premises—Lessee. *Re Bell* (N.W.T.), 3 W. L. R. 489.

Selling liquor in forbidden houses—*Proof of license.*]—Upon a charge of having had a bar-room open and sold liquor during prohibited hours the prosecution must either allege or prove that the defendant was a licensee. *Regina* v. *Davidson*, 21 C. L. T. 98, 4 Terr. L. R. 425.

Selling to interdict — Conviction — Offence against s. 122 (3)—Amendment of statute—Effect of—Period of imprisonment in default of payment — Forms — Criminal Code—Quashing conviction. *Rex* v. *Harris*, 5 W. L. R. 4.

Selling liquor to interdicted person —*Conviction for—Defects in conviction — Quashing conviction on appeal.*]—On an appeal by the defendant from a conviction for selling liquor to an interdicted person:—*Held*, that the conviction was bad because it did not disclose on its face that the liquor was sold or given "during the period of interdiction," and also because it did not state the

period for which the defendant should be imprisoned in default of payment of the fine imposed. *Rex* v. *Harris*, 6 Terr. L. R. 249, 5 W. L. R. 4.

vi. *Nova Scotia Act.*

Alleged irregularity of magistrate in delivering judgment—Nova Scotia Liquor License Act—Motion to quash a conviction under the Liquor License Act—Agreement by counsel for defendant that magistrate should take time to consider case—Effect of. *R.* v. *McKenzie* (N. S. 1910), 9 E. L. R. 214.

Certiorari—Previous application for writ to another Judge which was dismissed—Amended affidavits used on second application—Order refused. *R.* v. *McKay* (N. S. 1910), 9 E. L. R. 121.

Conviction—*Certiorari — Affidavit—Constitutional law.*]—The judgment in 31 N. S. R. 436 vacating an order for a *certiorari* to remove a conviction against the appellant under the Nova Scotia Liquor License Act, on the ground that the affidavit required by s. 117 had not been produced on the application for the *certiorari*, was affirmed for the reasons given in the Court below, Gwynne, J., dissenting. *Bigelow* v. *Regina*, 31 S. C. R. 128.

Conviction — *Sale — Unlicensed premises — Colourable lease — Illegal contract— Appeal — County Court.*]—The defendant sought to set aside a conviction for selling intoxicating liquors contrary to law, on the ground that the premises in which the sale was admitted to have taken place, although the property of the defendant, were at the time of the sale under lease to M., and that defendant was in possession solely as the agent or servant of M. The evidence shewed that defendant was not in receipt of wages from M., that no books were kept containing any account of income and expenditure, that no inventory was made of the contents of the premises at the time of the alleged lease, that no method was provided of fixing or accounting for the value of any article lost, injured, or destroyed during the term of the lease, and that no change was made in the occupation or management of the premises, the defendant's name remaining on the door as proprietor:—*Held*, that the lease was a mere cover to enable the defendant to continue the business, that the defendant was the occupant of the premises within the meaning of the Liquor License Act, 1895, s. 128, and that the conviction must be affirmed:—*Held*, also, that the contract between defendant and M., being to do a thing which could not be performed without a violation of law, was void:—*Held*, also, that the effect of the appeal to the County Court was to vacate the judgment appealed from, and that the Judge of the County Court was required to try the case *de novo*, and to make such conclusion upon the evidence as he thought just, whether he took new evidence or not. *Regina* v. *McNutt*, 33 N. S. R. 14.

Conviction — *Sale of liquor — Place of Sale—Evidence.*]—The defendant's clerk received, at Truro, N.S., an order, addressed to Bigelow & Hood, Ltd., Halifax, for one bottle of whiskey. The order was sent to Halifax, and was returned the following day, endorsed "Deliver this order from our Truro warehouse, and charge," etc. Bigelow & Hood rented from the defendant, who was president of the company, premises at Truro, which they used as a bonded warehouse; but the evidence shewed that the order in question was filled, not from the bonded warehouse, but from an open case in the defendant's cellar, which was kept there for that purpose, and that the money received by the clerk was put in the defendant's till, and a memorandum of it entered in the cash book, as a sale:—*Held*, that the evidence shewed a sale, by the defendant, in Truro. *Rex* v. *Bigelow*, 36 N. S. R. 559.

Conviction — *Third offence — Proof of previous convictions — Procedure before magistrate.*]—Previous convictions may be used as evidence upon which to base a conviction for a third offence against the provisions of the Liquor License Act, as often as such offence is charged and proved. It is not now necessary, under the statute (s. 131) to ask the defendant whether he has been previously convicted, unless he is present in person. Where at the conclusion of each of several cases tried before him, the magistrate decided to convict, but, at the instance of the defendant's counsel, refrained from imposing sentence and drawing up the formal conviction, until the County Court Judge should have decided a question, raised on the trial, as to the use of previous convictions:—*Held*, that the magistrate was not precluded from proceeding with the convictions at a later stage. *Regina* v. *McBerney*, 29 N. S. R. 327, distinguished. *Rex* v. *Bigelow*, 36 N. S. R. 554.

Conviction for third offence—*Appeal to County Court — Security — Deposit of money in lieu of bond.*]—The defendant was convicted of a third offence against the Liquor License Act, and was adjudged to be imprisoned for a period of thirty days.—Notice of appeal to the County Court for district No. 4 was given, and a sum of money was deposited in place of the bond required in such cases:—*Held*, that, in the absence of the bond, the Court had no jurisdiction to hear the appeal.—*Whitman* v. *Union Bank*, 16 S. C. R. 410, distinguished. *Rex* v. *Fraser*, 42 N. S. R. 202.

Imprisonment under conviction for *second offence against N. S. Liquor License Act — Release — Irregularity in proceedings —Costs of conveying defendant to gaol.*]—The costs of conveying the defendant to gaol not having been mentioned in the warrant or endorsed thereon, prisoner discharged. At the argument a second warrant was handed the Judge, but as he had not been asked to amend the first, and as the second warrant did not say that it was in substitution for or in amendment of the first, he did not consider it. *Rex* v. *Hines*, 7 E. L. R. 149.

Infraction — *Conviction* — "*Bona fide guests.*"]—Neither obtaining at a hotel a glass of beer and a sandwich, or some whiskey and some bread, will make these men "*bona fide* guests." To be such a guest one must go to the hotel for the primary purpose of obtaining a meal in good faith. *Rex* v. *Byng*, 6 E. L. R. 239, 43 N. S. R. 40.

Infraction — *Conviction—Time of offence—Habeas corpus.*]—In a summary con-

viction for an offence against the Nova Scotia Liquor License Act, the offence was stated to have been committed "within the space of six months last past previous to the information:" — *Held*, that an offence committed within six months before the laying of the information was not disclosed; and the defendant, who had been imprisoned pursuant to the conviction, was discharged upon *habeas corpus*. *Rex* v. *Wambolt*, 14 Can. Crim. Cas. 169.

Infraction — *Conviction — Travellers obtaining liquor at meals.*]—K. having left his home without breakfast, was on his way to North Sydney, when he called at defendant's hotel and obtained breakfast and liquor: —*Held*, that K. was a "*bona fide* guest," within the meaning of R. S. N. S. (1900), c. 100, and that the conviction should be quashed. — Meagher & Laurence, JJ., dissented.—*Semble*, that defendant might have been convicted if he had been charged under s. 73 of the Act for selling "otherwise than during regular meals." *Rex* v. *Byng*, 6 E. L. R. 240, 43 N. S. R. 43.

Infringement — *Knowledge—Liability.*]—On appeal conviction of defendant affirmed. Identification of the liquor analyzed is solely for the magistrate. Absence of knowledge of intoxicating nature of the beverage is no defence. *R.* v. *Sidowski*, 7 E. L. R. 397.

Irregularity — *Stated case — Jurisdiction of Court to amend conviction—N. S. Summary Convictions Act, s. 73, s-s. 6.*]—The magistrate had imposed a fine of $20 and costs and in default of payment 60 days in prison. Under ss. 103 and 105 of above Act, the imprisonment should not have exceeded 30 days. Conviction amended by reducing imprisonment to 30 days. *Rex* v. *Power*, 6 E. L. R. 412, 43 N. S. R. 235, 14 Can. Cr. Cas. 264.

Keeping for sale without license — *Proof of—Search of premises — Evidence — Presumption—Rebuttal.*]—Upon appeal from an order of a County Court Judge affirming a conviction made by a stipendiary magistrate for keeping liquor for the purpose of sale, barter, and traffic therein, without the license therefor by law required, the evidence shewed that the defendant occupied a house in the town of Truro, opposite a building occupied by his son-in-law as an hotel where liquor was believed to be sold illegally. The defendant had previously occupied the hotel himself, and had been convicted of unlawful selling, and was believed to be selling in collusion with his son-in-law, to whom he had rented the premises, the liquor being kept on the defendant's premises and carried across the street to the hotel as required. On making a search of the defendant's premises, the inspector found a quantity of liquor concealed in a hole below the floor of a room occupied as a bed-room, and also in a valise in a wood shed, which was found to be locked at the time of the search, and which the defendant declined to open. In both places he found a large quantity of straw wrappers, such as are used for packing bottles, and in the wood house some empty liquor cases. There was also evidence that as the inspector left, the defendant said there was a barrel that he had not got, though this remark was not heard by the inspector, and was denied by the defendant:—*Held*, that the evidence of search, coupled with the provisions of the Act R. S. N. S. 1900 c. 100, s. 165, s-s. 2, was ample to justify the conviction unless displaced. That defendant had to overcome the presumption raised against him and to explain the circumstances to the satisfaction of the Judge, and having failed to do so, the Judge could properly find as he did, and the Court would not disturb the conviction. *Rex* v. *McNutt*, 38 N. S. R. 339.

Licensed premises — *Neighbourhood of railway — Prohibition of statute — Mayor of city—Refusal to sign license—"Railway"—Extension.*]—By the N. S. Liquor License Act of 1895, s. 27, subject to the provisions of s.-s. (2), it was enacted that no license should be issued for the sale of liquor in any place situate within a distance of one hundred yards from any place of worship, public school, etc. Sub-section (2) made an exception, enabling the council to continue to grant a license in any case in which a person held on the 15th April, 1891, and continuously since that date, a lawful license for the sale of liquor within the limits referred to. By the Acts of 1896, c. 25, s. 6, the prohibition contained in s. 27 was so extended as to include "any railway other than a street railway." By the Acts of 1897 c. 10, s. 3, s-s. (2) of s. 27 was amended in such a way as to authorise the council to continue to grant a license for the sale of liquor upon premises which had been "continuously licensed up to the 15th day of March, 1896," but it was provided that this should not be held to affect in any way the provisions of s. 6 of c. 25 of the Acts of 1896:—*Held*, that the effect of the latter amendment was to leave in force the prohibition as to the granting of a license in respect to a place within one hundred yards of a railway, and that, where the premises in respect to which the license was applied for were within the prohibited distance, a license could not be granted:—*Held*, that in granting a license to a person whose premises were within the prohibited distance, the city council of the city of Halifax exceeded its power, and that the mayor of the city, knowing the objection, was justified in refusing to sign the license. In February, 1895, the railway sheds at the deep water terminus of the Intercolonial Railway at Halifax were destroyed by fire, and in the same year the track was extended along the front of the property of S. Cunard & Co., for the purpose of conveying passengers and freight:—*Held*, that the track so built was a railway within the meaning of the Act. *In Re Quinn*, 32 N. S. R. 542. (See also *In re Fitzpatrick*, 19 C. L. T. 396, 20 C. L. T. 135.)

License granted by city council — *Payment of license duties—Refusal of inspector to deliver license—Prosecution for illegal selling.*]—A city council granted a shop license. The agent for applicant tendered the inspector the license fee and offered him the bond provided for by the Act, but the inspector refused delivery of license, and had defendant summoned for illegally selling liquor. Defendant was convicted. Conviction quashed. After the council has authorised a license, signing by the mayor and inspector is a mere ministerial act, and neither can defeat the will of the council by refusing to sign or hand out the formal license.—Where the city council grants a

license illegally, express power for the cancellation of the license is contained in the statute, but there is nothing in the scope of the statute to justify the officer entrusted with the formal duty of carrying out the council's instructions in saying he has any control as to the question of license or no license.—*Per* Meagher and Laurence, JJ., dissenting.—The burden was upon defendant under the Act, s. 123, of proving license or other justification, and he had failed to do so.—If D. had a valid license, defendant must shew that he was her agent or servant in respect to the sales proved. *Rex* v. *MacKasey*, 6 E. L. R. 330, 43 N. S. R. 169.

License inspector seized, without warrant or other judicial authority therefor, certain intoxicating liquors that had been shipped by plaintiffs into a county where no licenses had been issued, in violation of N. S. Liquor License Act (1907), c. 7. No proceedings subsequent to seizure were taken by inspector against plaintiffs, but the liquors were detained by him for two months, when he refused to deliver them up to plaintiffs. On action brought for value of goods, Longley, J., *held*, that the seizure of the liquor by inspector without judicial authority was unlawful, and that he was liable in damages for value of goods so seized. *Monaghan & Co.* v. *McLean* (N.S.) (1910), 9 E. L. R. 14.

Liquor License Act—*Appeal from judgment of County Court quashing conviction—Partnership—Want of license—Evidence of sale—Parties—Penalty.*]—Appeal from a judgment of Finlayson, Co.C.J., quashing a conviction made by A. D. McCuish, Esq., stipendiary magistrate, Glace Bay, C.B., for a sale of liquor in violation of the provisions of the Provincial Liquor License Act:—*Held*, that the non-joinder of the other member of the firm is not material in this kind of offence. The penalty is several. Appeal allowed with costs and the decision of the County Court Judge reversed with costs and the conviction restored. *Rex* v. *Ogilvie* (1911), 9 E. L. R. 361, N. S. R. , Can. Cr. Cas. .

Liquor sold by third person on premises.]—There were three rooms in the house, one front and back and one between. A butcher occupied the back room and the one between, and a shoemaker is said to have occupied the front room. Each had access to all the rooms:—*Held*, that under s. 156 of the N. S. Act, the shoemaker was acting for the butcher in selling and serving persons with beer in the middle room which he brought from the back room.—Judgment of the County Court Judge setting aside the conviction reversed, and the conviction of the magistrate restored. *Rex* v. *Passerini*, 6 E. L. R. 541, 43 N. S. R. 448.

Magistrate — *Proceedings before—Contempt—Commitment — Jurisdiction—Liquor License Act.*]—Defendant had been committed to gaol for contempt of Court for not answering a question asked by the magistrate:—*Held*, that the magistrate had power to commit on witness refusing to answer. *Rex* v. *Endler*, 7 E. L. R. 150.

Nova Scotia Act—*Appointment of inspector—Resolution of municipal council—Bond—Condition—Presumption—Validity of appointment—Seizure of liquor—Trespass—Warrant — Estoppel.*]—Section 4 of the Liquor License Act (1900) provides that every inspector shall give security by bond to the municipality for due performance of his duties. A municipal council by resolution appointed the defendant inspector, and also resolved "that he be required to file a bond which is satisfactory to the license committee." A bond was executed and approved by the mayor. It was contended that because there was no evidence that the bond was satisfactory to the license committee in accordance with the resolution, the appointment of the defendant was illegal and his subsequent acts invalid:—*Held*, that, as it was not necessary that the satisfaction of the license committee should be expressed in writing, it should be presumed that the bond was satisfactory to them until the contrary was proved; also that the appointment of the defendant was valid, he having acted as such officer.—The defendant, in seizing liquor, on being asked for the warrant under which he was acting, produced the wrong warrant, and stated in evidence afterwards that he seized the liquor under that warrant. In an action against the defendant for breaking open the premises of the plaintiff, it was contended that the defendant was thereby estopped from justifying under the other warrant:—*Held*, that, as there was no evidence that the defendant gave the wrong warrant to the plaintiff with the wilful intent that he should act on it, estoppel would not apply. *Brown* v. *Laurence*, 40 N. S. R. 375.

Offence—*Time of committing — Information—Conviction — Warrant of commitment—Discharge.*]—To an order in the nature of a *habeas corpus* for the discharge of the defendant, a prisoner confined in the common gaol at H., the gaoler returned a warrant signed by the stipendiary magistrate for the county of H., reciting a conviction under the Liquor License Act made against the defendant "for that he, the said L. B., within the space of six months last past, and previous to the information herein, which information is dated and laid on the 22nd day of April, A. D. 1904, did sell liquor by retail without the license therefor by law required," etc.:—*Held*, that the defendant was entitled to his discharge, it not appearing from the warrant that the offence charged was committed within six months before the laying of the information. *Rex* v. *Boutilier*, 24 C. L. T. 240.

Prosecution—*Witness for defence—Compelling attendance—Fees — Jurisdiction of magistrate—Habeas corpus.*]—On a prosecution before the stipendiary magistrate for the city of Halifax, for a violation of the Liquor License Act, proof was given of service of a summons on M., who it was asserted, was a material witness for the defendant, but without tendering witness fees, and an application was made to the magistrate for a warrant to compel the attendance of the witness, the fees being at the same time tendered to the magistrate. The application was refused on the sole ground that fees were not tendered in the first instance to the witness, and the trial was proceeded with, and the defendant convicted. On application for a writ of *habeas corpus*:—*Held*, Weatherbe, J., dissenting, that the question whether, in a case under the Liquor License Act the witness could be compelled to attend, or the party was entitled to a warrant, unless the fees had been

paid, was open to debate, but that, even if the decision of the stipendiary magistrate was erroneous, it could not be reviewed upon *habeas corpus;* and the application must be dismissed. *Rex* v. *Clements*, 34 N. S. R. 443.

R. S. N. S. s. 100—N. S. *Acts, 1907, c. 7, s. 138—Wholesale license—Validity of sale to private person.*]—Defendant was a holder of a wholesale liquor license for Sydney. He received an order for a case of gin to be sent to Louisburg, where no license law in force, same to be sent by express and to be paid for by sending a post-office order. The gin was for the purchaser's own use and not for resale:—*Held*, that the sale was made in Sydney where the property passed to the purchaser and no offence was committed. Conviction quashed. *Rex* v. *Crowson*, 6 E. L. R. 558.

Sale by agent—*Conviction—Service of minute—Burden of proof—Occupant.*]—The Liquor License Act, R. S. N. S. 1900, c. 100, s. 111, provides that "the occupant of any house, shop, room, or other place in which any sale has taken place, shall be personally liable to the penalty, notwithstanding such sale was made by some other person who cannot be proved to have so acted under or by direction of such occupant:"—*Held*, that the defendant was properly convicted for sales made by his son, who lived with him in a house occupied by the defendant and his family. *Per* Ritchie, J., that the service, upon the persons convicted, of an incorrect copy of the minute of conviction, followed by service of a correct one, would not invalidate the proceedings, or prevent the magistrate from preparing a conviction in accordance with the original minute made by him, and issuing process to enforce the penalty or imprisonment. *Per* Graham, E.J., that the son living with his father was a person "suffered to be or remain" on the premises within the meaning of the Act, s. 111, s.-s. 2; that the burden was on the defendant of proving that the sales were made without his authority; and that the defendant was an "occupant" within the meaning of the Act. *Rex* v. *Conrod*, 35 N. S. R. 79.

Sale of liquor by secretary of social club without license — *Liability.*]—On appeal the conviction of defendant, the secretary of a social club, for selling liquor without a license, was confirmed. The club was incorporated, every member being a shareholder. Members ordered liquor from the steward. The defendant was acting for the steward in the present instance. *R.* v. *McIsaac*, 7 E. L. R. 393.

Sale of malt extract—"*Low grade ale*" *—Percentage of alcohol—Conviction set aside by County Court Judge—Appeal.*]—Conviction for sale of malt extract, which the evidence shewed to be a "low grade ale," —The only point relied upon by defendant on appeal from a conviction for a violation of the Liquor License Act was that there was no evidence that the sale of the liquor in question took place in the town of B. as alleged.—The purchaser of the liquor swore that she bought the article from defendant and that it was delivered at her house in B. by the defendant's team, and another witness, the policeman of the town, swore that defendant's factory and residence were in the town of B., and that he put up bottled drinks there which were sold and delivered in the town of B.:—*Held*, that the evidence was sufficient to support the conviction, and that the judgment of the County Court Judge to the contrary should be set aside and the conviction made by the stipendiary magistrate of the town restored. *Rex* v. *Wilson*, 7 E. L. R. 91, 363, 43 N. S. R. 482.

Sale without license — "*Liquor*" — *Proof of presence of alcohol — Quantity — License — Constitutional law — Powers of provincial legislature.*]—The Liquor License Act, R. S. N. S. c. 100, s. 2 (g), defines "liquors" and "liquor" to mean and include all drinkable liquids containing alcohol. —The defendant was convicted for keeping for sale without license, in contravention of the provisions of the Act, a beer sold under the name of "Pilsener Beer," which was shewn by the evidence to contain alcohol in quantities varying from 2.27 to 4.71 per cent. in volume, which would be the equivalent of from something under 2 to 3½ per cent. by weight:—*Held*, that the presence of alcohol in this quantity brought the beer in question within the definition of "liquor" contained in the statute; that the intention of the statute being to require a license in all cases where alcohol beverages were sold, whether they were intoxicating or not, it was not necessary, under the wording of the Act, to constitute a drinkable liquid or liquor that it should contain enough alcohol to render it intoxicating; and that the power to enact such a law was clearly within the legislative authority of the provincial legislature. *Rex* v. *Bigelow*, 3 E. L. R. 101, 41 N. S. R. 469.

Second offence — *Imprisonment — Irregularity in conviction—Release.*]—Application for discharge of prisoner convicted of a second offence under above Act. The prisoner being ill undertook that if discharged he would not again violate the provisions of above Act:—*Held*, (1) that a Judge has no power to discharge on an undertaking to sin no more; (2) that prisoner could not be discharged on ground that there was no evidence on his trial that there was no license in force in the town where he conducted a hotel because he had admitted the charge; (3) but he must be discharged because he was convicted on 30th April for a second offence committed between 12th February and 24th April, when his conviction for the first offence was on 19th April. The second offence must be committed after the first conviction. *Rex* v. *Walker*, 7 E. L. R. 295.

Second offence — *Nova Scotia Liquor License Act—Evidence of previous conviction —Certificate — Identity of defendant.*]—Appeal from conviction for violation of Liquor License Act. *R.* v. *Atkinson* (N. S. 1910), 9 E. L. R. 212.

Selling without license — *Conviction —Defendant not appearing—Service of summons—Reasonable time to appear — Third offence.*]—Information was laid before the stipendiary magistrate for the town of Truro, charging the defendant with having sold liquor at retail without license, the defendant having been previously convicted of first and second offences of the same nature. A

summons was issued on the 20th June, 1905, requiring the defendant to appear at the town Court room at 10 o'clock on the following morning to answer the charge against him, and to be further dealt with. A copy of the summons was served by a constable on the defendant personally on the same day on which the summons was issued, and defendant failing to appear, was convicted in his absence. The conviction was attacked on the ground that the defendant was not served until the night of the day on which the summons was issued, and that he had no time to consult counsel:—*Held*, that the question of the reasonableness of the service was one for the justice, under all the circumstances of the case, and that on the facts stated there was evidence to justify him in coming to the conclusion that a reasonable time had elapsed between the time of service and the time fixed for the trial, and in proceeding with the case in the defendant's absence.—*Per* Russell, J., that if the defendant required further time, it was his duty to have appeared, and to have made his application to the justice, and that it was not permissible for him to ignore the summons and afterwards ask the Court to quash the conviction. *Rex* v. *Craig*, 38 N. S. R. 345.

Selling without license — *Non-intoxicating beverage — "Pilsener beer"—Knowledge of intoxicating nature—Liability.*]—On appeal conviction of defendant affirmed. Defendant had for sale "Pilsener Beer" which she thought was non-intoxicating, but which was found on analysis to be intoxicating. Absence of knowledge of the intoxicating nature of the beverage is no defence. *R.* v. *Ryan*, 7 E. L. R. 395.

Social club — *Conviction — Reduction of penalty by Judge on appeal.*]—Defendant was president, secretary and manager of a club. Club privileges, including purchase of liquor, were obtainable by members, who were required to purchase a share of the par value of $1:—*Held*, on appeal, that she was rightly convicted of keeping liquor without a license. *Rex* v. *Hiatt*, 7 E. L. R. 230.

Social club—N. S. Liquor License Act—*Bona fides* — Conviction confirmed. *R.* v. *Bing* (N. S. 1910), 9 E. L. R. 215.

Social club—*Sale of liquor by steward to members—Liquor License Act (N.S.)—Violation.*]—An incorporated social club selling to or supplying its members only with liquors at a tariff rate is violating the above Act. *R.* v. *Simmons*, 7 E. L. R. 529.

Stated case — *Evidence of defendant—Protection against incriminating questions.*]—There is no provision for stating a case under the above Act. Defendant was charged with illegally selling liquor. In giving his evidence he denied selling to a witness between the 15th and 29th of March. On cross-examination he was asked as to his transactions with this witness on the 29th March. His counsel objected that he could not be compelled to answer. Under s. 164 of above Act the prosecutor cannot call the accused as a witness to prove the offence. The accused, when he goes on the stand, is entitled to claim the same protection. The claim for protection is a personal one and must be made by the party himself and under oath. The objection of his counsel will not do. *Rex* v. *McIntyre*, 7 E. L. R. 50.

Summary conviction—*Evidence—Third offence — Proof of previous convictions — Trial on three separate charges — Evidence in one affecting decisions in others.*]—Motion to quash three convictions for offences against the Liquor License Act, R. S. N. S. c. 100, all being convictions for a third offence committed on different days. It was contended that the previous convictions could not be used more than once as evidence of previous offences for the purpose of convicting the defendant a third time:—*Held*, that such previous convictions may be used as evidence on which to base convictions for a third offence as often as one is charged and proved. It was also urged that, the defendant being before the magistrate charged with three separate offences, the magistrate should dispose of one first before entering upon the trial of the others. *Regina* v. *McBurney*, 29 N. S. R. 327. The magistrate and the prosecutor's counsel produced affidavits shewing that the magistrate decided to convict at the conclusion of the evidence in each case, and that he simply refrained from imposing the sentence and drawing up the formal conviction. The magistrate also stated in his affidavit that he was not influenced by the evidence in one case in making up his judgment in the other:—*Held*, that *Regina* v. *McBurney* was not, therefore, applicable. *Rex* v. *Bigelow*, 24 C. L. T. 141.

Summary conviction—*Steward of social club selling liquor to members—Stated case—Jurisdiction — Practice — Summary Convictions Act, 1900, c. 161, s. 75, s.s. 2.*]—An information was laid before the stipendiary magistrate of the City of Halifax, by the license inspector for said city, charging defendant with having unlawfully in said city kept intoxicating liquors for sale within the space of six months previous to the laying of the information.—A summons was issued, and on its return defendant appeared and pleaded not guilty.—The stipendiary magistrate at defendant's request, stated a case for the opinion of the Court, upon the point whether the serving of liquor by the steward of an incorporated club to *bona fide* members (in which liquor the steward had no pecuniary interest, and which was bought by the funds of the club) amounted in law to a "keeping for sale" by said steward, within the prohibition contained in s. 87 of the Nova Scotia Liquor License Act:—*Held*, quashing the case stated, that in order to give the Court jurisdiction to hear the case there must be a conviction, order, determination or other proceeding heard and determined which the person aggrieved complains of, and it was impossible to say whether such was the case in the present instance, the point being stated at the defendant's request and apparently before any determination by the magistrate.—Also, that in stating a case under the statute, the findings and conclusion of the magistrate upon the whole evidence must be set forth, and not merely the evidence.—Also, that the application for a stated case must be made in writing, and that, as, in the present case, the inference was the other way, there was a defect going

to the jurisdiction of the Court which could not be waived. *Rex* v. *Gaines*, 6 E. L. R. 342, 43 N. S. R. 253.

Supplying liquor to minors — *Conviction — Offence committed by servant of licensed vendor—Knowledge of master—Instructions to servant — Contravention — Liability — "Allow."*]—On appeal conviction quashed. Defendant's servant had without his knowledge, and contrary to his instructions, sold liquor to minors. *R.* v. *Quirk*, 7 E. L. R. 398.

Supreme Court of N. S. set aside above order and restored the conviction with costs. *R.* v. *Quirk*, 8 E. L. R. 56.

Witness—*Conviction for non-attendance—Proof of tender of witness fees.*] — The defendant was summoned to appear as a witness on behalf of the prosecution at the trial of a complaint under the Liquor License Act, R. S. N. S. 1900, c. 100. He did not appear, and afterwards a summons was issued requiring him to appear to answer to the charge of refusing or neglecting to attend as a witness. He appeared, and, after hearing evidence in support of the charge, the justices convicted the defendant, and imposed a fine of $5 and costs:—*Held*, setting aside the conviction with costs, that the defendant could not be made liable for the penalty imposed by the Act, s. 161 (2), in the absence of proof that the proper fees were tendered to him before he was required to give evidence. *Rex* v. *Chisholm*, 35 N. S. R. 505.

vii. *Ontario Act.*

Application to quash by-law — *Irregularities—Liquor License Act, s. 204.*]—Petitioners moved on several grounds to quash By-law No. 483, of the town of Renfrew, being a by-law to prohibit the sale by retail of spirituous, fermented or other manufactured liquors, in said town. The total vote cast was 690; of these 370 voted for the by-law and 223 against. On a scrutiny before the County Judge, 12 of the votes in favour of the by-law were struck off, leaving the vote 358 for and 223 against the by-law. Petitioners now attacked 18 more votes as irregularly cast:—*Held*, that the irregularities set up in the affidavits were wholly covered by s. 204. Motion dismissed with costs; that the question whether the applicant is estopped by his acquiescence was not considered, as in a public matter like the present the doctrine of estoppel has no place. *Re Ellis & Renfrew* (1910), 15 O. W. R. 880, 21 O. L. R. 74.

Application to quash — *Irregularities — Municipal Act, s. 338 (2) — By-law quashed.*]—Petitioner moved to quash the Local Option By-law of the township of Dunwich. The total vote cast was 781; 481 being in favour and 300 against. The motion to quash was on 12 different grounds, but on the opening of the argument only 3 were pressed, the others being expressly abandoned:—*Held*, that the ground as to bad votes did not need to be passed upon, as not sufficient were attacked to affect the result. As to the second ground, that the notices were not properly posted as required by s. 338 (2) of the Municipal Act, no care appears to have been taken by the clerk to ascertain if the copies were actually posted outside of Dutton (which was not in the municipality); that s. 338 (2) had not been complied with, and that s. 204 did not apply to heal this defect; and that the by-law must be set aside with costs. *Rees* v. *Dunwich* (1910), 15 O. W. R. 908, 21 O. L. R. 94.

Application to quash by-law.]—Divisional Court affirmed judgment of Riddell, J., 15 O. W. R. 880, 21 O. L. R. 74, 1 O. W. N. 710.—*Re Schumacher and Cheeley*, 16 O. W. R. 641; 21 O. L. R. 552, 1 O. W. N. 1041, and *Re Orangeville*, 15 O. W. R. 564, followed; *Re Saltfleet*, 16 O. L. R. 293, 11 O. W. R. 356, 379, 545, questioned.—Leave to appeal to Court of Appeal granted. *Ellis* v. *Renfrew* (1910), 16 O. W. R. 952, 2 O. W. N. 27.

Application to quash by-law — *Irregularities.*]—Petitioner moved on several grounds to quash By-law No. 642 of the town of Strathroy, being a by-law to prohibit the sale by retail of spirituous, fermented or other manufactured liquors in said town. The total vote cast was 477 for and 309 against, which, on a scrutiny before the County Judge, was changed to 471 for and 310 against. Petitioner now attacked 10 more votes as irregularly cast:—*Held*, that the application should be dismissed with costs. *Re Prangley and Strathroy* (1910), 15 O. W. R. 890, 21 O. L. R. 54.

By-law limiting licenses to one—*Monopoly — By-law quashed.*] — Although passed in good faith, a by-law limiting to one the number of licenses to be granted in a municipality was set aside on the ground that such limitation was in effect to create a monopoly.—Judgment of Sutherland, J., 16 O. W. R. 732, 1 O. W. N. 1091, affirmed. *McCracken* v. *Sherborne* (1911), 18 O. W. R. 24, 2 O. W. N. 601, O. L. R.

By-law of city reducing number of licenses — *Section 29 of Act—Next ensuing year—Future years—Annexation of town to city—Repeal of former's by-laws by implication—Quashing by-law—Discretion.*]—Application to quash a by-law limiting the number of tavern licenses to be issued by the City of Toronto refused:—*Held*, that in above section "for any future license year" is surplusage, and that "or" should be read "and." A by-law passed for the next ensuing license years remains in force until altered or repealed. When the town became annexed to the city the present by-law repealed the former license by-laws of the town. *Re Brewer and Toronto, Re Robinson and Toronto*, 13 O. W. R. 954, 19 O. L. R. 411.

By-law restricting number of licenses — *Commencement of by-law—Next ensuing year—Tavern or shop license?—Oral proof that no shop license existed in township—Liquor License Act, ss. 29, 32.*]—A by-law restricting the number of liquor licenses to three was attacked on the grounds that no time was mentioned when it should come into force, and that it was vague because it did not specify that it applied to taverns only or to taverns in particular. Evidence showed that there were no shop licenses in the township:—Boyd, C., *held* (16 O. W. R. 582, 1 O. W. N. 1012), that the by-law was valid; that it

came into operation on 1st May next ensuing after its passage.—*Re Wilson & Ingersoll*, 25 O. R. 439, considered over-ruled.—*Re Brewer & Toronto*, 13 O. W. R. 954, 19 O. L. R. 411, followed.—Divisional Court dismissed an appeal from above judgment with costs. *Bourgon* v. *Cumberland* (1910), 17 O. W. R. 438, 2 O. W. N. 244. O. L. R.

"**Club**"—*Liquor License Act, ss. 50, 53—Conviction.*—Eight men contributed $1 each, which was handed to defendant. He rented a room for an unstated period, paying $4 for one month's rent, and with the balance purchased two eight gallon kegs of lager beer. He borrowed a beer pump and procured some glasses which were all taken to the room where a P. C. found these men drinking beer. Defendant was charged with a violation of s. 50 of the Liquor License Act.—The Police Magistrate dismissed the information. The Crown appealed.—Widdifield, Co. C.J., *held*, that there was a club or association within the meaning of s. 53 and allowed the appeal. Defendant fined $20 and costs. *R.* v. *Cahoon* (1910), 17 O. W. R. 467.

Commitment — Habeas corpus — Proceedings anterior to conviction—Second offence—Admission of previous offence—Record — Magistrate's minute—Uncertainty—Discharge of prisoner — Excessive penalty — Power to amend. *Rex* v. *Simmons*, 12 O. W. R. 776, 17 O. L. R. 239, 14 Can. Crim. Cas. 5.

Conviction — *Commitment — Habeas corpus—Proceedings anterior to conviction—Second offence — Admission of previous offence—Record—Magistrate's minute — Uncertainty—Discharge of prisoner—Excessive penalty — Power to amend.*]—Although a conviction on its face appears sufficient to support the commitment of the defendant, the Court will, on the return of a *habeas corpus*, examine the proceedings anterior to the conviction to see if they warrant his detention, and, if they do not, will order his discharge.—*Regina* v. *St. Clair*, 27 A. R. 508, followed.—The defendant was convicted on the 15th September, 1908, for selling liquor without a license; the conviction recited that the defendant had been convicted on the 17th October, 1907, of having unlawfully sold liquor without a license; and the punishment adjudged was imprisonment for four months without hard labour—the statutory penalty for a second offence. The only record in the proceedings in respect to any previous conviction was contained in an indorsement upon the information, in the handwriting of the magistrate, as follows: "The defendant makes a statement that he was convicted of selling between 4 Oct. and 14 Oct., 1907, and I find the within charge a second offence for selling. I commit the defendant to the county gaol for four months without hard labour:"—*Held*, that s.-s. 6 of s. 101 of the Liquor License Act, R. S. O. 1897 c. 245, requires that the subsequent offence and the earlier offence shall each be an offence in contravention of one of the sections numbered 49, 50, 51, 52 or 72, or an offence against some other section for which no penalty is provided except by s. 86. The admission as recorded might mean that the defendant had previously been convicted of an offence against s. 78 (2) or against s. 124 (1), or of selling on licensed premises in prohibited hours; proof or the admission of a former conviction for any of these offences would not warrant a later conviction under s. 72 being treated as a second offence under s.-s. 6 of s. 101; and this fact sufficed to render the admission of the accused as recorded by the magistrate so uncertain that it was inadequate to sustain his conviction as for a second offence; and he should be discharged from custody under the commitment.—*Semble*, that the Court had no power to amend the conviction by substituting the maximum penalty prescribed by s. 72 for a first offence. *Rex* v. *Simmons*, 12 O. W. R. 776, 17 O. L. R. 239.

Conviction—*Offence of selling—General sale or separate sales.*]—Middleton, J., *held*, that when a hotel-man keeps open bar and sells liquor to all comers, the Crown may treat this selling as one offence or may treat each sale as an offence. The selling is the offence, and may be shewn by a number of sales as well as by shewing one sale. *R.* v. *Sutherland* (1911), 18 O. W. R. 280, 2 O. W. N. 595.

Conviction — *President of club — Keeping liquor for sale—R. S. O. c. 245, ss. 50, 53—Intra vires—Penalty.*]—Where intoxicating liquor was kept by the president of an incorporated whist club in the club's room for intended consumption by the members of the club, and was in fact consumed and paid for by them, although neither the club nor any member of it was licensed under the Liquor License Act:—*Held*, having regard to the provisions of s. 53 of the Act, that the defendant should be convicted of a violation of s. 50. The provisions of s. 53 are *intra vires* of the Legislature of Ontario. Section 86, and not s. 72, provides the penalty applicable to such a case as this. *Regina* v. *Lightburne*, 21 C. L. T. 241.

Conviction — *Removal by certiorari — Commitment—Invalidity—Amendment — Act relating to justices—Irregularities—Names—Sentence—Adjudication—Fine.*]—The defendant was convicted on the 23rd February, 1903, before a Judge designated under s. 91 of the Ontario Liquor Act, 1902, of an illegal act within the meaning of that section, and was sentenced to be imprisoned for one year and to pay a penalty of $400. On the same day a warrant was issued by the Judge committing the defendant to gaol in pursuance of the conviction, and under this warrant he was arrested and lodged in gaol. On the 30th January, 1903, a writ of *certiorari* was issued to the Judge and a County Crown Attorney commanding them to send to the High Court of Justice all summonses, proceedings, etc., had before the Judge against the defendant and two others. This was served on the Judge on the 2nd February, before the date of the conviction and before the issue of the warrant:—*Held*, that the proceedings against the defendant were removed from the Court below by the issue and service of the *certiorari*, and that the subsequent proceedings were void. By 2 Edw. VII. c. 12, s. 15 (O.), the provisions of the Criminal Code respecting amendment of proceedings before justices of the peace are made applicable to all cases of prosecutions under Provincial Acts:—*Held*, not to apply to proceedings under the Liquor Act,

1902.—*Semble*, that, in a conviction of this kind, it was no objection, on *habeas corpus*, that the name of the informant did not appear, nor that the prisoner was prosecuted under the name of "Foster," whereas his name was "Forester." — *Semble*, also, that there was a sufficient sentence and adjudication, although the particular language which might have been necessary in a conviction by a magistrate was not made use of in the record of the proceedings; but, at all events, there was no reason why the sentence of imprisonment should not stand good, even if the adjudication of the fine were objectionable. *Rex* v. *Foster*, 23 C. L. T. 228, 5 O. L. R. 624, 2 O. W. R. 312.

Conviction—*Third offence — Evidence of previous convictions — Improper reception—Subsequent defection.*]—A conviction of the defendant for a third offence against the Liquor License Act, R. S. O. 1897 c. 245, was quashed, on the ground that the convicting magistrate had improperly admitted evidence of previous convictions before the determination of the defendant's guilt upon the charge against him of a third offence, contrary to s. 101 of the Act. *Regina* v. *Edgar*, 15 O. R. 142, approved. Dictum of Armour, C.J., in *Regina* v. *Brown*, 16 O. R. 41, 48, disapproved:—*Held*, also, that the jurisdiction of the magistrate was gone when he admitted the improper evidence and his competence was not restored by its deletion. *Rex* v. *Nurse*, 24 C. L. T. 222, 7 O. L. R. 418, 3 O. W. R. 224.

Conviction for first and second offences—*Conviction for first offence quashed on appeal — Second offence same as first offence after — Second offence amended as such—New conviction drawn up—Form penalty and costs—Thirty days' imprisonment amended to one month—R. S. O. (1897), c. 245, s. 101 (5), Criminal Code ss. 146, 753.* —Defendant was charged with two offences against the Liquor License Act. The first conviction was quashed. The magistrate amended the other conviction as of a first offence and imposed $45 fine and costs or imprisonment for thirty days, which he later changed to one month. Defendant moved to quash this later conviction. Boyd, C., *held*, that the application should be dismissed with costs. *R.* v. *Rudolph* (1910), 16 O. W. R. 723, 1 O. W. N. 1057.

Conviction for second offence of selling intoxicating liquor without license —Jurisdiction of justices who made first conviction—Knowledge of first conviction—Section 101 of Act—Certificate of previous conviction. *Rex* v. *Wellman*, 12 O. W. R. 822.

Conviction for second offence of selling intoxicating liquor without license —Jurisdiction of justices who made first conviction—Knowledge of first conviction—Section 101 of Act—Information for first offence, laid before commission of second offence—Discharge of defendant from custody under commitment, by order of Judge of High Court—Right of Crown to appeal to Court of Appeal—Habeas Corpus Act—Liquor License Act, s. 121. *Rex* v. *Reid*, 12 O. W. R. 819.

Conviction for unlawfully selling—*Habeas corpus—Motion for discharge—Warrant of commitment—Interlineation—Previous conviction—Evidence—Police magistrate —Costs of conveying to gaol — Amendment of conviction.* —Defendant was convicted of unlawfully selling liquor without a license. He attacked the conviction on the following grounds: (1) That the warrant was void on its face as having an unverified interlineation of a material character; (2) that there was no statement in the conviction of the capacity in which Wm. Lawson acted when the previous conviction was made; (3) that the commitment did not say that the first offence was an unlawful sale; and (4) that there was an adjudication by the convicting magistrate without authority, in directing that in default of payment by defendant of costs of conveying him to gaol, he was to be imprisoned therefor. Sutherland, J., *held*, 16 O. W. R. 181, that the first three objections were not well founded, and as to the fourth, the conviction should be amended by striking out the words "and charges of conveying the said Daniel Graves to the said common gaol." *R.* v. *Degan*, 12 O. W. R. 1047, 17 O. L. R. 366, 14 Can. Cr. Cas. 148, followed.—Divisional Court *held*, that the previous conviction had not been proved, and the conviction should not stand, but Falconbridge, C.J., and Riddell, J., dismissed the appeal from above judgment, holding that a Divisional Court has no jurisdiction.—*Re Harper*, 23 O. R. 63, followed.—*Rex* v. *Teasdale*, 15 O. W. R. 397, 20 O. L. R. 382, not approved.—Britton, J., dissenting, *held*, that a Divisional Court has jurisdiction and the prisoner ought to be discharged from custody.—*Rex* v. *Teasdale*, 15 O. W. R. 397, 20 O. L. R. 382, approved.—*Re Harper*, 23 O. R. 63, distinguished. *R.* v. *Graves* (1910), 16 O. W. R. 372, 21 O. L. R. 329, 1 O. W. N. 972.

Criminal Code, s. 786 — *Discrediting witnesses—Irrelevant questions.* — A motion was made to quash a conviction under Ontario Liquor License Act, on the ground that magistrate had ruled that a witness was not bound to answer if he had been in the hotel of accused in the forenoon and in another hotel in the forenoon and afternoon of the day on which the accused was charged with illegally selling liquor between 2 and 6 o'clock in the afternoon of that day. Motion dismissed. *Rex* v. *Butterfield*, 13 O. W. R. 542. Appeal dismissed. 13 O. W. R. 616.

Delivery of intoxicating liquor to person after notice — Licensed seller — Service of notice on barman—Sufficiency—Damages—Costs — Notice coming to knowledge of seller. *Middleton* v. *Coffey*, 5 O. W. R. 18, 336.

Destruction of liquors under magistrate's order — *Proprietary medicines — 61 V. c. 30, ss. 2 and 3 (O.)—Police officers —Oral direction of magistrate — Bona fides —Reasonable and probable cause—Absence of malice—Notice of action—Costs of action—R. S. O. 1897, c. 88, s. 22.*]—The plaintiffs were on the 9th July, 1906, convicted by a magistrate of keeping intoxicating liquors for sale without license, contrary to the Liquor License Act. The conviction was not formally drawn up and signed until the 25th October, 1906, when it was made part of the return to a writ of *certiorari*. The conviction

as returned contained a declaration that a large quantity of liquor found on the plaintiffs' premises, including portions alleged by the plaintiffs to be proprietary medicines, should be forfeited, and an order and direction to the defendants, who were police officers, to destroy the liquor and the vessels containing it. This direction was given orally at the time of the conviction, and was acted upon by the defendants about three weeks later. On the 10th December, 1906, the order for the destruction of the portions of the liquor alleged to be medicines was quashed by an order of the High Court of Justice. In an action for damages for the destruction of those portions: — *Held*, (1) upon the evidence, that the liquors in question came within the protection of ss. 2 and 3 of 61 V. c. 30 (O.), as proprietary medicines or medicine wines.—(2) That in destroying the liquors in question the defendants in good faith believed they had the right to do so in their capacity as police officers, and it was their duty to obey the direction, though merely oral, of the police magistrate.—(3) That the goods being in the custody of the law, and under the jurisdiction of the magistrate, and the destruction being a ministerial act, there was no necessity, in the absence of statutory requirement or other authority, for the direction to the police officers to be in writing.—(4) That the defendants had reasonable and probable cause to believe that they had the right to destroy the liquors in question, and no malice on their part was shown.—(5) That the notice of action was sufficient, as the defendants, according to their own evidence, understood the nature of the complaint and when and where the act complained of happened.—(6) That, in view of the provisions of R. S. O. 1897 c. 88, s. 22, the successful defendants could not be deprived of their costs of the action, and were entitled thereunder to costs as between solicitor and client. *Arscott* v. *Lilley* (1887), 14 A. R. 283, followed. *Bostock* v. *Ramsey Urban District Council*, [1900] 1 Q. B. 357, [1900] 2 Q. B. 616, distinguished. *Ing Kon* v. *Archibald*, 17 O. L. R. 484, 12 O. W. R. 592, 997, 14 Can. Crim. Cas. 201.

Dismissal of complaint by police magistrate — *Right of appeal to County Court Judge.* —The Liquor License Act, R. S. O. 1897 c. 245, provides by s. 118, s-s. 6, that "an appeal shall lie to the Judge of the County Court of the county in which an order of dismissal is made . . Where the Attorney-General of the province so directs, in all cases in which an order has been made by a justice or justices dismissing an information or complaint laid by an inspector:"—*Held*, that the words "justice or justices" in this sub-section does not include a police magistrate. *Re Rex* v. *Smith*, 11 O. L. R. 279, 7 O. W. R. 40.

Distress.]—In a conviction under the Ontario Liquor License Act, after setting out the judgment for $100 and costs, it provided that these sums should be paid forthwith, and if defendant had no goods or chattels out of which said sums could be levied by distress, imprisonment was adjudged. The addition of the words "if no goods or chattels" is mere surplusage, and does not award distress and may be disregarded. *Rex* v. *Degan*, 12 O. W. R. 1029.

Evidence of previous conviction.]—On the trial of the defendant for a second offence against the Ontario Liquor License Act, a certificate of a previous conviction was put in, in the absence of the defendant:—*Held*, not sufficient grounds on which to quash the conviction. *Rex* v. *Warilow*, 12 O. W. R. 1026.

Evidence taken in shorthand.]—Evidence taken in shorthand in a liquor license prosecution is reduced to writing within R. S. O. 1897, c. 245, s. 99. Reading over the evidence is merely directory. The consent of the defendant in waiving the reading over of evidence is effective. The magistrate received in evidence a certificate of a previous conviction and acted thereon. The Court will not inquire whether or not he came to a right conclusion. The effect of the existence of a local option by-law will not deprive the magistrate of the power to direct the imprisonment of the defendant. *Rex* v. *Leach*, 12 O. W. R. 1016. *Rex* v. *Fogarty*, 12 O. W. R. 1026. *Rex* v. *Warilow*, 12 O. W. R. 789, 17 O. L. R. 284, 14 Can. Crim. Cas. 117.

Evidence taken in shorthand—*Section 99—Consent—Waiver — Criminal Code, ss. 683, 711, 721.* —Upon a prosecution for a second offence of selling intoxicating liquor without a license, contrary to the Liquor License Act, R. S. O. 1897 c. 245, the evidence was taken in shorthand, with the express consent of the accused, and was not read over to or signed by the witnesses, as required by s. 99. The accused was convicted and sentenced to imprisonment.—Upon the return to a *habeas corpus*:—*Held*, following the *King* v. *Janneau*, 12 Can. Crim. Cas. 360, that the consent amounted to a legal waiver of a requirement affecting procedure only; and the prisoner was not entitled to be discharged.—*Semble*, that, apart from any consent on the part of the accused, the effect of ss. 683, 711, and 721 of the Criminal Code, warranted the course taken. *Rex* v. *Warilow* 12 O. W. R. 789, 17 O. L. R. 284.

Execution — *Fieri facias — Liquor license—Assignment of—Consent by lessee to re-assign license.*] — A license under the Liquor License Act cannot be seized by a sheriff under a writ of *fieri facias*. The piece of paper upon which it is printed and written ceases to be seizable as an ordinary chattel when it is converted into such a license. The right to sell liquor at a particular place under such a license is a personal one, and is not assignable by the holder of it unless he obtain the consents and comply with the conditions of s. 37 of the Liquor License Act, R. S. O. c. 245. A covenant in the lease of an hotel by the lessee, that at the expiration of the lease he will assign to the lessor the license, if any, then held by him is not a covenant binding upon the assignee of the term as such. It is a merely personal covenant, having nothing to do with the land or its tenure. *Walsh* v. *Walper*, 22 C. L. T. 49, 3 O. L. R. 158.

Furnishing liquor to minors—*Section 78—5 Edw. VII. c. 30, s. 1—Convictions—Power of magistrate to amend informations—Laying new charges after 30 days—Sections 95, 104.* —Upon the hearing of complaints upon two informations for breach of s. 78 of the Liquor License Act, as amended by 5

Edw. VII. c. 30, s. 1 (O.), in selling liquor to minors the justices amended by inserting in the informations the necessary allegation that the persons to whom the liquor was sold were "apparently or to the knowledge of the defendants, under the age of 21 years:"—*Held*, that under s. 104 of the Act the justices had power so to amend, notwithstanding that 30 days had elapsed from the date of the commission of the offence charged. — *Quære*, whether, in view of s. 95 this would have been permissible if the amendments had substituted other and different offences for those charged in the informations. *Rex* v. *Ayer*, 17 O. L. R. 509, 12 O. W. R. 1223, 14 Can. Crim. Cas. 210.

Having liquor for sale.] — Defendants admitted having cider for sale within 20 miles of a railway under construction but claimed that the cider was not intoxicating:—*Held*, that the convictions should be quashed and the fines returned to the defendants. *Rex* v. *Palangio* (1909), 14 O. W. R. 620, 1 O. W. N. 26.

Hotel-keeper—*Holding tavern but not shop license—Sale of quantity more than one quart—Question as to whether one sale or two sales—Evidence—R. S. O. (1897) c. 245, s. 2, cl. 2.*]—W. and P. purchased two bottles of ale, one each, from the bartender, for which they paid. Then they went out on the verandah and came back in a minute or two and purchased two more bottles as before.—Divisional Court, *held*, no offence under the statute, as it was two sales instead of one. Conviction quashed. *R.* v. *Trainor* (1911), 18 O. W. R. 474, 2 O. W. N. 398.

Illegal sale — *Absence of accused—Evidence taken in shorthand.*]—Motion to discharge prisoner under a commitment pursuant to conviction for illegally selling liquor contrary to Ontario Liquor License Act. The following objections to the commitment were held insufficient: (1) absence of defendant whose counsel was present; (2) agreement that shorthand notes should be as binding as if evidence read over and signed by witness, (3) that magistrate had no power to decide that prisoner had no means of paying the fine, (4) that prisoner was held under two commitments, (5) that the gaoler has returned two convictions. Under s. 105 of said Act conviction was amended by eliminating any reference to costs of conveying prisoner to gaol. *Rex* v. *Degan*, 12 O. W. R. 1047, 17 O. L. R. 366, 14 Can. Crim. Cas. 148.

Illegal sale of intoxicating liquors—*Imprisonment under several warrants — Consecutive terms of imprisonment—Power to amend convictions and warrants — Shorthand reporter's notes—Power of counsel to accept same as final—Conviction—Certiorari.* —Section 72 of the Liquor License Act, R. S. O. 1897 c. 245, enacts that, in the event of the imprisonment of any person under several warrants of commitment under different convictions in pursuance of this Act the terms of imprisonment under such warrants shall be consecutive and not concurrent:—*Held*, that in such case, upon the fine imposed on the first conviction being paid the imprisonment commences under the second; and, if the fine be not paid, the second term commences at the end of the first: and in the meanwhile the prisoner is held under both warrants.—Under the power to amend the conviction warrant, process, or proceeding given by s. 105 of the Liquor License Act, the Court has power to amend by striking out references to the costs of conveying to prison when the same are not properly indicated in the commitment or sufficiently identified by indorsement.—*Held*, also, that on proceedings before a magistrate on a charge of selling liquor contrary to the Act, counsel for the defendant, in the absence of the latter, had authority to bind him by an agreement that the shorthand reporter's notes should have the same force and effect as if taken down by the magistrate, and read over to and signed by each witness. *Rex* v. *Degan*, 17 O. L. R. 366, 12 O. W. R. 1047.

Keeping for sale without license—Amendment of information—Refusal of adjournment—Jurisdiction of magistrate—Discretion of magistrate—Conviction on mere suspicion—No evidence that liquor was intended for sale—Britton, J., quashed conviction with costs against magistrate fixed at $35, to be paid within 30 days—Protection of magistrate if so paid. *R.* v. *Milkens* (1911), 18 O. W. R. 137, 2 O. W. N. 659.

License duty in town — *Municipal by-law increasing to $2,500—Approval of electors —Mala fides—Motives of promoters—By-law —Effect of — Prohibition or monopoly.*] — Under 6 Edw. VII. c. 47, s. 10 (O.), amending the Liquor License Act R. S. O. 1897 c. 245, the license duties were increased, the duties imposed being, in cities of a population of over 100,000, $1,200 for a tavern and $1,000 for a shop license; in cities of a population of 10,000 only and towns of over 5,000 and not more than 10,000, $450 for a tavern and shop license respectively. By s. 11, the council of any municipality, with the approval of the electors, could increase the above amounts; but by s.-s. 5, where in cities there had been an increase made by the Act, no further increase should be made.—In a town with a population of about 7,000, the council, with the electors' approval, passed a by-law increasing the amount to be paid for a tavern license to $2,500:—*Held*, that the validity of the by-law was dependent on the good faith of the council in passing it, and, it being apparent that the object was not with regard to the continuance of the business, but either to altogether prohibit it, or to so restrict it as to create a monopoly, the by-law was bad, and must be quashed. *Re Rowland and Town of Collingwood*, 16 O. L. R. 272, 11 O. W. R. 804.

Liquor License Act (Ont.) — Conviction — Keeping for sale—Chinese wines — Evidence ample to justify conviction. *R.* v. *Sam Lee Hing* (1910), 1 O. W. N. 806.

Mandamus—*Creation of village after final passing of local option by-law of township of which village formed part—Municipal Act, 1903, s. 55—By-laws in force.* —A local option by-law of M. township was finally passed on 25th January, to become operative on and after 1st May following. Coldwater was erected a village out of said township on 29th January:—*Held*, that said by-law was "in

force," that is, had the force of law in said township on 29th January, and, therefore, under s. 55, continued in force in Coldwater until repealed or altered by Coldwater council. *Re Denison & Wright*, 13 O. W. R. 1056, 19 O. L. R. 5.

Motion to quash—*Appointment of police magistrate—Jurisdiction before issue of commission—Appointment for town in unorganised district—Jurisdiction of police magistrate so appointed—Jurisdiction as ex officio justice of the peace—Police Magistrates Act, R. S. O. 1897, c. 87, ss. 6, 22, 39.*]—Under the Police Magistrates Act, R. S. O. 1897, c. 87, s. 6, conferring power on the Lieutenant-Governor in Council to appoint police magistrates, the effective act of appointment is the order in council, and police magistrates so appointed have jurisdiction to act as such before their commissions are issued. —Under s. 6 of the said Act, by which "the Lieutenant-Governor in Council may at all times, notwithstanding anything in this Act contained, appoint a police magistrate without salary for any town," such appointment may be made for a town made such by proclamation, with less than 5,000 inhabitants, in an unorganised district before a council has been elected for it, notwithstanding that by s. 3 (2) no salaried police magistrate shall be appointed for a town with less than 5,000 inhabitants until a resolution of the council affirming the expediency thereof is passed by a vote of two-thirds of the members of the council.—Such magistrate has jurisdiction to act, notwithstanding that there may be another police magistrate appointed for the part of the unorganised district in which the town to which he has been appointed is situate, and this though he is *ex officio* a justice of the peace, since jurisdiction of a justice of the peace in such a district to adjudicate upon or otherwise act, until after judgment in any case, is excluded (by s. 22) only if the initiatory proceedings have been taken by or before the police magistrate for the district or part of the district.—On motion to quash a conviction for unlawfully keeping liquor for purposes of sale without a license therefor:—*Held*, that the magistrate making such conviction, being a police magistrate for the town of Cobalt, correctly described himself as making the conviction as such police magistrate, although, in making it, he was acting in his capacity as *ex officio* justice of the peace for the district of Nipissing:—*Held*, also, that in this case the conviction must be quashed on the ground that no offence was disclosed upon the evidence; and *Regina* v. *McGregor*, 26 O. R. 114, distinguished in that regard. *Rex* v. *Reedy*, 18 O. L. R. 1, 13 O. W. R. 265, 14 Can. Crim. Cas. 256.

Motion to quash—*Voting on by-law—Persons not entitled voting—Voters' Lists Act, 1907—Finality of lists—Scrutiny.*]—Section 24 of the Voters' Lists Act, 7 Edw. VII. c. 4 (O.), provides that "the certified list" made under that Act "shall upon a scrutiny under the Ontario Elections Act," meaning the Ontario Controverted Elections Act, "or the Municipal Act, be final and conclusive evidence that all persons named therein, and no others, were qualified to vote at any election at which such list was, or was the proper list to be used," except persons (1) guilty of corrupt practices at the elections, etc.; (2) becoming non-resident, etc.; (3) persons disqualified under ss. 4 to 7 of the Ontario Elections Act, namely, Judges, clerks of the peace, etc., prisoners, lunatics, or persons in charitable institutions: —*Held*, that the section applied to the proceedings on a motion to quash a local option by-law, so that the list was final and conclusive as to the right of the persons named in such list, and not within the exceptions mentioned, to vote on such by-law. The legislation passed from time to time relative to motions to quash and to scrutinise, as also the cases on the subject, referred to and considered. *In re McGrath and Town of Durham*, 17 O. L. R. 514, 12 O. W. R. 149, 1091.

Motion to quash conviction for second offence—*Liquor License Act and Criminal Code—Grounds insufficient evidence — Power of magistrate.*]—Boyd, C., *held*, that where affidavits explain that no evidence was returned because none was taken and it is shewn that the defendant was convicted upon his admissions of guilt as to both charges in open Court, and in the presence of the magistrate, the magistrate can lawfully convict. *Rex* v. *Dagenais* (1911), 19 O. W. R. 252, 2 O. W. N. 1091.

Municipal by-law — *Part prohibition —Sale in shops — Discrimination — Motion to quash—Costs.*]—A municipal council, under the powers conferred by s. 141, s.-s. 1, of the Liquor License Act, R. S. O. 1897, c. 245, may pass a by-law prohibiting the sale of liquors (except by wholesale) in shops, without at the same time prohibiting the sale in taverns. *Re Frawley and Town of Orillia*, 9 O. W. R. 365, 14 O. L. R. 99.

Municipal corporations — *By-law to reduce number of licenses—Construction of statutes and by-laws—Unauthorised limitation — Ultra vires — Meaning of "year."* — By s.-s. 1 of s. 20 of the Liquor License Act, R. S. O. 1897, c. 245, the council of every city is authorised by by-law passed before the 1st of March in any year to limit the number of tavern licenses to be issued therein for the then ensuing license year, beginning on the 1st May, or for any future license year until such by-law is altered or repealed, provided such number is within the limit imposed by the Act. Under the authority of this sub-section, the municipal council of the city of Toronto, on the 22nd February, 1904, passed a by-law, the second section of which provided that "the number of tavern licenses to be issued shall not exceed the number of 150 in any one year." On the 27th January, 1908, the council passed a by-law, intituled "A by-law to reduce the number of tavern licenses to 110," the effect of which was to amend the second section of the first by-law, so that it would read: "The number of tavern licenses to be issued shall not exceed the number of 110 in any one year." The number of licenses issued by the license commissioners for the license year commencing on the 1st May, 1907, was 144, but under s. 8, s.-s. 3, of the Act, they had authority, if special grounds were shewn, to issue the six unissued licenses at any time before the 1st May, 1908:—*Held*, Riddell, J., dissenting, that the council by the by-law of the 27th January, 1908, had, in effect, assumed to

limit the number of licenses which the license commissioners had authority to issue for the license year beginning on the 1st May, 1907, and that the by-law was therefore *ultra vires*, and should be quashed. *In re Hassard and City of Toronto*, 16 O. L. R. 590, 11 O. W. R. 684, 1088, 12 O. W. R. 50.

Offence against s. 112—Amendments by 7 Edw. VII., c. 46, s. 5, and 8 Edw. VII., c. 54, s. 6—Construction—Liability of owner or person having control of unlicensed premises for illegal keeping or selling by occupant. *Rex* v. *Bradley*, 13 O. W. R. 39.

Order of magistrate directing destruction of liquors — Order of High Court quashing—Right of informant to appeal to Court of Appeal under s. 121—Order quashing, right on merits—Refusal of High Court to protect informant from action—Discretion—Appeal. *Rex* v. *Ing Kon*, 10 O. W. R. 544, 14 Can. Crim. Cas. 197.

Permitting intoxicating liquors to be consumed on unlicensed premises—House of public entertainment—Lodging house. *Rex* v. *Cretelli*, 3 O. W. R. 176.

Permitting liquor to be consumed on unlicensed premises — "*Owner*" *not being "occupant" not liable—Section 50 of above Act* — "*Permit*" — *Mens rea.*] — Conviction of defendant for unlawfully permitting liquor to be sold on unlicensed premises quashed. The defendant, the owner of the premises, had before the act complained of, leased the premises to his son with whom he boarded:—*Held*, he was not the "occupant" of the premises. One J. found a bottle of whiskey in a manger in hotel premises, drank some and gave to others while two stablemen were in the stable: — *Held*, that defendant did not "permit the drinking." *Rex* v. *Irish*, 13 O. W. R. 769.

Placing one addicted to excessive use on Indian list—*Inspector acted at request of brother-in-law—Brother-in-law not competent to make request under 6 Edw. VII., c. 71, s. 33—Action for damages for being placed on list by inspector—Act of public officer.*]—Plaintiff, a grocer, brought action to recover $2,000, damages against defendant license inspector, for placing him on the Indian list, at request of plaintiff's brother-in-law, and notifying the hotelkeepers of the county not to supply him with liquor:—*Held*, that the statute does not designate "a brother-in-law" as one of the persons who are competent to give the notice authorised by 6 Edw. VII., c. 47, s. 33, but it is limited to "the parent, brother or sister of the husband or wife of the person addicted to the excessive use of liquor; that it was a serious matter to stigmatise a man in business as one addicted to the use of liquor in excess—to put this in writing and publish it among the houses of entertainment as the deliberate act of a public officer. Judgment given plaintiff for $100 damages, with costs of action. *Piggott* v. *French* (1910), 15 O. W. R. 852, 21 O. L. R. 87.

Powers of license commissioners — *Resolution prohibiting games of chance in licensed premises* — "*Euchre*"—*Knowledge of licensee—Conviction—Form — Distress—Imprisonment—Costs.*] — A board of license commissioners, under the authority of the Liquor License Act, R. S. O. 1897, c. 245, s. 4, s.-s. 4, passed a resolution "that no gambling or any game of chance whatever for gain or amusement or for any other purpose whatever shall be played about any licensed tavern or other house of public entertainment . . . or on the premises;"—*Held*, McMahon, J., dissenting, that the powers of the commissioners under s. 4 were not restricted by s. 81, and that the resolution was within their power. Four persons played "euchre" for amusement in a room behind the bar of the defendant's hotel, the cards used being the property of one of the players, a boarder in the hotel:—*Held*, that "euchre" is a game of chance, and that the defendant was properly convicted of an infraction of the resolution by reason of the game having been played in his premises, though without his knowledge:—*Held*, also, that s. 100 of the Act should be read into the resolution providing for the recovery of the fine imposed upon a conviction, and that the direction of the conviction for recovery by distress and in default of distress imprisonment was authorised:—*Held*, also, that where the license inspector attends Court as prosecutor he is to be allowed certain expenses by way of costs, as provided in s. 117, and there was nothing wrong in the amount ($4.20) allowed for costs in this case. If it were wrong, it was severable, and could not affect the conviction. *Rex* v. *Laird*, 23 C. L. T. 281, 6 O. L. R. 180, 2 O. W. R. 607.

Prior conviction — *Proof of.*]—Under s.-ss. 1 and 2 of s. 101 of the Liquor License Act, R. S. O. c. 245, it is necessary that the proof of the prior conviction should be by the production of the formal conviction or by a certificate thereof, other satisfactory evidence being by the statute declared to be sufficient. Where, therefore, on a trial before a magistrate—being the same magistrate by whom the defendant had been previously convicted of a like offence—the information alleging such prior conviction, all that appeared with regard to it was the evidence of the license inspector, who proved that the defendant was the person previously convicted:—*Held*, that it must be assumed that the magistrate satisfied himself as to the prior conviction, the inspector's evidence only being necessary to prove the identity of the defendant. *Regina* v. *McGarry*, 20 C. L. T. 170, 31 O. R. 486.

Procuring personation of voter — *Ontario Election Act, 1902, ss. 167, 168—Procuring person to vote knowing that he has no right.*]—The defendant was convicted of having unlawfully induced and procured another person to vote at a certain polling place on a certain day, upon the question of bringing into force the Ontario Liquor Act, 1902, well knowing that such other person had no right to vote at the said time and place upon the said question:—*Held*, that the conviction was justified under s. 168 of the Ontario Election Act, R. S. O. 1897, c. 9 (made applicable by s. 91 of the Liquor Act), although the evidence shewed that the defendant's offence consisted in inducing one R., who was himself a voter, but had no vote at the polling place mentioned, to personate a

voter at such polling place. Section 167 (1) makes the counselling or procuring of personation a corrupt practice, but does not provide a punishment; and s. 168 is in terms wide enough to cover the offence. *Rex* v. *Coulter*, 23 C. L. T. 280, 6 O. L. R. 114, 2 O. W. R. 523.

Reduction—*By-law limiting licenses to one — Monopoly — By-law quashed.*]—Although passed in good faith, a by-law limiting the number of licenses to be granted in a municipality was set aside on the ground that such limitation was in effect to create a monopoly. *Re McCracken & Sherborne* (1910), 16 O. W. R. 733, 1 O. W. N. 1091.

Referendum—*Voting—Corrupt practices —Place of trial — Jury — Conviction — Sentence — Imprisonment — Penalty—Costs —Form of conviction—Habeas corpus—Warrant of commitment.*] — The provisions of s.-ss. (2) and (3) of s. 91 of the Ontario Liquor Act, 1902, are amplifications of the provisions of the Ontario Election Act which are incorporated in the Liquor Act; and the Judge (appointed under s. 91 (4)) in this case did not exceed his powers in sentencing the accused, whom he found guilty of personation, to one year's imprisonment in addition to the payment of a penalty of $400 and costs. The jurisdiction is to try at any place in Ontario, and, it appearing in the order of conviction that the trial was held under the Act, and that the offence was committed at the city of Toronto, and the prisoner being sentenced to be imprisoned in the common gaol of the county of York, at the city of Toronto, the order shewed jurisdiction, although it did not specify that place of trial. It was immaterial that the order of conviction was intituled in the High Court of Justice, and that it did not shew the informer's name, the County Crown Attorney of the county of York being shewn to be the prosecutor. Nor was it material that the date of the offence was not shewn, the time for conviction not being limited by statute. The prisoner was in custody under an order for his imprisonment for one year. In addition to this he was ordered to pay a penalty of $400 and costs within thirty days, and in default to imprisonment for three months unless sooner paid:—*Held*, that upon *habeas corpus* proceedings within the year, the objections that the costs were not ascertained or stated in the order, and that the warrant of commitment erroneously stated that the time for payment of the penalty and costs had expired, could not be considered, but the right should be reserved to the prisoner to apply again for his discharge at the expiration of the year. The amount of the costs should have been fixed by the Judge and inserted in the order, instead of being left to be ascertained by a taxing officer. *Rex* v. *Carlisle*, 23 C. L. T. 321, 6 O. L. R. 718, 2 O. W. R. 905.

Sale by brewer *to person not licensed to sell.*] — On appeal, conviction of police magistrate was restored, where defendants' agent in selling liquor had simply been told it was ordered for campers. This was not a reason to the agent that the purchaser did not intend to resell. *Rex* v. *Calcutt*, 12 O. W. R. 1045.

Sale in prohibited hours—*Conviction for second offences — Acknowledgment of guilt—Payment of fines as for first offences —Informations amended so as to charge second offences—2 Edw. VII., c. 12, s. 14.*]—Motion by defendant to quash two convictions for selling liquor during prohibited hours, same being second offences, dismissed. The informations charged first offences, but were amended to charge second offences. The defendant pleaded guilty and was fined $100 and costs, and on default 3 months' imprisonment. Before the adjudication the defendant had appeared before the magistrate and admitted his guilt. *Rex* v. *Renaud*, 13 O. W. R. 1090.

Sale of intoxicating liquor by brewer —*Person not licensed to sell—Re-sale—Reason to believe not purchased for re-sale—Evidence—Conviction.*]—A purchaser who was not himself licensed to sell intoxicating liquors went to a brewery and ordered five dozen pints. He said he was "ordering it for the campers." The vendors did not ask who the campers were, or what he meant by that phrase:—*Held*, that there was nothing in the reply to give the vendors reason to believe that the purchaser did not buy to re-sell within the meaning of s.-s. 2 of s. 64 of the Liquor License Act, R. S. O. 1897, c. 245, and that, therefore, the vendor was rightly convicted under that section. *Rex* v. *Calcutt Brewing Co.*, 17 O. L. R. 363, 12 O. W. R. 1045.

Sale of liquor during prohibited hours—*Conviction of two persons for same offence—Requisition for medical purposes — Exception not negatived by information — Burden of proof — Power of Court to amend.*]—B., a hotel-keeper, and O., his bartender, were convicted by a magistrate upon informations charging them with the illegal sale of liquor during prohibited hours, both informations, however, referring to the same sale. Both convictions were quashed by the District Court Judge as being in contravention of the Liquor License Act, s. 112, s.-s. 2, which provides that in such a case both the accused parties shall not be convicted of the same offence. On appeal to a Divisional Court:—*Held*, that as to O. the Judge's order was right on the ground taken by him, but as to B., who was convicted before O. was tried, the subsequent conviction of O. could not affect the validity of the conviction against B.—2. As, however, the information did not negative the exception in s. 54 of the Act protecting sales to vendees holding requisitions for the purchase of liquor for medicinal purposes, the prosecutor was bound to adduce evidence that the sale was not within that exception, and, as there was no evidence before the magistrate on that point, the order quashing B.'s conviction must be upheld.—3. Although the magistrate might have amended the information at the trial, subject to s. 104 of the Act, by adding a clause negativing the exception, no such amendment could now be made.—*Regina* v. *White*, 21 C. P. 354, followed. *Rex* v. *Boomer*, 10 O. W. R. 978, 15 O. L. R. 321.

Sale of liquor near public works—*Police magistrate — Justices of the peace — Jurisdiction — Conviction — Form of — Irregularity — Costs — Evidence — Reduc-*

tion to writing — Signing by witnesses.] — In areas wherein R. S. O. 1897, c. 39, an Act respecting the sale of intoxicating liquors near public works, is in force, a person who sells liquor without license may be proceeded against either under that Act or under the general Liquor License Act, R. S. O. 1897, c. 245. It is optional to proceed under either one Act or the other, with this proviso, that the offender shall not be punished twice for the same illegal sale.—The fact that a man is a police magistrate does not debar him from calling in another justice of the peace to sit with him, and there is nothing to oust the general jurisdiction of justices in the fact that a stipendiary magistrate has been appointed for the district.—The omission to ascertain the costs and insert the amount in a conviction under the Liquor License Act, R. S. O. 1897, c. 245, s. 49, is only an irregularity and not a fatal defect, and may be afterwards rectified by the same justices if it is sought to enforce payment of the costs.—*Semble*, that under the proper construction of s. 49, of the Liquor License Act, it is not necessary to negative the excepted cases in a conviction under that section.—*Semble*, that reducing the evidence of witnesses to writing and tendering the same to them to be signed by them, though details which it is better not to disregard, are not essential to the validity of a conviction under the Liquor License Act. *Rex* v. *Irwin*, *Rex* v. *Pettit*, 16 O. L. R. 454, 11 O. W. R. 728, 730.

Sale of liquor without license — Conviction — Fine — Distress — Imprisonment. *Rex* v. *Degan*, 12 O. W. R. 1029.

Sale of liquor without license — Conviction for second offence—Evidence of previous conviction—Certificate put in, in absence of accused — Adjourned hearing — Failure of accused to appear—Impossibility of asking accused whether he had been previously convicted — Information for third offence — Variance — Absence of prejudice. *Rex* v. *Warilow*, 12 O. W. R. 1026.

Sale of liquor without license — Conviction for second offence — Evidence taken in shorthand and not read over to witnesses and signed—Consent of counsel—R. S. O. 1897, c. 245, s. 99—7 Edw. VII. c. 2, s. 7 (2), cl. 14—Criminal Code—Proof of previous conviction — Certificate of magistrate — Identity of defendant with person previously convicted—Proof of—Questions for magistrate — Review upon *certiorari*—Court of last resort — Authority of previous decisions — Independent judgment — Offence committed in place where local option by-law in force—R. S. O. 1897, c. 143—"Penalties" in force—Question whether punishment by imprisonment included. *Rex* v. *Leach*, 12 O. W. R. 1016.

Sale of without license — *Previous conviction.*]—Conviction for illegally selling liquor quashed, defendant having been asked if he had been previously convicted before he was found guilty of the second offence. *Rex* v. *Vanzyl*, 13 O. W. R. 485.

Sale to minor—*Magistrate's conviction—No evidence that minor was apparently under age—Conviction quashed.*] — Magistrate convicted defendant of having given, sold or supplied liquor to one C. R. C., who was apparently or to the knowledge of the defendant, under 21 years of age, but the Co. C.J. of Oxford Co. quashed the conviction.—Divisional Court affirmed the Co. C.J. on the ground that there was no evidence that the so-called minor was under the age of 21 years, or that the accused knew that he was under 21, and none that he was apparently under 21 years of age.—*Gilbert* v. *Brown*, 15 O. W. R. 673, at p. 679, approved. *R.* v. *Farrell* (1910), 16 O. W. R. 630, 21 O. L. R. 540, 1 O. W. N. 1045.

Sale without license—*Second offence—Jurisdiction of magistrate to convict in absence of defendant—Criminal Code, ss. 718, 721; 10 Edw. VII. (Ont.), c. 37, s. 4—Ontario Liquor License Act, s. 101.*]—Court of Appeal *held*, that a magistrate has jurisdiction to convict defendant of a second offence of selling liquor without a license without bringing him before the magistrate so that the course pointed out in s. 101 of the Liquor License Act may be strictly followed. — Judgment of Middleton, J., 16 O. W. R. 903, 2 O. W. N. 6, reversed. *R.* v. *Coote* (1910), 17 O. W. R. 470, 2 O. W. N. 229, O. L. R. .

Sale without license — *Trial — Evidence taken in shorthand — Conviction — Validity — Prior conviction — Identity — Evidence — Absence of accused — Necessity for evidence being read to and signed by witnesses — "Penalty" — Punishment by imprisonment — Interpretation Act — Criminal Code, ss. 683-711—Liquor License Act, R. S. O. 1897, c. 245, ss. 99, 143.*]—On a trial before a magistrate for selling liquor without a license contrary to the Liquor License Act, the evidence with, and *semble*, without, the consent of the accused, may be taken down in shorthand, and it is not necessary that it should be read over to and signed by the accused.—In proof of the conviction of a prior offence by the person accused, identity of name in the certificate of conviction is some evidence of the identity of the person, and it is then a question of the weight of evidence for the determination of the magistrate.—The existence of a local option by-law in a locality has not the effect, under s. 193 of the Liquor License Act, of depriving the magistrate of the power to direct the imprisonment of the accused, the word "penalty," used in the Act, including imprisonment.—When the accused is present at the trial and has due notice of the adjournment of it to another time, the fact of his absenting himself at that time, whether represented by counsel or not, does not deprive the magistrate of authority to hear evidence and convict him of a second offence.—The Court, by virtue of the powers conferred by s. 119 of the Ontario Judicature Act, R. S. O. 1897, c. 51, has jurisdiction to award costs against the applicant for discharge upon *habeas corpus* when the conviction is for a penalty imposed by or for an offence created by provincial legislation, such jurisdiction being in no way interfered with by s. 191. *Rex* v. *Leach*, *Rex* v. *Fogarty*, *Rex* v. *Warilow*, 17 O. L. R. 643, 12 O. W. R. 1016, 1026.

Second offences—*Alleged convictions for first offences on same informations—Failure of evidence to establish—Unauthorised distress — Excessive imprisonment — Summary*

Convictions Act, s. 7, s-s. 2—Certiorari taken away—Jurisdiction of justice of the peace.]—Upon an application by the defendant to quash two convictions made by a justice of the peace for offences against the Liquor License Act, the defendant stated that, having been summoned to appear before the justice at one p.m. on a certain day to answer two charges of selling liquor during prohibited hours, the offences charged not being alleged to be second offences, he went to the justice in the forenoon of the day for which he was summoned, acknowledged his guilt, was found guilty and fined, and paid his fines, and subsequently on the same day, the informations having been in the meantime amended by charging the offences as second offences, he was again convicted and fined for the same offences:—*Held*, that the principal objection, viz., that the alleged first convictions were bad because the penalties imposed exceeded those authorised for first offences, and that the alleged second convictions were bad because of the existence of the alleged first convictions, failed on the evidence, there having been in fact no convictions at the earlier hour, and therefore no payment of fines, but at most a deposit with the justice of the amount of the fines and costs which would be imposed when the complaints should be formally heard.—The other objections related to the provision as to the recovery of penalties by distress, which was found in the convictions, but not in the minute of adjudication, and the term of imprisonment imposed in default of payment of the fines and costs, the former being, it was urged, wholly unauthorised, and the latter in excess of what is authorised by the Act:—*Held*, that assuming both to be valid objections, not to be got rid of by amendment in the present proceedings, they did not entitle the applicant to invoke the aid of the Court to quash the convictions, because by the provisions of s-s. 2 of s. 7 of the Ontario Summary Convictions Act, as enacted by 2 Edw. VII., c. 12, s. 14 (amended by 4 Edw. VII., c. 10, s. 25), the right to *certiorari* is taken away, and therefore the right to apply under the new procedure to quash the convictions, except in cases where there is no adequate remedy by appeal; and the objections were not such as affected the jurisdiction of the justice in such a way as to make the provisions of the sub-section inapplicable. *Rex* v. *Cook*, 18 O. L. R. 415, 12 O. W. R. 829, followed. *Rex* v. *Renaud*, 18 O. L. R. 420, 13 O. W. R. 1090.

Second offence — *Jurisdiction of justices — Knowledge — Section 101 — Certificate of first conviction.*]—The defendant was convicted of a second offence against the Liquor License Act by the same justices who had made the former conviction, as in the next case, *Rex* v. *Reid*, 17 O. L. R. 578, 12 O. W. R. 819, and it further appeared that among the papers returned upon the *certiorari* was a certificate of the fact of the previous conviction, signed by the justices, but it did not appear that any use was made of the certificate at the trial:—*Held*, that the conviction was valid. *Rex* v. *Wellman*, 17 O. L. R. 583, 12 O. W. R. 822, 14 Can. Crim. Cas. 335.

Second offence — *Jurisdiction of justices who made first conviction—Knowledge—Section 101 — Information — Habeas corpus proceedings — Discharge — Right of appeal by Crown.*]—The defendant was convicted of a second offence against the Liquor License Act, R. S. O. 1897, c. 245, by the same magistrates who had tried and convicted him of the first offence. The magistrates, however, followed accurately the directions of s. 101 of the Act, first inquiring concerning the subsequent offence only, of which the defendant was found guilty, and then, and not before, asking him whether he had been previously convicted, to which he answered that he had been:—*Held*, that the conviction was valid. *Rex* v. *Nurse*, 7 O. L. R. 418, distinguished.—*Held*, also, that an appeal lies at the instance of the Crown, under s. 121 of the Liquor License Act, against the decision of a Judge discharging a prisoner from custody upon an application made under the Habeas Corpus Act, and that to such a case the provisions of s. 6 of that Act do not apply. *Rex* v. *Reid*, 17 O. L. R. 578, 12 O. W. R. 819, 14 Can. Crim. Cas. 329.

Second offence — *Proof of prior conviction — Section 101 of said Act — Criminal Code, s. 739 — Minute of adjudication — Variance from conviction.*]—Motion by defendant to quash his conviction for second offence under above Act, dismissed. The minute of adjudication states that a fine of $50 and costs was imposed to be paid forthwith, or in default of such payment two months' imprisonment. The conviction provided for distress if fine not paid, and imprisonment if not sufficient distress:—*Held*, that s. 739 of the Criminal Code applies and conviction right. *Rex* v *Reid* (1909), 14 O. W. R. 71, affirmed 153.

Selling liquor without a license — *Absence of evidence to shew sale by defendant — Habeas corpus — Certiorari — Duty of Court.*]—The taking down of the evidence under the Liquor License Act, R. S. O. 1897 c. 245, is not only for the protection of the magistrates, but as a record of the material on which a conviction is founded, in case of ulterior proceedings in respect of it, the Court being bound by such evidence, without any power to remit the case back to the magistrates to take further evidence. — Where, therefore, a defendant was convicted and imprisoned for the sale of liquor without a license, but the evidence returned in response to *certiorari*, issued in aid of a writ of *habeas corpus*, while disclosing a sale on the premises, failed to shew a sale by the defendant himself, the conviction and imprisonment of the defendant were held to be illegal, and an order was made for his discharge from custody.—The Court is bound to examine the proceedings returned on *certiorari* to see if they authorise the detention, and, if not, to discharge the prisoner: Habeas Corpus Act, s. 5. *Rex* v. *Brisbois*, 10 O. W. R. 869, 5 O. L. R. 264.

Selling without license — *Conviction for second offence—Appeal to the Divisional Court from Judge — Habeas Corpus Act — R. S. O. (1897), c. 245, ss. 101, 118, 121.*]—After defendant had been convicted for a first offence of selling intoxicating liquors without a license, an amendment was made to the Act by increasing the penalty for a first offence. After the amendment, defendant was convicted for a second offence. It was contended that he could not be convicted for

a second offence in view of the amendment. Clute, J., *held* (15 O. W. R. 242), that the Legislature by increasing the penalty for a first offence did not intend to give a clear slate to all cases where a first conviction had been made.—On appeal to Divisional Court, Crown contended that there was no appeal to Divisional Court under Habeas Corpus Act and because of R. S. O. (1897), c. 245, ss. 118, 121:—*Held*, that neither Act prevented an appeal from a Judge in the ordinary course to a Divisional Court. The Court approved of the statement of the law by Clute, J., but discharged defendant on the ground that s. 101 of the Act, as to procedure in cases where a previous conviction is charged, had not been complied with in form or substance. *R.* v. *Teasdale* (1910), 15 O. W. R. 397, 20 O. L. R. 382, 1 O. W. N. 486.

Selling without license — *Last day for laying informations — Informations laid by telephone — Forwarded by mail — Not a compliance with Liquor License Act, s. 95— Jurisdiction of magistrate before whom informations were laid — New territorial division — R. S. O. c. 87, ss. 15 (4), 20 — 7 Edw. VII. c. 29, s. 10.*]—Informations were laid before a police magistrate for Algoma, charging defendants with infractions of the Liquor License Act, in the district of Sudbury. The informations were laid by telephone on the last day allowed by statute and were forwarded by mail:—*Held*, that this was not a compliance with the Liquor License Act, s. 95. — *Held*, further, that the Algoma magistrate had no jurisdiction to receive informations relating to offences committed in the district of Sudbury. Charges dismissed with costs. *R.* v. *Harrington*, *R.* v. *Paquette* (1910), 16 O. W. R. 165.

Selling without license]—Neither the information, nor the conviction as originally drawn, stated that the unlawful selling was without a license. After a motion to quash had been launched the conviction was amended to cover this objection and the amended conviction was returned and filed: — *Held*, that having regard to the amendment made and to the provisions of s. 105 of the Act, the objection failed. *R.* v. *Leonard* (1910), 1 O. W. N. 415.

Selling without license — *Second offence — Jurisdiction of magistrate to convict in absence of defendant — Criminal Code, ss. 718, 721, 16 Edw. VII. (Ont.) c. 37, s. 5— Ont. Liquor Act, s. 101.*]—A magistrate has no jurisdiction to convict defendant of a second offence of selling liquor without a license without bringing him before the magistrate so that the course pointed out in s. 101 of the Liquor Act may be strictly followed.—*Rex* v. *Nurse*, 3 O. W. R. 224, 7 O. L. R. 418, and *Rex* v. *Salter*, 20 N. S. R. 206, followed.—*Regina* v. *Brown*, 16 O. R. 41, overruled. *R.* v. *Coote* (1910), 16 O. W. R. 903, 2 O. W. N. 6.

Selling without license — *Summons issued by police magistrate — Trial before two Justices — Acting at request of police magistrate — Request not appearing on conviction — Warrant of commitment — Imprisonment — No period of mentioned—Cured by later statement — Habeas corpus — Amendment of conviction under s. 105 Liquor License Act — Costs of conveying to gaol — Direction as to payment*] — Defendant was charged with an offence against the Liquor License Act. The information was laid before the police magistrate of Belleville, who was also a J. P. for the county. He issued a summons to answer the charge before himself or such other justices as might be there, *i.e.*, at Stirling, where the alleged offence occurred. On a motion by defendant for a *habeas corpus* with a view to an application for his discharge from custody, Boyd, C., *held*, 15 O. W. R. 679, that reading together the information, summons and the conviction by two other justices shewed that the convicting magistrates were acting at the request of the P. M. who issued the summons. The first part of the conviction mentioned "Three ——" as the period of detention:—*Held*, that the "——" was cured by a later statement that the term of imprisonment was to be "three months."—*Held*, also, that there was a sufficient *adjurat* as to payment of costs, in directing payment to the keeper of the gaol. Divisional Court, 1 O. W. N. 672, ordered the writ of *habeas corpus* to issue. Defendant then moved before Divisional Court for his discharge on the return of a writ of *habeas corpus*.—*Held*, that the several objections, urged on behalf of the defendant, were not well taken, and in view of the Liquor License Act, s. 105, the proper order to be made was, that the Court direct that the defendant be further detained under the present proceedings, and that the magistrates before whom he was convicted to amend the conviction, that it may shew upon its face that the magistrates acted at the request of the police magistrate. *R.* v. *Ackers* (1910), 16 O. W. R. 105, 21 O. L. R. 187.

Selling without license—*Two offences on same day — Conviction on one charge only — Informant not resident of county — Minutes of convicting justices — Evidence.*] —Two charges of selling liquor without a license may be tried together, and where the evidence leaves the exact hour a matter of uncertainty, the magistrates may convict for the offence disclosed, *i.e.*, a sale on the day in question. It is not necessary that the informant should be a resident of the county wherein the offence was committed. *R.* v. *Dunkley* (1910), 16 O. W. R. 263, 1 O. W. N. 861.

Tavern license — *Sale by licensee in wholesale quantity — Sale without license— Sale of three gallon keg of beer by successive quarts — Intention — Evasion of Act.*]—A person brought a three-gallon keg to the defendant's hotel to be filled with beer, and was informed by the defendant, who held a "tavern license," that he could not sell more than a quart at a time. The keg was taken into a room adjoining the bar-room, and a little less than a quart of beer drawn off and poured into the keg, and this was repeated until the keg was filled:—*Held*, that this was a sale by the defendant of three gallons and not of a quart at a time, as authorised by his license; and that the offence came within s. 49 of the Liquor License Act, R. S. O. 1897 c. 245, namely, for selling otherwise than as permitted by his license. *Rex* v. *Lampier and Orr*, 12 O. W. R. 885, 17 O. L. R. 244.

Transfer of license — *Premises to be made suitable — Powers of Commissioners— Injunction — Costs*]—License commission-

ers appointed under the Ontario Liquor License Act have no power to say to an applicant for a transfer of a license that, if he will put certain premises into a suitable state for compliance with the law in the future, they will transfer a license to such premises; they are entitled to act under the statute only with regard to the existing state of facts, not to make promises as to the future, in such cases. O'C., having no interest in the premises proposed to be licensed, and having no valid license at all, presented a petition to the commissioners for the transfer to these premises of a license standing in his name for other premises in which he had no longer any real interest. The commissioners decided that they would allow the transfer of O'C.'s license to the new premises when they should be made suitable; but before that time arrived O'C., whose fitness for the transfer was one of the subjects of the petition, had ceased to have any interest in the matter, and was allowed to make over his right to K., who in this way escaped the necessity of obtaining the certificate of the ratepayers as to his fitness:—*Held*, that this was illegal, and if the plaintiff had asked promptly for an injunction to prevent O'C., when he had no valid license and no interest in the new premises, from obtaining rights by asserting that he had, he might have obtained some relief; but at the trial it was too late to interfere, for K. had obtained rights which could not be interfered with in his absence, and the license commissioners whose conduct was in question had ceased to hold office.—*Held*, also, that an offer made by the defendants to submit the question of the costs of the action to be disposed of in Chambers should have been accepted by the plaintiff, and, as it was not, the plaintiff was not entitled to costs against O'C.; and the license commissioners should not have costs against the plaintiff. *East* v. *O'Connor*, 21 C. L. T. 498, 2 O. L. R. 355.

Transfer of license to new premises —Notice — Report of inspector — Injunction. *Stephens* v. *O'Connor*, 1 O. W. R. 241.

Unlicensed hotel — *Section 50 — Permitting liquor to be consumed—"Occupant" —"Permit" — Mens rea.*]—The defendant was the owner of an unlicensed public house or hotel, which he had leased to his son; the defendant lived in the hotel as a boarder:—*Held*, that he was not an "occupant" within the meaning of that portion of s. 50 of the Liquor License Act which provides that the occupant of an unlicensed house shall not "permit any liquor, whether sold by him or not, to be consumed upon the premises." —*Held*, also, that the word "permit" indicates authorisation, either expressly or tacitly, proceeding from the occupant personally, and involves a *mens rea*; and, there being no evidence that the defendant knew or in any way authorised or connived at the drinking on the premises for "permitting" which he was convicted, that, even if he were an occupant, the conviction could not be sustained. *Rex* v. *Irish*, 18 O. L. R. 351, 13 O. W. R. 769.

Unlicensed premises — *Search — Stranger — Warrant — Sale — Proof.*]—The right of entry under s. 130 of the Liquor License Act, R. S. O. c. 245, into any inn, tavern, etc., to make search for liquor, is limited to the persons named therein, namely, "any officer, police constable, or inspector;" and it is only under s. 131, on the procuring a warrant as therein provided, that the officer, etc., can take with him a person not being one of those named. Where, therefore, a license inspector took with him a person, not being one of those so named, without having procured a warrant, his act was illegal, and the defendant justified in resisting it; and a conviction for obstructing the inspector in the discharge of his duty was quashed. The defendant's premises had been licensed as a tavern, but the license had expired, and the only evidence of liquor being sold or reputed to be sold therein, was the statement of the inspector that the defendant's barroom remained the same as before, *i.e.*, before the expiry of his license. *Per* Meredith, C.J. —This was not sufficient to satisfy the requirements of the section. *Per* Meredith, C.J., also, that under the circumstances of this case, an objection that reasonable grounds had not been shewn for suspecting that some violation of the Act was taking place or was about to take place, was not tenable. *Regina* v. *Ireland*, 20 C. L. T. 4, 31 O. R. 267.

Warrant of commitment — *Failure to recite convictions — Habeas corpus—Motion for discharge — Application by Attorney-General for certiorari — Right to ex debito justitiæ — Adjournment of motion—Practice —Invalid warrant — Power to amend—Discharge — Stay — Terms.*]—The defendant was imprisoned under a warrant of a police magistrate, directed to a constable and the keeper of the gaol, reciting that the defendant was charged before the magistrate for unlawfully selling, at a place and on a day named, intoxicating liquor, and receiving an information for a third offence against the Liquor License Act, and then, without any allegation of a conviction, commanding the defendant's conveyance to the gaol and detention there at hard labour for six months. The defendant procured a writ of *habeas corpus*, declining a *certiorari* in aid. Upon a motion made for the discharge of the defendant, counsel for the Attorney-General appeared and asked for a *certiorari* to bring up the papers. This was granted, subject to all objections, and the motion for discharge adjourned till the return of the *certiorari*:—*Held*, that the Attorney-General is entitled to a *certiorari* of absolute right and absolutely in all cases; and that the recent statute 8 Edw. VII. c. 34 (O.), and the corresponding rules do not affect such right.—*Held*, also, that there was power to adjourn the motion, and that the proper practice was followed.—*Held*, however, that the warrant was bad, and could not be cured or amended under s. 1123 of the Criminal Code, R. S. C. 1906, c. 146, nor under s. 105 of the Liquor License Act, R. S. O. 1898, c. 245. The defendant was entitled to be discharged and the discharge should not be stayed for a new warrant, nor should terms be imposed. Remarks on the necessity for attention by magistrates and others to the form of proceedings, especially in matters involving the liberty of the subject. *Rex* v. *Nelson* (1908), 18 O. L. R. 484, 12 O. W. R. 1063, 15 Can. Cr. Cas. 10.

Will — *Devise of hotel premises to widow —Benefit of children — Division of income —Transfer of license to widow — Creditors —Receiver.*]—A testator by his will devised hotel premises to his wife during her widowhood, for the benefit of herself and four chil-

dren, the income to be applied for their support and maintenance until the children became of age, and in case of daughters until marriage. On the widow marrying, the property was to go to children, the widow being paid $1,000. On the testator's death in 1896, the widow applied to the license commissioners and obtained a transfer of the license to her for the remainder of the year; and for the subsequent years until 1900 the license was granted to her, she carrying on the business and maintaining herself and the children thereout, no money of the estate going into the business:—*Held*, that, after the testator's death, the license and good-will of the hotel business belonged to the widow personally, and formed no part of his estate; and apart therefrom the income was divisible amongst the widow and children as in *Allen* v. *Furness*, 20 A. R. 34.—*Held*, also, that creditors of the widow were entitled to attach the widow's interest in the property, which could be reached by the appointment of a receiver. *Taylor* v. *Macfarlane*, 22 C. L. T. 325, 4 O. L. R. 239, 1 O. W. R. 283.

viii. *Prince Edward Island Act.*

Confiscation of liquor — Search warrant — Validity of confiscation provisions of P. E. Island Prohibition Act — Action of trespass against officer seizing — Informant's belief — Magistrate's belief — Statutory form of information. *Matthews* v. *Jenkins*, 3 E. L. R. 577.

Conviction — *Dies non* — Thanksgiving Day — Provincial Interpretation Act—Justice of Peace — Magistrate — Disqualification — Pecuniary interest — Ratepayer of municipality into funds of which fines payable — Express statutory jurisdiction — Waiver — Previous convictions of same offender not objected to — No objection at trial. *In re Gillis*, 3 E. L. R. 565.

Prosecution for offence — Witness refusing to answer — Contempt — Committal by magistrate — Validity. *In re Morrison*, 3 E. L. R 154; *In re Sims*, 3 E. L. R. 157.

Social club — Prohibition Act. 1900 — Prosecution against steward — *Bona fides* of club—What constitutes a sale in violation of the Act. *R. ex rel. Jenkins* v. *Doyle* (P.E.I. 1910), 9 E. L. R. 97.

ix. *Quebec Act.*

Action for price — *License—Production — Pleading.*]— The plaintiff was a grocer, and sued to recover the amount of an account for intoxicating liquors sold. The defendant moved for an order that the plaintiff should be directed to declare whether at the time of the sale of such beverages he had a license required by law and to produce such license:—*Held*, that the plaintiff was not obliged to allege that he was the holder of a license nor was he obliged to produce one as long as the defendant did not by his pleading allege that the plaintiff had not obeyed the law upon this point. *Martel* v. *Paquet*, 5 Que. P. R. 109.

Adjournment for more than 30 days.]—The sentence or judgment and its delivery in a suit taken pursuant to the Quebec License Act (Art. 903 and following R. S. Q., 1909), are not a part of the hearing of the case within the meaning of Art. 1117. Hence, for the purpose of rendering his decision, the magistrate may adjourn the case for more than thirty days from the close of the hearing. *Plante* v. *Cliche* (1910), 38 Que. S. C. 535.

Certiorari.] — No appeal being allowed from a conviction under Que. License Act, the Court, on an application for *certiorari*, will not look into the evidence with a view to revise the decision of the magistrates. *Dubuc* v. *Maclaren*, 37 Que. S. C. 59.

Collector of revenue — *May take action to recover penalty.*]—In a municipality in which a prohibition by-law is in force, the notice given to the council to prosecute those who have broken the law, in conformity with s. 165 of Quebec License Act, and which is sent by registered letter from the collector of revenue to the mayor, and contains the names of the law breakers, and of the witnesses to be taxed and the dates upon which the law was broken, is sufficient. A reply from the secretary-treasurer to the collector authorizing the latter on behalf of the mayor to take proceedings is proof of the fact that the municipality has refused to act itself. From that moment, the collector may take action at the expense of the municipality and he may recover such expense from it in case the defendants in the suit are insolvent or it is found impossible to enforce payment by them. *Bruneau* v. *Black Lake* (1910), 39 Que. S. C. 91.

Commitment, under a condemnation to pay a fine, a specified sum for costs, or, in default, to imprisonment for a stated period, "unless the said several sums of money and costs and charges of arrest of commitment and of conveying to common gaol, shall be sooner paid," is not bad under Que. License Act, s. 207, for the payment of such subsequent costs. *Dubuc* v. *Maclaren*, 37 Que. S. C. 59.

Complaint signed by the collector of revenue—*Art. 776 and following.*]—When an action or suit, in virtue of the Quebec License Act, is instituted in the Circuit Court, Article 776 of the Act does not apply to proceedings before that Court, and the declaration does not require to be signed by the collector of revenue. *Paquin* v. *Lallier*, 16 R. de J. 3.

Conclusions in suits to recover penalties are superfluous, a fine being provided by law, or, when the penalty is an alternative one, the point is left to the discretion of the magistrate. Hence, a decision ordering imprisonment for an offence which is punishable by a fine or imprisonment, is legal, although the suit contains conclusions for a fine merely. *Plante* v. *Cliche* (1910), 38 Que. S. C. 535.

Confirmation of certificates for license — *Petition against — Signatures — Sufficiency — Powers of municipal council—Cutting off en bloc the names of those who signed the certificates.*]—The question whether a written petition in opposition to the confirmation of a certificate for the obtaining of a liquor license is or is not signed by a majority of the electors as required by a statute,

is a question of fact of which the municipal council is the sole judge. Therefore, a resolution denying the petition in opposition as not being sufficiently signed does not afford ground for an action to set aside the resolution for illegality under s. 23 of the Liquor License Act, as amended by 3 Edw. VII. c. 13, s. 3.—A municipal council has power to cut off *en bloc* from the petition in opposition to three certificates, the signatures of all those who have previously signed such certificates, and is not obliged to make a particular elimination for each of the signatures which appear there, as well as upon the petition in opposition. *Brunelle* v. *Princeville*, 30 Que. S. C. 19.

Confirmation of licenses — *Necessity for notice* — *Imperative Statute.*]—The Liquor License Act of Quebec requiring on the part of a municipal council, at the time of the confirmation of certificates of license, a preliminary notice, is imperative and of public order, and the absence of such notice will justify any one interested in demanding the setting aside of the confirmation of such certificate within the time and in the manner indicated by the Municipal Code. *Plessisville* v. *Moffet*, 12 Que. K. B. 418.

Conviction — *Certiorari* — *Informant*— *False name* — *Date of summons* — *Fee of clerk.*]—The fact that, upon a penal prosecution for selling intoxicating liquors to a minor, the complainant (the alleged minor), who has also given evidence as a witness to prove the offence, has given a false name, does not take away from the Recorder's Court the jurisdiction which it has over such offences, and is not a ground for a *certiorari*.—2. An error in the summons, by which it is made to bear date on the day on which it is returnable, and in fact returned, when it is ascertained that the summons was served on the day on which it was issued, is not a ground for a *certiorari*, if the defendant has not objected to the irregularity before the Recorder. —3. The Clerk of the Recorder's Court, being an advocate, may charge the defendant with the fee of $8 mentioned in Art. 1060, R. S. Q. *Pepin* v. *Montreal*, 2 Que. P. R. 565.

Conviction — *Payment of costs — Suspended sentence* — *Mandamus.*]—In a prosecution under the Quebec License Act, 63 V. c. 12, in which the defendant pleaded guilty, a judgment by the magistrate suspending sentence on payment of costs, is illegal and *ultra vires*. Had the magistrate merely suspended sentence, a writ of *mandamus* would lie against him ordering him to proceed to adjudicate under s.-s. 3 of Art. 992, C. P. *Lambe* v. *Lafontaine*, 26 Que. S. C. 132.

Conviction — *Sentence* — *Changing* — *Payment of costs only* — *Certiorari.*]—Under the Liquor License Act of Quebec a Judge has no discretion to change his sentence for the offence of keeping liquors for sale without license into a sentence imposing payment of costs only, and a *certiorari* will be granted to remove a conviction so drawn up. *Lambe* v. *Desnoyers*, 6 Que. P. R. 439.

Conviction — *Validity* — *Temperance Act 1864* — *Concurrent statutes still operative.*]—The Temperance Act of 1864, commonly known as the Dunkin Act, has never been repealed, and is still in force. Its operation, however, is not incompatible with that of the Quebec License Act, 63 V. c. 12, and both statutes take effect concurrently. A conviction, therefore, under the latter for selling liquor without a license, in a municipality in which a by-law has been passed under the former, to prohibit the sale of intoxicating liquor, is valid, although the offence is also a breach of and punishable under the Temperance Act, 1864. *Ex p. O'Neill*, 28 Que. S. C. 394.

Depositions of witness present in Court taken down in writing by leave of the magistrates, under s. 189 of Que. License Act, need not be signed by the witnesses and are sufficiently attested by the signatures of the justices to the minutes of proceedings that declare each one of the witnesses was sworn and gave the evidence written in the depositions. *Dubuc* v. *Maclaren*, 37 Que. S. C. 59.

General opposition to confirmation of any license certificate.]—In considering application for confirmation of certificates for licenses for the sale of intoxicating liquors in incorporated cities and towns, it is the duty of municipal council to ascertain if the requisite numbers of electors have signed the same, and to refuse the confirmation if the demand for a license is opposed in writing by the absolute majority of the electors resident in the municipality or polling subdivision, as the case may be, and where the council disregards such opposition on the ground that it is made in general terms against all application and not directed nominatively against the applicant, the resolution of confirmation will be set aside. *Montmagny* v. *Bélanger* (1910), 16 R. de J. 268.

Granting of licenses — *Opposition* — *Powers of municipal corporations* — *Interpretative laws and their application.*]—Municipal corporations cannot grant hotel licenses when there is a written opposition on the part of a majority of the electors under the pretext that a certain number of those who signed the opposition, and in the absence of which there would not have been a majority, had signed the certificate. This was the law before 9 Edw. VII. c. XVII. was passed.— The interpretation clause of an Act forms part of the Act itself and applies to anterior facts without thereby entailing retroactivity. *Maddington Falls & Faucher* (1910), 19 Que. K. B. 357.

Hotel license — *Action to set aside a resolution of a municipal council—Jurisdiction* — *Future rights* — *C. P. 49 (4); 3 Edw. VII. c. 13, s. 3; 3 Edw. VII. c. 58, s. 368.*] — The Circuit Court, by virtue of 3 Edw. VII. c. 13, s. 3, has jurisdiction in a case of which the object is to set aside a resolution of a town council granting a license for the sale of liquor; the jurisdiction is a special one and is an exception to the rule contained in 47 C. P. (1). An action taken to have a resolution of a town council permitting the sale of spirituous liquors is not one affecting the future rights of the license holder: it follows that the license holder cannot revoke the case to the Superior Court. *Picard* v. *Bordeaux & Boisseau* (1909), 11 Que. P. R. 296.

Hotel license — *Confirmation—Refusal by municipal council* — *Finality* — *Motion*

to quash — Magistrate — Prohibition — Preference to licensees of previous year — Application.]—A resolution of a municipal council refusing to confirm a tavern license is final, and is not subject either to appeal or to quashing. The effect of the amendment of 3 Edw. VII. c. 13, s. 5, is to make only resolutions confirming licenses subject to be quashed. Therefore, a municipal corporation whose council has refused, by resolution, to confirm a license, has a remedy by prohibition against the magistrate of the district if he entertains a petition to quash the resolution.—2. Clause 26 of the License Act, which gives a preference to those who have kept hotels during the preceding year, and who are qualified, applies only in the cities of Quebec and Montreal. *Ste. Thérèse de Blainville* v. *Terrebonne Magistrate's Court*, 34 Que. S. C. 470.

License Commissioners — *Prohibition to—Deposit — Absence of—Preliminary exception — Grant of license — Discretion — Opposition — Petitions — Enquête.*]—1. The absence of the deposit required by law with the application for a writ of *certiorari* or prohibition should be pleaded by preliminary exception. 2. License commissioners, although not among the inferior courts mentioned in Arts. 59, 63, 64, and 65, have duties of a judicial character which, on proper occasion, subject them to the superintending authority of the Superior Court; and the proper remedy is a writ of prohibition. 3. The only proof required, or admissible, on a writ of prohibition against the license commissioners is such as would go to establish want or excess of jurisdiction. 4. When Art. 836, R. S. Q., may be invoked, the license commissioners can no longer grant a license as a matter of discretion; but their judgment is none the less final as to whether majority oppositions, or two previous oppositions, really exist.—5. The refusal of the commissioners to re-open the *enquête* after both parties had formally declared their respective *enquêtes* closed is not sufficient to support a writ of prohibition.—6. The refusal of the commissioners to count on the opposition signatures of duly qualified electors, for the reason that the same persons had also signed in support of the application, was a decision on an issue within their jurisdiction, and was, moreover, a proper decision. *Kearney* v. *Desnoyers*, 19 Que. S. C. 279.

License fee — *Amount of—Fees fixed by municipal charters — Conflict.*]—The statute amending the Liquor License Act of Quebec, 54 V. c. 13, which enacts that the municipal councils of cities, towns, villages, and other municipal local authorities cannot impose by by-law, resolution, or otherwise a tax, impost, or fee, exceeding in any year the sum of $50, upon a person holding a license under that statute, whether for a confirmation or a certificate to obtain the license, or otherwise, for the object for which he possesses such license, has not the effect of abrogating the provisions of particular charters permitting municipal corporations to impose a higher tax. *Farnham* v. *Roy*, 12 Que. K. B. 227.

Hogan v. *Montreal*, *ib.* 215.

Liquor licenses are exempt from taxation in Montreal, as its charter, ss. 387 and 388, only refer to corporeal rights, and by analogy, exclude incorporeal rights. *Mitchell* v. *Montreal* (1909), 38 Que. S. C. 11.

Municipal council — *Confirmation of License—Affidavit — Irregularities — Certificate.*]—The function of a municipal council, when it is called upon to confirm a certificate for a hotel license, is limited to examining, verifying, and confirming such certificate; and irregularities contained in the affidavit of the petitioner, required by Art. 11 of the Liquor License Act of Quebec, do not affect the validity of the resolution of the council confirming the certificate, such affidavit being required only for the satisfaction of the collector of the revenue of the province. —2. It is not necessary that the oath required by Art. 21 of the License Act should be set forth in writing. Therefore, in this case, the deponent having actually taken the oath before the council in session, although an affidavit was prepared of which the jurat was signed by the secretary-treasurer, instead of by a member of the council, proof of the authenticity of the signatures affixed to the certificate was held to have been regularly made. Judgment in 19 S. C. 162, affirmed. *Duhaime* v. *St. Francois du Lac*, 21 Que. S. C. 89.

Offence — *Conviction — Suspended sentence—Quashing.*]—A magistrate has no discretion to suspend sentence upon conviction of an offence against the Quebec License Law, but must impose the fine therein prescribed; a judgment suspending sentence will be quashed on *certiorari*. *Lambe* v. *Lafontaine*, 6 Que. P. R. 422.

Personal character of licensee—*Conviction—Disorderly house—Proof of — Confirmation of license — Commissioners.*]—There are objections to the personal character of a licensee, within the meaning of Art. 27 of the Quebec Liquor License Act, if she has been convicted of a violation of the provisions of the Act, and has tolerated disorderly conduct in a restaurant for which she holds a license, though it is not actually kept by her, even if she does not know of such conduct.—2. Proof of such disorderly conduct need not be made according to the strict rules of evidence; it is sufficient if, in whatever manner it is made before the license commissioners, it convinces them of the existence of disorder.—3. The license commissioners cannot be forced to confirm the certificate which a person against whom such facts have been established to their satisfaction has obtained for a hotel license. *Dugenais* v. *Desnoyers*, 18 Que. S. C. 16.

Prosecution — *Police magistrate — Adjournment — Time — Conviction — Evidence of accused.*]—Where a police magistrate, upon a prosecution for selling intoxicating liquors without a license, reserves his judgment, he cannot legally make a conviction except upon a day fixed by him at the time of the hearing, and within a period not exceeding eight days from the adjournment; and if he makes a conviction at a more distant date, and on a day not fixed at the time of hearing, a writ of *certiorari* will be granted.—2. The Evidence Act of Canada, 1893, does not apply to a prosecution for selling liquors without a license instituted pursuant to the provincial statutes in that behalf; and a magistrate trying such a case

has the right to refuse to hear the defendant as a witness in his own behalf. *Re Cairns & Choquet*, 3 Que. P. R. 25.

Provisions of Criminal Code, s. 58 of 1892 are applicable to suits taken under the Quebec license law. *White* v. *Leet* (1911), 12 Que. P. R. 339.

Quebec license law, s. 26, applies only to the cities of Montreal and Quebec, but even if it were interpreted to include country municipalities, it would remain within the discretionary power of municipal corporations to grant or refuse the preference therein mentioned. *Desormeaux* v. *St. Therese* (1909), 19 Que. K. B. 481.

Sale of intoxicating liquor by druggist — Certificate — Sale on prescription of veterinary surgeon—By-law of municipality prohibiting sale—Validity—Municipal Code, Quebec, Art. 562. *Collector of Provincial Revenue* v. *George Brown*, 5 E. L. R. 551.

Sale to drunkard — *Action by wife — Petition for authorisation—Notice forbidding sale.*]—A married woman does not need judicial authorisation to *ester en justice* under the provisions of s. 149 of the License Law of Quebec, 63 V. c. 12.—2. A notice forbidding the sale of liquor to the plaintiff's husband, not strictly according to the provisions of s. 147 of the same Act, is null and of no effect. *Faulkner* v. *Faulkner*, 4 Que. P. R. 173.

Sale to minor — *Indirect sale.*]—Article 91 of the License Act must be interpreted strictly. To hold the license holder responsible in law, the sale must be made directly to the person under 18 years of age. *Perkins* v. *Brais*, 20 Que. S. C. 536.

Selling — *Penalty — Evidence.*]—In an action to recover the penalty of $120 imposed by the License Act for selling liquor without a license, having regard to Arts. 1031 and 1035 of the Act, the evidence should be taken down in writing. *Symmes* v. *Hillman*, 2 Que. P. R. 477.

Vagueness of complaint.]—A conviction of selling liquor without a license on 24th Feb., 1906, and on various occasions, both prior and subsequent to that date, is not bad for vagueness, it being provided in s. 193 Que. License Act, that "rigorous precision as to mention of time in complaint is not necessary in the proof, to justify a conviction." *Dubuc* v. *Maclaren*, 37 Que. S. C. 59.

Voluntary discontinuance on the part of the plaintiff in a suit to have a municipality ordered to issue a license to him, is equivalent under s. 165 of Quebec License Act, to a refusal on its part to accede to his demand. *Bruneau* v. *Black Lake* (1910), 39 Que. S. C. 91.

x. *Saskatchewan Act.*

Hotel license—*Sale of spirits in greater quantities than a quart—Intention at time of sale—Construction of statutes.*]—The defendant, the holder of a hotel license to sell liquor by retail, was convicted of selling liquor in greater quantities than that authorised by the Act. It was shewn that one G. applied to the licensee to purchase three quart bottles of whiskey, the quantity which the licensee could under his license sell being one quart. The licensee said to G. "one at a time," and gave him one quart, which was paid for. The purchaser understood the licensee to mean that he would sell the three bottles, but separately. Subsequently, and at intervals of fifteen minutes each, two other bottles were purchased, and these were stored in the bar until called for by the purchaser. On appeal:—*Held*, that the evidence disclosed that the real nature of the transaction was not a separate and distinct sale of separate and distinct quarts, but one sale delivered in instalments for the purpose of evading the Act, and the conviction should therefore be affirmed.—2. That the object of the statute being to prevent the sale of liquor by hotel licensees in greater quantities than one quart, the Court should so construe it as to suppress evasions and defeat attempts to avoid in an indirect manner that which is by the statute prohibited. *Rex* v. *Stephens*, 1 Sask. L. R. 509, 9 W. L. R. 441.

Hotel license — Sale by licensee in wholesale quantity—Sale without license—Sale of spirits in forbidden quantity by successive quarts — Intention of parties to sale—Evasion of Act. *Rex* v. *Stephens*, 9 W. L. R. 441.

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3. Local Option By-Laws.

Action to set aside by-law should be directed against the municipal corporation and not against those who signed the petition. *Piche* v. *St. Agathe* (1911), 12 Que. P. R. 295.

Application to quash — *Alleged irregularities — Submission to electors.*] — Application to quash a local option by-law of the rural municipality of Argyle, passed in 1889, under the Liquor License Act, 52 V. c. 15. Three objections were taken: (1) that the by-law was not signed by the reeve; (2) that the by-law fixing the day, hour, and places for taking the vote was not signed by the reeve, or sealed with the corporate seal; and (3) that the notice of the by-law and of the purpose to take the vote thereon was not published during the period in which it was required to be published. By s. 428 of the Municipal Act, R. S. M. 1902, s. 116, an application to quash a by-law cannot be entertained unless the application is made within one year from the passing of the by-law, "except in the case of a by-law requiring the assent of the electors or ratepayers, when the by-law has not been submitted to, or has not received the assent of the electors, or ratepayers." A similar provision, differing only as to the period of limitation, was in force when the by-law in question was enacted; see 49 V. c. 52, s. 328:—*Held*, that the above provision meant a submission in fact, and an assent in fact, without reference to the validity of the formalities attending the submission. The alleged by-law was submitted to a vote of the electors and received their assent, and it stood without rejection for over thirteen years. The summary method of quashing a by-law was the creature of the statute, and must be taken with the limitations imposed by statute. *In re Houghton & Argyle*, 23 C. L. T. 237.

Application to quash—*Local Option By-law—Irregularities—Liquor License Act, s. 204.*]—Court of Appeal dismissed with costs applicant's appeal from an order of Divisional Court, 16 O. W. R. 952, 2 O. W. N. 27, dismissing with costs his appeal from an order of Riddell, J., 15 O. W. R. 880, 21 O. L. R. 74, 1 O. W. N. 710, dismissing with costs his application to quash a local option by-law passed by Town of Renfrew. Meredith, J.A., *dissenting.*]—*Re Ellis & Renfrew* (1911), 18 O. W. R. 703, 2 O. W. N. 837, O. L. R.

By-law — *Deputy returning officers — Defect.*]—When a by-law requires the assent of the electors, the deputy returning officers to take their votes should be named in the by-law; and a by-law passed under s. 141 of the Liquor License Act, R. S. O. 1897 c. 245, from which their names were omitted, was quashed, even although deputy returning officers were subsequently appointed by a general by-law. *Re McArtee & Mulmur*, 20 C. L. T. 367, 32 O. R. 69.

By-law — *Procedure at council meetings —Right to reject by-law approved by electors —Statute, imperative or directory—Right to reconsider and adopt rejected by-law at subsequent meeting.*]—A municipal council submitted a local option by-law to the people and it was carried. At a regular meeting of the council, when only four or five members were present, the by-law was voted down by two votes each way. Later on in the month, at another meeting of the council when all the members were present, they passed the by-law without again taking a vote thereon by the electors. Argued that the by-law having once been voted down it could not be passed without another vote of the electors. Plea held bad, that the by-law was valid:—*Held*, that the first sentence of s. 373 of 3 Edw. VII. c. 19 was not imperative and the council could still reject the by-law although approved by the electors. *Re Wilson & Ingersoll*, 25 O. R. 439, considered. *Re Dewar & East Williams*, 6 O. W. R. 186, 10 O. L. R. 463.

By-law — Procedure under Liquor License Act—Omission to give notice of place where by-law may be seen—Omission to give notice of third reading by council — Fatal irregularities—Quashing by-law—Costs. *Re Cross & Gladstone* (Man.), 2 W. L. R. 40.

By-law — *Validity — Jurisdiction of council over liquor traffic—Renewal of license —Sunday closing—Saloons—Hotel bar-rooms —Liquor Traffic Regulation Act—Municipal Clauses Act.*]—A liquor license by-law provided that upon information of an infraction of its provisions by a holder of a license, he might be summoned to attend the next meeting of the licensing commissioners to make application for a renewal of his license. It was contended that the holder could not be compelled to make application for a renewal until the expiry of his license:—*Held*, that the council had authority to pass such an enactment, under s.-s. (d) of s. 205, Municipal Clauses Act, c. 32, 1906.—*Held*, also, that a provision to enforce, *inter alia*, the closing of hotel bar-rooms during such hours of the night as may be thought expedient, was bad as exceeding the powers conferred by s. 50, s.-s. 122 of c. 32. *Hayes* v. *Thompson*, 9 B. C. R. 249, followed on this point. *Re Maloney & Victoria*, 6 W. L. R. 627, 13 B. C. R. 194.

By-law — *Voting on by-law — Irregularities—Publication of by-law—Designation of newspaper by council — Appointment of agents or scrutineers—Persons not entitled to vote—Compartments for voters—Secrecy of ballot—Presence of strangers in polling place —Duties of returning officer at close of poll.*]—Application to quash a "local option by-law." The applicants complain that the requirements of the Municipal Act were not complied with. They state 20 grounds. Those urged may be classed under 8 heads:—1. That no newspaper was designated by the council, as the Act requires, wherein the by-law should be published.—2. Non-appointment of one person to attend the polling on behalf of those interested on each side.—3. Persons being allowed to vote who were not so entitled.—4. Absence of a compartment wherein a voter could mark his ballot screened from observation. 5. Presence of other persons in the compartment with the voter.—6. Allowing other persons to be in a position to see how the voter marked his ballot.—7. Allowing persons to be in the polling place who were not entitled to be there.—8. Non-performance by the returning officer of various duties required of him at and after the close of the poll. Part of the complaint was proved, part was disproved:—*Held*, that the election had been conducted within the meaning of the s. 204 of the Act and did not affect the result of the election. Motion refused. *Re Dillon & Cardinal*, 5 O. W. R. 633, 750, 10 O. L. R. 371.

Changes in name and boundaries of municipality—*Mandamus—By-law in part bad.*]—The Act 53 V. c. 52, 1890, assented to 31st March, 1890, making changes in names and boundaries of the municipalities into which the province was divided, provided, by s. 81, that if, in any of the territory changed as to its municipal situation by the provisions of the Act, a by-law under the local option clauses of the Liquor License Act should be in force at the time of the coming into force of the Act, such by-law should continue to affect such territory as if the Act had not been passed. The village of Napinka was in 1890 part of the rural municipality of Brenda, in which a local option by-law had been passed forbidding the receiving of any money for licenses under the Liquor License Act; but, by 53 V. c. 52, the village became part of the newly created municipality of Winchester, and again in 1896 it was made part of a municipality then created under the old name of Brenda:—*Held*, that the local option by-law was still in force in that village, notwithstanding the changes in name and boundaries of the municipalities referred to. *Doyle* v. *Dufferin*, 8 Man. L. R. 286, followed.—*Held*, also, that the by-law was valid, although it contained an additional provision unauthorised by the statute, purporting to prohibit the granting of any licenses within the limits of the municipality. *Rex* v. *Fishermen of Faversham*, 8 T. R. 352; *Rex* v. *Bumstead*, 2 R. & Ad. 699, and *Re Fennell & Guelph*, 24 U. C. R. 238, followed. Application for *mandamus* to license commissioners to grant a license to sell liquor in Napinka refused without costs.

Rex v. *License Commissioners for License District No. 1, In re Anderson*, 23 C. L. T. 279, 14 Man. L. R. 535.

Closing of saloons — *Bar-rooms — Sunday closing—Powers of municipality—Liquor Traffic Regulation Act.*]—Appeal by way of case stated from a conviction by the police magistrate for Nanaimo, whereby the appellant was convicted under a Sunday observance by-law, the offence being that of being found in the bar-room of the Crescent Hotel between 10 and 12 p.m. on Sunday, contrary to the provisions of the by-law. By the Liquor Traffic Regulation Act, liquor is prohibited from being sold between 11 p.m. on Saturday and 1 a.m. of the Monday following, and also during any other days or hours during which the place is to be kept closed by order of municipal by-law:—*Held*, setting aside the conviction, that a municipality has no power under s. 50, s.-ss. 109 and 110, of the Municipal Clauses Act, to pass a by-law closing any kind of licensed premises except saloons.—2. A municipality is not empowered, by s. 7 of the Liquor License Regulation Act, to pass any closing by-law, the intention of the section being to prohibit the sale during, *inter alia*, such hours as may be prescribed by the municipality under the authority of some other statute.—3. Where a statute creates offences and provides the necessary machinery for the carrying out of its provisions, a by-law to put it in force is unnecessary and bad. *Hayes* v. *Thompson*, 22 C. L. T. 422, 9 B. C. R. 249.

Convicted as agent—*Set aside.*]—Defendant was sending for ale to a Brockville brewery and two friends asked him to order some for them, giving him the money to pay for the same. The ale was delivered to the defendant and his two friends:—*Held*, that the only sale of ale was by the Brockville dealers, and the importation into the township of Mountain was an innocuous act and the conviction should be quashed. *Rex* v. *Montgomery* (1909), 14 O. W. R. 625, 1 O. W. N. 30.

Directions to voters—*Motion to quash —Electors' status to oppose.*]—A local option by-law named as one of the polling places a small unincorporated village, without specifying any house, hall, or place in the village. Polling had taken place at this village year after year at municipal elections, and any house or place in it could be easily found:—*Held*, following *In re Huron & South Norwich*, 19 A. R. 343, that the polling place was sufficiently defined. But *held*, also, that, as directions to voters had not been, as required by the Municipal Act, ss. 142 and 352, furnished to the deputy returning officers, and as there was not clear evidence of the posting up under the directions of the council of the by-law at four or more public places, the by-law must be quashed, these not being irregularities cured by s. 204, and the fact that no harm had, as far as shewn, resulted, being no answer. The municipal council having decided not to oppose the motion to quash the by-law, certain electors were allowed, at their individual risk as to costs, to oppose it in the council's name. *Re Mace & Frontenac*, 42 U. C. R. at p. 76, followed. *Re Salter & Beckwith*, 22 C. L. T. 182, 1 O. W. R. 266, 4 O. L. R. 51.

Failure to publish notices required by s. 66 of the Liquor License Act — Injunction to restrain municipal councils from submitting by-laws to electors—Jurisdiction—Remedy by motion to quash—Special meeting of council—Notices. *Little* v. *McCartney, Johnston* v. *Wright*, 9 W. L. R. 448.

Knowledge acquired by plaintiff of prior publication of a by-law is not a reason for dismissing his suit to have such by-law set aside for want of publication. *Piche* v. *St. Agathe* (1911), 12 Que. P. R. 295.

Liquor License Act—*Provisions as to voting contained in concurrent by-law — Absence of proper provisions in operative by-law—Defective by-law—Municipal Act, s. 200—Publications in Gazette.*]—Upon appeal from an order quashing a by-law of a town forbidding the receiving of any money by the town corporation for a license under the Liquor License Act:—*Held*, that the Act does not contemplate or provide for more than one by-law, and that by-law must contain within itself all the essential provisions prescribed by law. By-law 77, which was the operative one, did not contain a number of provisions required by the Act as to the taking of the vote of the electors thereon, etc.; but these provisions were contained in by-law 78, which was finally passed on the same day that by-law No. 77 received its second reading. By-law 77 was afterwards submitted to the electors and approved, and then received its third reading. By-law 78, among other things, fixed the time when the summing up of the votes should take place, and the time when and the place where the mayor should appoint the persons to attend at the polling places and the summing up of the votes:—*Held*, that this should have been contained in by-law 77, and its absence from that by-law rendered that by-law inoperative and void, and incapable of being saved by s. 200 of the Municipal Act. *Per* Howell, C.J.A., that the Act was not complied with as regards the publication in the Gazette. *Re Shaw and Rural Municipality of Portage la Prairie*, 15 W. L. R. 718, followed. Order of Metcalfe, J., affirmed. *Re Ryall & Carman* (1911), 16 W. L. R. 380. Man. L. R.

Liquor License Act, 1908—*Construction — Powers of provincial legislature — Petition—Alterations in—Defects—Non-compliance with statute—Invalidity of by-law—Notice of voting—Publication—Appointment of returning officer—Time and place for summing up votes — Printed instructions for voting—Unauthorised addition to—Place of voting — Irregularities — Curative section of Act — Costs.*] — The Saskatchewan Liquor License Act, 1908, and Acts in amendment thereto, being statutes derogatory of the common law, should be construed strictly.—*Quære*, whether the provisions of the Act giving to municipalities the right to pass a local option by-law were within the powers of the Saskatchewan legislature:—*Held*, upon a motion to quash a local option by-law approved by the electors and passed by the council of a city, that the petition for the by-law did not comply with the statute, because it was altered after it was signed, by adding "Moose Jaw" to the petitioners' name as signed, and because no street address or description of the locus in which each of the petitioners resided was given in the schedule,

as required by the Act. *Re Williams and Town of Brampton*, 17 O. L. R. 398, applied and followed. And *held*, that, as there was no sufficient petition to the council, the by-law founded on the petition was invalid, and should be quashed.—*Held*, also, that the petition was void for another reason, *viz.*, that the figures "1910" were added to it after it was signed, which was important in view of s.-s. 4 of s. 130 of the Liquor License Act.—*Held*, also, that the curative section of the Act did not save the by-law, as against these objections, as it does not apply to defects and irregularities in the petition. The notice of the voting on the by-law, required by s. 133 of the Act, as amended in 1909, was published on the 6th, 13th, and 20th days of October, 1910:—*Held*, not a publication "for at least three weeks" within the meaning of the section; and that the curative section did not apply. *Cornfoot* v. *Royal Exchange Assurance Co.* [1904] 1 K. B. 40, and judgment of Howell, L.J.A., in *Re Shaw and Rural Municipality of Portage la Prairie*, 15 W. L. R. 718, applied and followed.—*Held*, also, that the by-law was bad because it did not appoint a returning officer nor fix the time when and the place where he should sum up the number of votes cast, as required by s. 214. *Re Ryall and Town of Carman*, 16 W. L. R. 380, and *Re Bell and Township of Elma*, 13 O. L. R. 80, applied and followed.—*Held*, also, that the by-law was bad because the printed instructions to voters added an unauthorised illustration which in effect invited the electors to vote in favour of local option.—*Held*, also, that, having regard to the provisions of s. 132 of the Act, every elector was entitled to vote on the by-law at the polling place where he voted for mayor and alderman; and an arrangement by which the polling places were different was such an irregularity as could not be cured. The by-law was quashed with costs against the city corporation. *Re Mead & Moose Jaw* (1911), 17 W. L. R. 14. Sask. L. R.

Liquor License Act, s. 141 (3)—*Petition for submission of by-law—Signatures—Detachment from petition — Insufficiency — Imperative enactment — Duty of Court — Mandamus to council—Demand—Refusal — Appeal—Status of appellant.*]—Sub-section 3 of s. 141 of the Liquor License Act, R. S. O. 1897 c. 245, as added by 6 Edw. VII. c. 47, s. 24, and amended by 7 Edw. VII. c. 46, s. 11, provides that "in case a petition in writing signed by at least twenty-five per cent. of the total number of persons . . . qualified to vote at municipal elections, is filed with the clerk of the municipality on or before the 1st day of November . . . praying for the submission of such by-law"—a local option by-law—"it shall be the duty of the council to submit the same to a vote of the municipal electors as aforesaid." Upon a motion for a *mandamus* to compel the council, after the filing of a petition in due time, to submit a by-law to a vote of the electors:—*Held*, reversing the decision of Meredith, C.J.C.P., that the document filed, being in the form of a petition, but signed by only two electors, with the signatures of others sufficient to make up the proper number attached thereto, having been previously affixed to, and detached from, other petitions in the same form, was not a "petition in writing signed by at least twenty-five per cent. of the total number of persons qualified to vote," within the meaning of the statute, notwithstanding that no fraud was alleged.—*Held*, also, that one of the members of the council had a status to maintain an appeal from an order in the nature of a *mandamus* requiring the council to submit the by-law.—*Semble*, also, *per* Anglin and Clute, JJ., that if a demand other than that made by the filing of the petition was necessary to found the application for a *mandamus*, the action of a deputation which waited on the council and urged the submission of the by-law was a sufficient demand; and that, although there may have been no express refusal by the council formally enunciated, the proceedings in the council shewed that there was a withholding of compliance with the prayer of the petition, a determination not to comply, which was the equivalent of a refusal. —*Semble*, also, *per* Anglin, J., that the statute is imperative, and it is the duty of the Court, upon the application for a *mandamus*, to determine for itself whether or not a petition sufficiently signed has in fact been filed, whatever view the municipal council may have taken of it. *Re Williams & Brampton*, 17 O. L. R. 398, 12 O. W. R. 1235.

Liquor License Act, s. 141 (3)—Petition for submission of by-law—Signatures—Detachment from petition — Insufficiency — Non-compliance with statute—Mandamus to council—"Just and convenient"—Judicature Act, s. 58 (9). *Re Carter & Clapp*, 12 O. W. R. 1275.

Motion to quash—Irregularities in submission to electors—Advertising—Posting — Time of passing by council—Substantial compliance with statute — By-law good on face — Delay in moving — Discretion — Refusal to quash—Costs. *Re Robinson & Beamsville*, 9 O. W. R. 273, 317.

Motion to quash — Objections—Voting —Notices—Character of type—Posting — Public places—Tenants voting without right —Effect on majority—Refusal to swear voter —Undue influence—Bribery—Coercion—Boycotting—Proof of offences—Promise to erect building in village. *Re Leahy & Lakefield*, 8 O. W. R. 743.

Motion to quash — *Persons entitled to vote—Consolidated Municipal Act, 1903, ss. 348, 368.*]—Upon an application to quash a local option by-law:—*Held*, that, on a proper interpretation of s. 348 of the Consolidated Municipal Act, 1903, the clerk was justified in treating as included in the list of voters therein referred to the names of persons found to be entitled to vote by the County Court Judge, upon revising the voters' list of the municipality.—The provision of s. 368 requiring a statutory declaration of secrecy to be made by every officer and clerk authorized to attend at a polling place is directory only, and the failure of the officers to comply with its requirements does not invalidate the election.—It is competent for the council not to hold a poll in each subdivision of the municipality if, in its judgment, it is expedient not to do so. *Re Wynn & Weston*, 10 O. W. R. 1115, 15 O. L. R. 1.

Motion to quash — *Procedure — Non-compliance with statute — Substantial compliance—Petition for by-law—Percentage of qualified electors — Inquiry by council — Minutes of council—Voters' list—Certificate*

of clerk — Summing up of votes — Adjournment—Time for by-law to take effect—Mistake.]—On an application to quash a local option by-law passed under the provisions of ss. 61 to 73, inclusive, of the Liquor License Act, R. S. M. 1902, c. 101:—*Held*, that none of the following objections to the proceedings were fatal to the by-law:—1. That, instead of one petition, about 15 papers, all with the same printed heading, each having a number of signatures, were tied up in a roll, the sheets not fastened together, and presented to the council, it being admitted that the heading of each was sufficient for a petition. —2. That there was no entry in the minutes of the proceedings of the council shewing receipt of the petition, such receipt having been recited in the by-law.—3. That there was no proof that the petitions altogether had been signed by one-fourth in number of the electors. It was for the council to satisfy itself that this condition had been complied with, and it must be assumed that it performed its duty in that respect.—4. That, instead of preparing and posting up "a list of those entitled to vote on such by-law," as required by s. 67 of the Act, the clerk of the municipality posted up and supplied merely copies of the last revised list of electors of the municipality for the year, certified by him to be true copies thereof. Under s. 63 of the Act the two lists would contain the same names.—5. That the certificate of the clerk as to the result of the voting, by mistake, referred in the body of it to the by-law by a wrong number. The heading of the certificate, however, sufficiently shewed what by-law was referred to.—6. That, instead of summing up the votes on the day appointed by the by-law, the clerk, on account of the non-receipt of one of the ballot boxes, adjourned the proceedings to a future day, for which there is no statutory authority.—7. That the by-law received its third reading on the 27th December, 1904, and, although passed in the afternoon of that day, was declared to be in force on that day, that is, as alleged, from the beginning of that day.—When there has been a virtual compliance with the statute, and the departures complained of have been rather from the letter than from the spirit of the enactment, the Court has a discretion in determining whether there has been a sufficient compliance, and whether effect should be given to the objection on an application to quash. *Re White & East Sandwich*, 1 O. R. 530, and *Re Young & Binbrook*, 31 O. R. 108, followed. *Re Caswell & South Norfolk*, 15 Man. L. R. 620, 1 W. L. R. 327.

Motion to quash — *Publication through mistake of by-law and notice more than five weeks before day of voting—Correction — Validity of election of members of council passing by-law—Invalid resignation of reeve prior to signing by-law and affixing seal.*]—Where, by the mistake of the township clerk, the first publication of a local option by-law was more than five weeks before the voting day, but very shortly afterwards, on discovering the mistake, he caused such publication to be cancelled, treating it as a nullity, and republished the by-law so as to bring it within the proper time, the notice appended thereto stating it was the first publication, and the result of the voting was apparently in no way affected by the first erroneous publication:—*Held*, that the publication was sufficient. *Re Armstrong and Township of Toronto*, 17 O. R. 706, distinguished.—The legality of the election of the members of the council who pass such a by-law, they having been returned as duly elected and having taken the oath of office, will not be enquired into on a motion to quash the by-law.—The fact that the reeve, who signed the by-law and caused the corporate seal to be attached, had prior thereto purported to resign from the office, without the consent of the majority of the members present at a meeting of the council, and without his resignation having been entered on the minutes thereof, did not preclude him from afterwards acting as such. *Re Vandyke & Grimsby*, 12 O. L. R. 211, 7 O. W. R. 739, 8 O. W. R. 81.

Motion to quash — Technical objections —Substantial compliance with statute—Delay in moving—Discretion—Refusal to quash. *Re Robinson & Beamsville*, 8 O. W. R. 689.

Motion to quash — Voting on by-law— Persons voting who were not entitled—Voters' Lists Act, 1907—Finality of lists—Scrutiny. *Re McGrath & Durham*, 12 O. W. R. 149, 1091.

Motion to quash by-law—*Can ascertain how bad ballots were marked — Vote of clerk—Municipal Act, s. 204.*]—169 votes were cast in favour of a by-law and 111 against, so that 166½ (equal 167) votes were necessary to give the statutory majority, and it was claimed that the by-law should be quashed if it could be shewn that three votes were improperly cast:—Middleton, J., *held*, that the Court has power to quash a by-law for illegality. Illegality is shewn when it appears that the by-law was passed upon the vote, not of qualified voters, but of the qualified voters plus certain persons having no qualification. In order to ascertain whether these affected the result the number of bad votes is compared with the majority. The Court can enquire into the facts and ascertain how the bad ballots were marked. Voters alone are protected, and not the man who has no right to vote. The Court is compelled in effect to deduct the bad votes from the votes cast in favour of the by-law. In this way the bad votes are really counted twice—once at the actual count, and again at the motion to quash. The question is not conclusively decided, but the Court is at present bound by *Re Schumacher & Chesley*, 21 O. L. R. 525, where it held that the clerk could vote. *Stürmer v. Beaverton* (1911), 19 O. W. R. 255, 2 O. W. N. 1116.

Motion to quash by-law—*Votes illegally cast—Right to shew—Deduction from majority.*]—*Held*, having regard to s. 12 of the Liquor License Act, that, on a motion to quash a local option by-law, the applicant may shew that illegal votes were cast; and, if that is shewn, that the illegal votes must be deducted from those favourable to the by-law; and, if the result be that the majority is not sufficient, the by-law will be quashed. —*Re Mitchell & Campbellford*, 16 O. L. R. 578, distinguished.—*Re Cleary & Nepean*, 14 O. L. R. 392, approved and followed.—And where the by-law was carried by a majority of 10 of the votes actually cast, and it ap-

peared that 12 of the persons who voted had no right to do so, the by-law was quashed. *Re O'Flynn & Davidson* (1911), 17 W. L. R. 153, Sask. L. R.

Notices — *Failure to publish — Injunction—Liquor License Act, s 66—Remedy by motion to quash.*]—The failure to publish the notice of the voting on a local option by-law required by s. 66 of the Liquor License Act, R. S. M. 1902, c. 66, is good ground for an application under s. 417 of the Municipal Act to quash the by-law if afterwards carried and passed by the council at the third reading (*Hall* v. *South Norfolk*, 8 Man. L. R. 459; *In re Cross and Town of Gladstone*, 15 Man. L. R. 528); but an injunction to prevent the council from submitting the by-law to the vote of the electors will not be granted by reason only of the failure to publish such notice, because of the existence of another adequate remedy in case the by-law should be carried, viz., an application to quash it. *Weber* v. *Tinalin*, 34 N. W. R. 29, followed. *Helm* v. *Port Hope*, 22 Gr. 273, and *King* v. *City of Toronto*, 5 O. L. R. 163, distinguished on the ground that in those cases the councils had no jurisdiction to submit the questions to the vote of the people. *Little* v. *McCartney*, *Johnston* v. *Wright*, 18 Man. L. R. 323, 9 W. L. R. 448.

Omission of essential part—*Summing up of votes — Time and place for.*] — The omission in a local option by-law of the time and place where the votes are to be summed up, as provided by ss. 341 and 342 of the Municipal Act, 1903 (O), is the omission of an essential part of and makes the by-law invalid, and s. 204 of the Act does not apply to cure the defect, as such omission is more than an irregularity. *Re Bell & Elma*, 13 O. L. R. 80.

Order quashing because third reading and final passing premature — Appeal from — Waiver by council purporting to read by-law a third time after notice of appeal—Time for finally passing by-law — Necessity for expiry of two weeks from declaration of result of vote — No necessity for declaration — Municipal Act — Liquor License Act — Repeal of by-law — Irregularities in voting — Voters depositing ballots in box — Publication of notice — Time for — Constitution of council—Knowledge of council of approval of voters — Voters' lists — Names of voters — Deputy returning officers —Appointment of — Poll clerks — Illiterate voters — Marking of ballots—Irregularity— Effect on result — Curative provision of statute — Form of oath for voters—By-law not prohibiting sale of liquor in places of public entertainment — Immaterial omission. *Re Duncan & Midland*, 10 O. W. R. 345, 551.

Petition for submission of by-law—*Insufficiency — Injunction — Rule 475.*] — In preparing a local option petition the headings apparently in the first instance were written on a number of sheets of paper and signatures obtained. Then the sheets were gummed together, one at the bottom of the other, the headings on all except the first being mutilated. Petition held insufficient. Testimony received under Man. K. B. Rule 475, on the application for interim injunction. *Adams* v. *Woods*, 12 W. L. R. 135, affirmed (1909), 12 W. L. R. 491.

Petition for submission of by-law—*Revival of petition prepared in previous year —Injunction.*]—A local option petition prepared for submission in 1908 to a municipal council was not submitted until 1909:—*Held*, that petition could not be acted on. *Hatch* v. *Rathwell*, 12 W. L. R. 141.

Reversed: (1909), 12 W. L. R. 376.

Petition for submission of by-law—*Signatures — Opportunity for fraud — Duty of council — Injunction.*] — Plaintiff asked for an injunction restraining the defendant, a municipal secretary-treasurer, from submitting a by-law to repeal a local option by-law. The main contention was as to whether or not a petition is valid where the heading is on the first page only, the signatures being on that and following pages. There was merely a suggestion of the possibility of fraudulent practices with such a petition. Petition held valid and injunction refused. *Moore* v. *McKibbon* (1909), 12 W. L. R. 358.

Petition for submission of by-law—The petition in this case was prepared with headings on a number of sheets and were then handed in to the clerk of a municipality Presentation held sufficient. The clerk suggested that these should be put in the shape of one document, and he who had charge of the sheets then cut off some of the headings and pasted one sheet at the bottom of another, a sheet with a heading being at the top. One of the headings was not addressed to any one, and another one was not addressed to any municipality. Striking out the names on the imperfected sheets, it was found there were not as many names left as is required by Man. Liquor License Act, s. 62. *Larkin* v. *Polson*, 12 W. L. R. 144. Affirmed (1909), 12 W. L. R. 491.

Petition for vote of ratepayers — *Proof of genuineness of signatures—Mandamus.*]—One of several petitions under 7 Edw. VII. c. 46, s. 1, amending the Liquor License Act, C. S. N. B. 1903, c. 22, s. 21, was accompanied by a mere certificate as to genuineness of signatures, etc., and another by a certificate, purporting to have been sworn to, stating that the names in the petition were genuine, and that the petitioners signed themselves or gave authority to some member of their family or to the party certifying to sign for them:—*Held*, this was not a compliance with the Act. *Ex p. Stavert*, 39 N. B. R. 6.

Petition to council — *Liquor License Act, s. 62—Receipt of petition—Time.*]—The receipt by the clerk of a municipality of a petition for a local option by-law under s. 62 of the Liquor License Act, R. S. M. 1902, c. 101, as amended by s. 2 of c. 26, of 7 & 8 Edw. VII., is not a receiving of the same by the council within the meaning of the Act, and, when there was no meeting of the council after the petition reached the clerk until the 3rd October, a *mandamus* to compel the council to submit a by-law to the vote of the electors was not granted. *Re North Cypress, Re McRae & Elmshurst*, 18 Man. L. R. 315, 9 W. L. R. 368.

Petition to secure prohibition is in order notwithstanding the fact that a by-law

of the same purport and previously adopted was not submitted to the ratepayers. *Piche* v. *St. Agathe* (1911), 12 Que. P. R. 295.

Procedure under Liquor License Act —*Omission to give notice of place where by-law may be seen—Omission to give notice of third reading—Fatal irregularities—Quashing by-law—Costs.*]—1. The notice given by the council under s. 66 of the Liquor License Act, R. S. M. 1902, c. 101, must, among other things, state that the by-law or a true copy of it can be seen at the office of the clerk until the day of the taking of the vote, and the absence of such statement in the notice will be fatal to the by-law on an application to quash it.—2. If, on account of an application for a recount of the votes, the council postpone the further consideration of the by-law until after the result of the recount is known, they must either formally adjourn such further consideration to a named day, or they must afterwards give such notice of the time and place when the third reading is to be moved that parties opposed to it may be in a position to attend and urge their views, and, if the third reading takes place without such notice being given, the by-law will be quashed. *Re Mace and Frontenac*, 42 U. C. R. 85, and *Hall* v. *South Norfolk*, 8 Man. L. R. 430, followed.—3. The third reading of such a by-law, even after it has been carried by the votes of the electors, is not an empty formality, as the councillors have still to exercise their judgment upon it, and may, if they choose, then finally refuse to pass it. —4. Under s. 427 of the Municipal Act, R. S. M. 1902, c. 116, a Judge, on quashing such a by-law for illegality, as in this instance, has no discretion to refuse costs to the applicant. *Re Cross & Gladstone*, 15 Man. L. R. 528, 2 W. L. R. 40.

Public notices in newspapers of the petition and notice requesting the putting into effect of a temperance law should extend over four full consecutive weeks; if the first publication was on May 14th, voting cannot take place on June 7th following; injunction will lie to prevent it. *Piche* v. *St. Agathe* (1911), 12 Que. P. R. 295.

Publication—"*Three successive weeks*" —*Municipal Act, s. 338 — Non-compliance —Incurable as irregularity.*] — The publication of a proposed by-law in a newspaper "each week for three successive weeks," as required by s.-s. 2 of s. 338 of the Consolidated Municipal Act, 1903, means a publication once in each of three successive periods of seven days, beginning on the first day of actual publication.—Where a by-law was published in a newspaper on Friday, the 14th, Tuesday the 18th, and Tuesday the 25th, of a certain month:—*Held*, that there had been two publications in the first week or seven-day period, one in the second, and none in the third, and that the statute had not been complied with.—*Held*, also, that non-compliance with the provisions of s. 338 could not be treated as a mere irregularity curable under s. 204. *Re Robinson & Beamsville*, 8 O. W. R. 689, 9 O. W. R. 273, distinguished. *Cartwright* v. *Napanee*, 9 O. L. R. 69, at p. 71, followed. *Re Rickey & Marlborough*, 9 O. W. R. 563, 930, 14 O. L. R. 587.

Repealing by-law — *Can. Mun. Act, s. 338a as amended by 4 Edw. VII., c. 22, s. 8.*]—The action was to set aside a by-law repealing the local option by-law, submitted to the electors and voted down, as never validly submitted to, or voted upon, or so dealt with by the council as to be operative, and to have another by-law ordered to be submitted to the electors.—Clute, J., at trial dismissed the action, with costs. Divisional Court dismissed an appeal therefrom, with costs, as there were no grounds disclosed upon which the action was maintainable. *Vandyke* v. *Grimsby*, 19 O. L. R. 402, 14 O. W. R. 538, distinguished. *Ward* v. *Owen Sound* (1910), 15 O. W. R. 443, 1 O. W. N. 512.

Repealing by-law.] — The Municipal Act, s. 338, requires the vote to be taken on a local option by-law not less than three weeks and not more than five weeks after the first publication. Where a municipal council submitted a repealing by-law last January more than seven weeks after the first publication, it was held invalid, and the electors could demand that another vote be taken the following January on another repealing by-law within the meaning of 6 Edw. VII., c. 47, s. 24, s.-s. 6, submitted to the electors. *Re Vandyke & Grimsby* (1909), 14 O. W. R. 538, 19 O. L. R. 402.

Scrutiny—*Voter's list — Qualification — Certificate of County Judge.*]—Middleton, J., *held* that the question of franchise must be determined on the scrutiny and not by the voters' list. Where disfranchised persons had voted on a local option by-law an order was made to restrain the County Court Judge from certifying to the municipal council until after he had made enquiry as to the facts to enable him to certify as to facts. Improper votes not to be assumed to be cast in favour of the by-law. Costs to applicant. *Re West Lorne Scrutiny* (1911), 19 O. W. R. 231, 2 O. W. N. 1038.

Scrutiny by County Judge — *Votes of persons unable to mark their ballots—Jurisdiction of County Judge to go into question whether these ballots should be rejected or not.*]—On 3rd January, 1910, a by-law to prohibit the sale of liquors in Strathroy was submitted to the electors. On 4th January, 1910, the municipal clerk declared the by-law approved by a majority of the qualified electors, and that three-fifths of the electors voting upon such by-law had approved of the same. He certified accordingly. On petition of Prangley, a scrutiny was held by the County Judge, in which he refused to consider evidence as to circumstances under which about a dozen votes alleged to have been cast in favour of the by-law, being alleged to be votes of persons claiming to be incapable of marking their ballots, through illiteracy and physical inability, were marked, on the ground that it was not within his jurisdiction upon the enquiry to go into the question whether the votes so cast should be thrown out. Motion for a *mandamus* requiring the Judge to enquire into and adjudicate upon these votes:—*Held*, that the County Court Judge rightly decided that the evidence referred to should be rejected, and that he had no jurisdiction. Motion dismissed, with costs. *Re Strathroy Local Option By-law* (1910), 15 O. W. R. 386.

Scrutiny of votes of electors—Qualification of voters — Recount — Majority — Computation — Spoiled ballots — Unmarked ballots. *Re Weston Local Option By-law*, 9 O. W. R. 250.

Seal and signature — *Order to quash —Alteration in boundaries of municipality.*]—1. Section 336 of the Municipal Act, R. S. M. c. 100, is imperative, and an instrument not sealed with the seal of a municipal corporation or not signed by its head or the person presiding at the meeting at which the supposed by-law was passed, is no by-law of the corporation. 2. When such alleged by-law purports to be passed in accordance with the local option clauses of the Liquor License Act, R. S. M. c. 90, the applicant is entitled to a definite order quashing it, so that the council of the municipality may know whether to receive license fees or not. 3. The order to quash a by-law should not affect territory detached from the municipality whose council originally passed it, now and forming parts of new municipalities which were not served with notice of the application. *Re Vivian & Whitewater*, 22 C. L. T. 338, 14 Man. L. R. 153.

Statement in by-law as to time and place of voting — *Substitution of equivalent — Unqualified voters — Result not affected thereby — By-law finally passed before lapse of time for scrutiny.*]—At the time a local option by-law received its first and second readings, it was stated therein that it would be voted on at the same time and place as the municipal elections. Before the first publication of the by-law, such time and place were fixed by the council and inserted in the by-law by the clerk. On objection to this:—*Held*, that s. 338 of the Municipal Act 1903, 3 Edw. VII. c. 19 (O), was substantially complied with, the act of the clerk having been merely the substitution of one equivalent for another.—An objection that a number of unqualified voters were allowed to vote was also overruled, it appearing that, even if the votes were struck out, there would still be the required three-fifths majority in favour of the by-law.—An objection that the by-law was finally passed before the lapse of the two weeks allowed for a scrutiny was also overruled, following *Re Duncan & Midland*, 16 O. L. R. 132, *Re Coxwell & Hensall*, 17 O. L. R. 431, 12 O. W. R. 279, 936.

Submission to electors — *Bribery — Treating.*]—A cattle drover, who was not a "temperance man," nor an agent in any way of the "temperance people" who were promoting the passage of a local option by-law, having a grudge against a local hotel keeper, took an active interest in the passing of the by-law and endeavoured to promote it by treating freely as he travelled through the township, with a view, as he admitted, of influencing the electors to vote for the by-law. There was no general drunkenness, and it was not proved definitely that any one elector had been treated. The by-law was carried by a majority of 205 in a vote of over 1,200: —*Held*, in the circumstances, that such treating and conduct were not the means of the passing of the by-law in violation of the provisions of ss. 245 and 246 of the Consolidated Municipal Act, 1903. Order of Meredith, C.J.C.P., reversed. *Re Gerow & Pickering*, 12 O. L. R. 545, 8 O. W. R. 356, 497.

Submission to electors — Majority — Computation — Voters depositing spoiled ballots. *Re Swan River Local Option By-law* (Man.), 3 W. L. R. 546.

Voting on — *Municipal Act, s. 173 — Polling places crowded during voting—Violation of secrecy of ballot — Canvassing in polling places—Elector desiring to be heard by counsel in support of by-law.*]—A local option by-law quashed on the grounds that the public were allowed to crowd into the polling places and because of canvassing therein. Where the council is represented, an elector is not entitled to be also represented by counsel on such an application. *Re Service & Front of Escott*, 13 O. W. R. 1215.

Voting on by electors — Day fixed for taking votes more than five weeks after first publication of proposed by-law — Municipal Act, s. 338 — Imperative enactment—By-law quashed—Costs. *Re Henderson & Mono*, 9 O. W. R. 599.

Voting on by electors — *Division of town into wards — Single or multiple voting —3 Edw. VII. c. 19, s. 355.*]—Section 355 of the Ontario Municipal Act, 3 Edw. VII. c. 19, providing that "when a municipality is divided into wards, each ratepayer shall be so entitled to vote in each ward in which he has the qualification necessary to enable him to vote on the by-law," does not apply to the vote on a local option by-law required by s. 141 of the Liquor License Act, R. S. O. 1897 c. 245.—Judgment of the Court of Appeal, 13 O. L. R. 447, 8 O. W. R. 974, affirming that of a Divisional Court, 12 O. L. R. 488, 8 O. W. R. 298, affirmed. *Re Sinclair & Owen Sound*, 27 C. L. T. 654, 39 S. C. R. 236.

Voting on by electors — *Majority — Computation — Rejected ballots.*]—Although an elector deposits a ballot at the voting on a local option by-law submitted under the Liquor License Act, R. S. M. 1902 c. 101, if such ballot is afterwards rejected, he has not voted within the meaning of s. 63 of the Act, and he should not be counted among those who vote in ascertaining whether the necessary three-fifths of those who vote have voted in favour of the by-law. *Re Swan River Local Option By-law*, 3 W. L. R. 546, 16 Man. L. R. 312.

Voting on by electors — *Three-fifths majority — Computation — Qualification of voters — Farmers' sons — Finality of roll— Subsequent disqualification — Deputy returning officers — Right to vote — Indian reserve — Necessity for exclusion — Publication — Three weeks — Computation of, inclusive of Sundays and holidays—Irregularities in meetings of council — Illegality in election of members — Scrutiny — Statement of, on face of by-law.*] — The proper mode of dealing with votes improperly cast on the submission of a local option by-law under 6 Edw. VII. c. 47 (O.), is to deduct them from the total number cast, and take three-fifths of the remainder.—The Court will not, under s. 89 of 3 Edw. VII. c. 19 (O.), inquire into the qualification of those entered on the voters' list. *Regina ex rel. McKenzie v. Martin*, 28 O. R. 523, followed.—Objections to the following votes by reason of what

had taken place after the final revision of the roll were overruled and the votes held good: (1) where two farmers' sons were assessed as owners, the father being the owner of the farm, the subsequent death of the father and the devise of the farm to one of the sons being shewn; (2) where a farmer's son was assessed as owner, the father being the owner of the farm, the subsequent sale of the farm, by the father, but that he acquired another farm before the voting being shewn.—The following votes were also held good: (1) where the son, the voter, lived with his mother, who had a life-estate in the property, with a power of appointment amongst a class, which included the son; (2) a farmer's son assessed as owner and living with his father, the owner of the farm, but who subsequently became the tenant; (3) a farmer's son, assessed as owner, living with his father, the owner, but carrying on a blacksmith business off the property: (4) an infant who became of age before the voting took place; (5) a farmer's son, the father and another being tenants in common of the farm; (6) where the property had been acquired after the roll had been made up, but before the final revision thereof; (7) where the property had been sold after the final revision, but another had been acquired before the date of the election.—Deputy returning officers are not entitled to vote on such a by-law; it is not necessary that they should be selected before the publication of the by-law, and their names mentioned therein, nor is it necessary to name a day for the final passing of the by-law, these being cured by 4 Edw. VII. c. 22, s. 8 (O.) — An Indian reserve, within the territorial limits of a township, but over which the municipal council has no jurisdiction, need not be specifically excepted in the by-law, for the municipal council must be assumed to have dealt only with the territory within their jurisdiction.—In construing the word "week," in dealing with the required three weeks' publication of the by-law, it must be taken in its ordinary acceptance, which would include Sundays and holidays, and, therefore, not necessarily seven days, exclusive thereof.—Irregularities in the meeting of the township council, or illegality in the election of the members, cannot be raised in a proceeding of this character. *Rex ex rel. Armour* v. *Peddie*, 14 O. L. R. 339, and *Re Vandyke & Grimsby*, 12 O. L. R. 211, referred to. It need not appear on the face of the by-law that a scrutiny has taken place. *Re Armour & Onondaga*, 9 O. W. R. 833, 14 O. L. R. 606.

Voting on by electors — *Three-fifths majority — Computation — Rejected or uncounted ballots — Illegal votes — Finality of voters' lists — Effect on by-law.*]—In computing the three-fifths majority of voters required for a local option by-law by 6 Edw. VII. c. 47, s. 24, s.-s. 4 (O), rejected or uncounted ballots are not to be considered. — Upon a motion to quash such a by-law the applicant may go behind the voters' lists, and shew that illegal votes were cast; if he succeeds in shewing that, the illegal votes must be deducted from those favourable to the by-law; and if the result be that the majority is not sufficient, the by-law will be quashed. *Re Leahy & Lakefield*, 8 O. W. R. 743, *Re Gerow & Pickering*, 12 O. L. R. 545, and *Re Sinclair & Owen Sound*, *ib.* 488, followed. *Re Cleary & Nepean*, 9 O. W. R. 406, 14 O. L. R. 392.

Voting on by electors — *Town divided into wards — Elector not entitled to more than one vote — Municipal Act, s. 355 — Disregard of statutable formalities not affecting result — Curative provision, s. 204 — Voters not legally entitled — Qualifications — Confusion from colour of ballot papers.*]—Section 355 of the Consolidated Municipal Act, 1903, providing that "where a municipality is divided into wards each ratepayer shall be so entitled to vote in each ward in which he has the qualification necessary to entitle him to vote on the by-law," does not apply to what is commonly known as a local option by-law, which, under s. 141 of the Liquor License Act, R. S. O. 1897 c. 245, must be "approved of by the electors of the municipality in the manner provided by the sections in that behalf of the Municipal Act;" and in voting on such a by-law no elector is entitled to more than one vote.—Objections based upon formalities not observed in the taking of the votes upon a local option by-law, not being such as are required by the statute, in express words, to be observed as a condition precedent to the right to pass the by-law, were held to come within the curative provisions of s. 204 of the Municipal Act, there being nothing to shew or suggest any intentional violation of the directions of the Act, nor any reason for believing that any disregard of the statutable formalities called for by the Act affected the result of the voting.—It was also objected that one hundred persons were allowed to vote who were not legally entitled to vote:—*Held*, that more than 75 of these persons might be duly qualified voters, for all that was shewn was that they did not possess the qualifications credited to them by the assessment roll, whereas they might be possessed of other sufficient qualifications, and in that event would be entitled to vote; but, even if all of them were disqualified, it was not shewn that their being allowed to vote was the result of any evil intent, and the deduction even of 100 votes from the majority (476) would not affect the result; and this objection was overruled. — Finally, it was objected that the voters were confused or misled by the colour of the ballot papers being similar to that used for voting upon another by-law at the same time and place. One was scarlet, the other pink. Each ballot had printed on its face a statement of its purport and effect:—*Held*, that no person of ordinary intelligence exercising ordinary care, could mistake one for the other; and this objection was also overruled.—Order of Mabee, J., quashing the by-law, reversed. *Re Sinclair & Owen Sound*, 12 O. L. R. 488, 8 O. W. R. 239, 298, 460, 974.

Voting on by-law.]—An appeal on application to quash a local option by-law was dismissed, the Court holding the by-law had been approved of by the statutory majority of legally qualified electors of the town. *McGrath* v. *Durham*, 12 O. W. R. 1091.

Voting on by-law — *Deputy returning officer and poll clerks — Right to vote and take oath — By-law passed before expiration of two weeks for scrutiny—Subsequent passing.*]—Section 141 of the Liquor License Act, R. S. O. 1897 c. 245, enacts that the council of every township may pass a prohibitory by-law, known as a local option by-law, provided that before the final passing thereof it has been duly approved of by the electors in the

manner provided by the sections of the Municipal Act in that behalf:—*Held*, that the fact that such a by-law was read a third time before the expiration of the two weeks allowed for a scrutiny was immaterial, where, after such two weeks, and within the time limited for its passing, the by-law was read and finally passed.—Deputy returning officers and poll clerks are entitled to vote on such by-laws, under s. 347 of the Municipal Act, and can properly take the oath, which may be required to be taken by persons claiming to vote thereon.—*Re Local Option By-law of Saltfleet*, 16 O. L. R. 293, 11 O. W. R. 356, 545, followed. *Re Armour & Onondaga*, 14 O. L. R. 606, 9 O. W. R. 833, not followed. *Re Joyce & Pittsburg*, 16 O. L. R. 380, 11 O. W. R. 859.

Voting on by-law — *Irregularities in conduct of election — Violation of provisions as to secrecy — Curative provision—When not applicable — Municipal Act, 1903, ss. 204, 536.*]—On a motion to quash a local option by-law passed by the municipal council of a town after an election at which five more than the requisite three-fifths of the electors voting thereon were in favour of the by-law, the applicant established many important violations, fully set out in the judgment of Riddell, J., of the statutory provisions relating to the taking of the poll, more especially of those which are intended to secure the secrecy of the ballot, which were, in effect, disregarded:—*Held*, that the election was invalid, and the by-law must be quashed, inasmuch as the irregularities proved were of such a nature as to cause an interference with the polling of a full, fair, and untrammelled vote of the electorate, and that such irregularities were not cured by s. 204 of the Municipal Act. *Re Hickey & Orillia*, 12 O. W. R. 68, 433, 17 O. L. R. 317.

Voting on by-law — *Qualification of voters — Voters' lists — Finality of—Meaning of "scrutiny"* — 7 *Edw. VII. c. 4, s. 24 (O.)*]—In voting on a local option by-law, under the Liquor License Act, which requires the assent of the electors before the final passing thereof, the voters' lists, when revised and certified by the Judge, under the Ontario Voters' Lists Act, 7 Edw. VII. c. 4, s. 24, are (with certain exceptions specified in the section) final and conclusive evidence that all persons named therein, and no others, are qualified to vote on the by-law.—Voting on such a by-law is an "election," and a motion to quash the by-law is a "scrutiny," within the meaning of the 24th section.—*Re Cleary & Nepean*, 14 O. L. R. 392, not followed. *Re Mitchell & Campbellford*, 16 O. L. R. 578, 11 O. W. R. 941.

Voting on by-law — *Recount or scrutiny of votes by County Court Judge — Right to inquire into qualifications of voters—Voters' Lists Act — Right of deputy returning officers and poll clerks to vote — Prohibition — Applicant for — Status.*]—Under s. 24 of the Ontario Voters' Lists Act, 7 Edw. VII. c. 4, the voters' lists finally settled by the Judge are, upon a scrutiny, conclusive evidence that all persons named therein, and none others, are qualified to vote on a local option by-law, under the Liquor License Act, R. S. O. 1897 c. 245, as amended by 6 Edw. VII. c. 47 (O.), except as therein mentioned, and therefore no evidence can be then given, touching alienage, or minority of any voters named therein, or as to whether the name of a married woman is properly on the list or not.—Deputy returning officers and poll clerks are entitled, if qualified otherwise, to vote on such a by-law, if their names appear on the voters' list certified by the Judge and transmitted to the clerk of the peace. They may vote at the place where they act, though it be not their proper polling division.—*In re Armour and Township of Onondaga*, 14 O. L. R. 606, 610, not followed.—As the law now stands under the present Voters' Lists Act, 7 Edw. VII. c. 4 (O.), "scrutiny" of the ballots cast on such a proposed by-law, within the meaning of s. 369 of the Consolidated Municipal Act, 1903, 3 Edw. VII. c. 19 (O.), is something different from and more comprehensive than a simple recount. The extent of it is to be measured by what can be done on inspection of the ballot papers and the ascertainment of what votes are void *ex facie*, and the scope of investigation contemplated by the exceptions to the finality of the voters' list in 7 Edw. VII. c. 4, s. 24 (O.)—A person who is a resident in the municipality in which a local option by-law is proposed and an elector therein has a *locus standi* to move for a prohibition to the County Court Judge in respect to a scrutiny of the ballots at the voting.—The certifying of the result of such a scrutiny, under s. 371 of the Consolidated Municipal Act, 1903, 3 Edw. VII. c. 19 (O.), is a judicial and not a merely ministerial act, and the Judge may be prohibited from allowing his certificate of the result to be affected by any matter which he should not have considered in arriving at the result, to this extent, that if he was not justified, in arriving at the result, in entering into the consideration of the qualifications of the voters, he may be prohibited from allowing these matters to affect his certificate. *Re Local Option By-law of Township of Saltfleet*, 16 O. L. R. 293, 11 O. W. R. 356, 545.

Voting on by-law — *Requisite three-fifths majority obtained—Two weeks allowed for scrutiny—Final passing by council before expiry thereof—Refusal to quash—Irregularities in voting—Voters depositing ballots in box—Publication of notice—Computation of time for—Council, whether lawfully constituted—Right to inquire into—Knowledge of council as to required majority — Necessity for—Ballot boxes — Use of for voting for other objects—Voters' lists, preparation of—Containing more than requisite number of voters — Appointment of deputy returning officers and poll clerks—Illiterate voters — Marking of ballots — Irregularity—Result of vote not affected—Oath, useless form of—Effect of — Public harbour, application of by-law to—By-law, publication of—Whether true copy — Words, meaning of.*]—By s.s. (1) of s. 141 of the Liquor License Act, R. S. O. 1897 c. 245, the municipal council may pass a local option by-law, provided that before the final passing thereof it has been approved by the electors "in the manner provided by the sections in that behalf of the Municipal Act;" but by s. 24 of 7 Edw. VII. c. 47 (O.), if three-fifths of the electors voting on the by-law approve of it, the council shall within six weeks thereafter finally pass it, and the duty so imposed may be enforced by *mandamus* or otherwise.—A local option by-law was submitted to the electors

of the town of Midland, and, on the day following the voting, the clerk of the council declared the result of the voting, which was in its favour by the requisite majority. A week after, the council purported to finally pass the by-law:—*Held*, *per* Osler and Garrow, JJ.A., in the Court of Appeal, that the provisions of the Municipal Act, as contained in ss. 369-374, as to ascertainment by the clerk of the result of the voting and as to the right to a scrutiny apply to a by-law of this kind; and, therefore, the by-law should not be finally passed by the council until the expiration of the two weeks next after the clerk has declared the result of the voting, but, there being here the requisite two-thirds majority, and no attempt made to obtain a scrutiny, the only objection made being as to the faulty third reading, the passing of the by-law being a purely formal and ministerial act only, which the council could be compelled to do, nothing would be gained by quashing it.—*Per* Maclaren and Meredith, JJ.A., that the by-law could properly be passed by the council at any time within the six weeks, notwithstanding the non-expiry of the two weeks allowed for the scrutiny, so long as there was the three-fifths majority, there being nothing to prevent a scrutiny being had afterwards.—Moss, C.J.O., agreed in the result. — Judgment of a Divisional Court, 10 O. W. R. 345, affirmed, and that of Mulock, C.J., 9 O. W. R. 826, reversed — *Held*, in the Divisional Court: (1) No proceedings after the polling, such as summing up the votes, or a declaration by the clerk of the result of the voting, are necessary. (2) Where a voter, instead of handing the ballot paper to the deputy returning officer, puts it into the box himself, but with the officer's approval, the vote is not invalidated. (3) In computing the three weeks required for the publication of the by-law, the word "week" is used in its ordinary signification, and includes Sundays and holidays. *Re Armour and Township of Onondaga*, 14 O. L. R. 606, approved of. (4) The question whether the council, when it passed the by-law, was properly constituted or not, will not be considered on a motion to quash. *Re Vandyke and Village of Grimsby*, 12 O. L. R. 211, followed. (5) Knowledge by the council, when finally passing the by-law, that the three-fifths majority has been obtained, is not essential. (6) The ballot-boxes used for voting on the by-law can properly be used for concurrent voting for other objects, the Act in no way restricting their use to voting on the by-law only. (7) Objections that the voters' lists were not properly prepared, that the list for one of the polling divisions contained more than the requisite number of voters, and that certain deputy returning officers and poll clerks were not properly appointed, were overruled. (8) The declaration of inability to read or physical incapacity to mark the ballot is a pre-requisite to open voting, and its absence invalidates the vote, even though it is done with the consent of the scrutineers for and against the by-law; but the defect was immaterial, for, even if struck off, the result here would not have been affected. (9) A voter is not to be deprived of his vote by reason of the submission to him by the deputy returning officer of a useless form of oath. (10) The fact that a public harbour, which is subject to the legislative authority of the Dominion, was within the territorial limits of the township, does not necessarily raise the presumption that the council intended the by-law to apply thereto, even assuming that the council had not power to do so. (11) The copy of the by-law as advertised was, "in every tavern, inn, or other house of public entertainment," omitting the words "or place" between the words "other house" and "public entertainment," which were contained in the original by-law.—*Held*, that the phrases "tavern, inn, or house or place of public entertainment" and "houses of entertainment" were equivalent terms, and an objection that the copy published was not a true copy was overruled. *Re Duncan & Midland*, 16 O. L. R. 132, 11 O. W. R. 242.

See APPEAL — INTOXICATING LIQUORS — LIQUOR LICENSES.

INTOXICATION.

See CONTRACT—VENDOR AND PURCHASER—WILL.

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See BENEFICE D'INVENTAIRE—DISTRIBUTION OF ESTATES—EXECUTORS AND ADMINISTRATORS — HUSBAND AND WIFE — RECEIVER—STAY OF PROCEEDINGS—SURROGATE COURTS.

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See MORTGAGE—TRUSTS AND TRUSTEES.

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JUDGMENT.

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1. ACTIONS ON.

i. *Generally.*

Division Court judgments in County Court—*No jurisdiction in County Court—Not a final judgment — Law unsatisfactory—Should be carried to Court of Appeal or Legislature should consider the law—Set-off—Costs.*]—Plaintiff brought action in County Court to recover $438.59, the amount of three judgments recovered by plaintiff against defendant in a Division Court. At trial the Co. C. Judge dismissed the action with costs, on the ground that no action lies in a higher Court upon a Division Court judgment. — Divisional Court *held*, that the state of the law was unsatisfactory as to the inability to sue in higher Courts upon Division Court judgments, and, if this case could not be taken to the Court of Appeal, it should be considered by the Legislature as to whether any change should be made in this point. Judgment below to stand, with costs of action and appeal to be set off against the debt of defendant to plaintiff.—*McPherson* v. *Forrester* (1853), 11 U. C. R. 362, and *Donnelly* v. *Stewart* (1866), 25 U. C. R. 398, followed with hesitation.—*Boyd* v. *Irwin*, 3 Man. L. R. 94, favourably considered. *Crowe* v. *Graham* (1910), 17 O. W. R. 143, 2 O. W. N. 158; 22 O. L. R. 145.

Limitation — *Writ of summons — Renewal.*]—Notwithstanding R. S. O. 1877 c. 108, s. 23 (see R. S. O. 1897 c. 133, s. 23), twenty years is the period of limitation applicable to an action on a judgment of a Court of Record. *Boice* v. *O'Loane*, 3 A. R. 167, and cases following it, followed in preference to *Jay* v. *Johnston*, [1893] 1 Q. B. 25, 189. The renewal of a writ of summons after its expiration is matter of judicial discretion, and where the Judge of the County Court in which the action was brought made an order for the renewal of a writ which had the effect of defeating the operation of the Statute of Limitations, and the defendant made no attempt to appeal from such order, but appeared to the writ without objection, the High Court, on appeal from the judgment rendered at the trial, refused to entertain an objection to the validity of the writ. *Butler* v. *McMicken*, 21 C. L. T. 71, 32 O. R. 422.

ii. *Foreign.*

Alimony — *Arrears—Writ of summons—Special indorsement — Summary judgment—Rules 138, 603.*]—An action lies for arrears of alimony past due upon a foreign judgment, and the claim therefor may be the subject of a special indorsement of the writ of summons under Con. Rule 138 and of a motion for summary judgment under Con. Rule 603.—*Swaizie* v. *Swaizie*, 31 O. R. 324, applied and followed.—Decision of the Master in Chambers affirmed. *Robertson* v. *Robertson*, 16 O. L. R. 170, 11 O. W. R. 715, 875.

Breach of contract—Alternative cause of action — Measure of damages — Costs. *Moritz* v. *Canada Wood Specialty Co.*, 9 O. W. R. 887.

Conclusive against all persons—*Title to a movable exemplification of judgment —*

Opposition to withdraw—C. P. 212, 646, C. C. 1220.]—In law a judgment of a foreign Court of competent jurisdiction, pronouncing as to the ownership of movable property, is conclusive against all persons. So a foreign judgment declaring an opposant proprietor of a number of shares of a company seized upon the defendant makes proof *prima facie* of such title, if the validity of such judgment is not attacked and the competency of the Court to pronounce it is not questioned. *Carsley* v. *Humphrey* (1910), 12 Que. P. R. 133.

Conflict of laws—*Action in Nova Scotia Supreme Court upon a judgment obtained in Supreme Court of New Brunswick—Promissory note subject-matter of action — Lex fori — Enforcing judgment in personam — "Foreign judgment" — Rule of private international law considered.*]—Appeal from a judgment of Meagher, J., 9 E. L. R. 385, in favour of plaintiff in an action to enforce in Nova Scotia a judgment recovered by plaintiff against defendants in New Brunswick.—Appeal allowed with costs and the judgment below vacated. Plaintiff given leave to amend by adding or substituting a claim against defendants on the original note or cause of action, on payment of the costs occasioned by such an amendment. *Gifford* v. *Calkin* (1911), 9 E. L. R. 498. N. S. R.

Defence — *Absence of personal service—Defendants not resident in foreign jurisdiction — Cognovit — Confession of judgment —Attornment to jurisdiction — Alternative cause of action — Election.*]—Action on a foreign judgment and in alternative on promissory note on which that judgment obtained. The note contained a *cognovit actionem* whereby defendants living in Toronto authorised an attorney in Illinois to appear and confess judgment and plaintiffs are bound therefore by judgment. It was not a good defence that there was not personal service of process on defendants. It was admitted that the foreign judgment was regular. At any rate plaintiffs entitled to judgment on note. Plaintiffs elected to have judgment entered on the foreign judgment. *Metropolitan* v. *Osborne* (1909), 14 O. W. R. 135.

Defence — Defendant not served with process in original action—Finding of fact—Leave to amend — Original cause of action —Parties. *Bank of Montreal* v. *Morrison*, 5 O. W. R. 90, 540.

Defence — *Domicil — Jurisdiction of foreign Court.*]—Plaintiff brought action to recover $1,359.82 from defendant, upon a B. C. judgment. At trial judgment was given for plaintiff against O'Heir, as committee of the estate of one Pirie, a lunatic. On appeal, Divisional Court *held*, that the defendant not having been domiciled or resident in B. C., when served with the writ of summons, the judgment must be treated as a nullity in Ontario. Judgment of Teetzel, J., at trial, reversed. *Brennan* v. *Cameron* (1910), 15 O. W. R. 331.

Defence — Fraud—Evidence to sustain. *Anderson Produce Co.* v. *Nesbitt*, 1 O. W. R. 818, 2 O. W. R. 430.

Defence — *Illegality.*] — The defendant cannot plead that the plaintiff's claim is based upon a contract forbidden by law and contrary to public policy and good morals, when the claim is upon a judgment recovered in another province of Canada, if the defendant has appeared and pleaded in the original action. *McCurry* v. *Reid*, 3 Que. P. R. 165.

Defence — *Jurisdiction of foreign Court —Domicil of defendant — Statute of Limitations — Payment on account.*] — Judgment was given against the defendant in Ontario in January, 1906, on a claim arising out of a promissory note, signed in 1898. The action was undefended, although the defendant was duly served in British Columbia. He left Ontario in 1899 for Winnipeg, and afterwards came to British Columbia, where he had since resided. The plaintiff sued in British Columbia on this judgment, and at the trial evidence was given of a payment made after the British Columbia action had been commenced:—*Held*, by the full Court, following *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*, [1894] A. C. 670, that the defendant had acquired a British Columbia domicil, and was not subject to the Ontario Courts. *Held*, also, following *Bateman* v. *Pinder*, 11 L. J. Q. B. 281, that the payment made could not operate to defeat a plea of the Statute of Limitations; and that it was a mere conditional offer of compromise, which was declined. *Walsh* v. *Herman*, 7 W. L. R. 388, 13 B. C. R. 314.

Defence—Jurisdiction of foreign Court—Residence of defendant — Judgment in absentia. *McLorg* v. *Stanning*, 7 W. L. R. 701.

Defence—*Non-service of process in original action — Pleading — Reply.*]—The declaration charged that the defendant was indebted to the plaintiff in $326, by virtue of a judgment recovered in the Superior Court of the District of M., in the Province of Q. Plea, that the defendant was not personally served with the first process in the suit within the jurisdiction of the Court where the judgment was obtained, and that the defendant was never indebted to the plaintiff in the claim on which the judgment was obtained. Replication that the contract on which the judgment was recovered was made at M., within the jurisdiction of the Superior Court of the district of M.; that the said Court had jurisdiction of the subject matter of the said suit, and the said judgment was regularly obtained according to the practice of the said Court, and that the sum mentioned in the said judgment and ordered to be paid is justly and truly due and payable by the defendant to the plaintiff. Demurrer to the replication, and notice of objection to the plea:—*Held*, that the plea as an allegation that the enforcement of the judgment by this Court was contrary to natural justice, was bad, as it did not negative the existence of all facts which, if proved, would render the judgment enforceable, that it was not sufficient to enable the defendant to go into the merits of the original cause of action under C. S. c. 48, as it did not set out the cause of action. That the replication was bad, as it did not join issue on the conclusion of the plea "never indebted," and merely reiterated in another form the right to enforce the judgment. *Shearer* v. *McLean*, 36 N. B. R. 284.

Defence of fraud practised on foreign Court — Motion for summary judgment — Rule 603 — Unconditional leave to

defend — Authority of English decisions. *Jacobs* v. *Beaver Silver Cobalt Mining Co.*, 12 O. W. R. 803.

Defences set up in original action— *Motion to strike out — Embarrassment — Delay.*]—The defences that may be set up in an action in Manitoba on a foreign judgment by virtue of s.-s. (1) of s. 38 of the King's Bench Act, R. S. M. 1902, c. 40, are not limited to such as might have been, but were not, pleaded in the original action, but include such as were actually pleaded there, subject to the power of the Court or a Judge to strike them out on the ground of embarrassment or delay; and a motion to strike out defences was refused. *Gault* v. *McNabb*, 1 Man. L. R. distinguished. *Meyers* v. *Petitte*, 1 Man. L. R. 27, not followed. *British Linen Co.* v. *McEwan*, 8 Man. L. R. 93, discussed. *Hickey* v. *Legresley*, 15 Man. L. R. 308, 1 W. L. R. 546.

Defence that judgment recovered in respect of gambling transactions — Stock speculations — Broker — Action for differences — Proof of defence — Onus — Weight of evidence. *Hickey* v. *Legresley* (Man.), 4 W. L. R. 46.

Divorce and alimony — *Domicil—Jurisdiction — Production of record—Presumption — Rebuttal — Lands in Ontario.*]—In an action on a judgment of a foreign state, granting a husband a divorce and a wife a sum of money as alimony, it was contended by the husband that, as he had never acquired the necessary domicil to give the foreign Court jurisdiction to grant the divorce, the judgment was invalid:—*Held*, that, as he had invoked and submitted to the jurisdiction of the foreign Court, he had precluded himself from setting up any want of jurisdiction.—*Held*, however, were this not so, that, in the absence of anything appearing on the face of the foreign proceedings to shew want of jurisdiction, the production of the record was *prima facie* evidence entitling the plaintiff to recover; and, although the presumption in favour of the judgment may be rebutted, clear proof of facts to shew want of jurisdiction must be adduced.—*Held*, also, that the wife was entitled to judgment for payment out of the alimony although the amount was arrived at upon a consideration of the value of the lands of the husband in Ontario.—*Semble*, that, had the foreign judgment provided for the division in specie of the husband's property in Ontario, it would not have been invalid. Judgment in 19 C. L. T. 281, 31 O. R. 81, reversed. *Swaizie* v. *Swaizie*, 20 C. L. T. 33, 31 O. R. 324.

Equitable relief — *Declaratory judgment — Simple contract creditor — Statute of Limitations.*]—A creditor under a Quebec judgment asked a declaration that the judgment debtor was beneficial owner of a certain claim against the Dominion government:—*Held*, that being in this province in the position of a simple contract creditor he was not entitled to such relief, for the same reasons which debar a simple contract creditor from taking garnishee proceedings or proceedings for equitable execution; and also because, the claim being one against the Crown, no consequential relief was or could be asked.—*Held*, also, that the judgment, being more than six years old, would under ordinary circumstances have become barred; but since the judgment debtor was not at the time of the recovery, nor had been since, in this province, the plaintiff's remedy was saved by R. S. O. 1897 (vol. 3) c. 324, s. 40. *Stewart* v. *Guibord*, 23 C. L. T. 242, 6 O. L. R. 262, 2 O. W. R. 168, 554.

Judgment recovered in England against defendants in Ontario — Jurisdiction — Breach of contract — Place of performance — Goods to be shipped from Canada to England — Place of payment — Alternative claim on original cause of action —Pleading — Assignment of claim — Partnership — Executors — Parties. *Moritz* v. *Canada Wood Specialty Co.*, 9 O. W. R. 522.

Jurisdiction of foreign Court — *Attornment — Contract — Reading and understanding of — Declaration — Estoppel — Sale of engine—Lien notes for price—Failure of consideration — Counterclaim—Damages — Judgment — Costs — Set-off.*] — The defendant, in writing, ordered an engine from the plaintiffs. The order was in the printed form in use by the plaintiffs, and contained a provision that any action for the price of the engine might be entered, tried, and finally disposed of in the Court having jurisdiction where the head office of the defendants was situated. The plaintiffs sued the defendant in the Court of King's Bench for the province of Manitoba (which was the Court answering the above description), and recovered judgment for the price of the engine; and then sued the defendant in the Supreme Court of Saskatchewan upon the judgment so recovered:—*Held*, that, as the defendant had contracted to submit himself to the forum in which judgment was obtained, the plaintiffs, in suing in Manitoba, acted within their rights, and were entitled to judgment in the Supreme Court of Saskatchewan for the amount of the judgment recovered in Manitoba.—*Copen* v. *Thompson*, L. R. 9 Ex. 345; *Schibsby* v. *Westenholz*, L. R. 6 Q. B. 155, and *Rousillon* v. *Rousillon*, 14 Ch. D. 351, followed.—It was objected that, as the order had not been read over to the defendant, and his attention had not been called to the unusual condition as to jurisdiction in the foreign Court, before he signed the order, he was not bound by that condition:—*Held*, that another clause in the order, just over the signature of the defendant, whereby the defendant acknowledged that he had read over the order and thoroughly understood it, estopped the defendant from setting up this objection.—*Held*, also, upon the evidence, that the engine after a fair trial was found to be unfit and incapable of performing the work which it was represented and intended it should perform, and wholly failed in doing satisfactory work, and there was a total failure of consideration for the giving of lien-notes for the price, and the defendant, under the contract and his counterclaim, was entitled to judgment for damages suffered by him for loss of time and expense in running the engine and for freight, etc., and the value of the engine, which had been returned. —*Held*, also, that the plaintiffs should have the general costs of the action, but not the costs of the action in so far as the lien-notes were concerned, and the defendant the costs of his counterclaim; the judgments and costs

to be set off *pro tanto*. *Manitoba Pump Co.* v. *McLelland* (1911), 16 W. L. R. 283, Sask. L. R.

Jurisdiction of foreign Court—*Citizenship.*] — In an action to enforce a personal judgment obtained in a State Court of the State of Dakota, where it appeared that the defendant had been born in the State of Wisconsin, had been living, at the time of the judgment, and for many years previously, in the North-West Territories, and had not appeared in the Dakota Court or submitted to its jurisdiction:—*Held*, that the defendant was not bound by the judgment, although the covenant sued upon had been executed in Dakota, when the defendant was resident there.—Judgment of Wetmore, J., reversed. *Dakota Lumber Co.* v. *Rinderknecht*, 6 Terr. L. R. 210, 1 W. L. R. 481, 2 W. L. R. 275.

Jurisdiction of foreign Court—*Forum —Contract — Consent — Defence to Original action — Pleading.*]—This action was brought to recover the amount of a judgment of an Ontario Court against the defendants in respect of notes given for an engine. These notes contained a provision that, in case of default, the makers, who were residents of Manitoba, might be sued in Ontario upon them: — *Quære*, whether such a consent to the jurisdiction of a foreign Court would not be recognized by international as well as by municipal law: *Copin* v. *Adamson*, L. R. 9 Ex. 345.—As, however, the defendents succeeded upon a defence to the original cause of action, which they were entitled to raise in this action, on the authority of *Hickey* v. *Legresley*, 15 Man. L. R. 304, it became unnecessary to decide this question. *New Hamburg Manufacturing Co.* v. *Shields*, 4 W. L. R. 307, 16 Man. L. R. 212.

Jurisdiction of foreign Court—Proof of — Exemplification of judgment — Residence of defendants — Identification of defendants — Pleading — Amendment — Contract as to forum — Defence to original action — Sale of goods — Action for price — Warranty — Construction of contract — Knowledge of agent of vendor of purpose for which goods purchased — Implied condition —Counterclaim — Damages — Costs. *New Hamburg Manufacturing Co.* v. *Shields* (Man.), 4 W. L. R. 307.

Jurisdiction of foreign Court — *Service of process in another province—Absence of submission to jurisdiction — Residence — Domicil — Change — Intention.*] —In an action brought in the Supreme Court of Saskatchewan upon a judgment recovered in the Court of King's Bench of Manitoba, it appeared that the Manitoba action was commenced in 1904; and that in September, 1904, the defendant was served with process at W., a place in the North-West Territories, beyond the jurisdiction of the Manitoba Court. The defendant did not appear, and judgment against him was signed on the 29th January, 1909:—*Held*, upon the evidence, that the defendant was not domiciled or resident within the territorial jurisdiction of the foreign Court when the judgment was obtained; and, as he had not appeared or submitted to the jurisdiction of the Manitoba Court, and had not contracted to do so, the action could not be maintained.—*Sirdar Gurdyal Singh* v. *Rajah of Faridkote*, [1894] A. C. 670, and *Emanuel* v. *Symon*, [1908] 1 K. B. 302, followed.—The defendant was born in Manitoba and lived in that province until shortly before the action was begun; and it was contended that, although he was living in W. when the action was begun, his stay there was merely temporary, and his domicil and permanent residence were still in Manitoba:—*Held*, that the circumstances which would warrant the inference of a change of residence from one province in Canada to another would not necessarily warrant the inference of a change to a foreign domicil.—*Walsh* v. *Herman*, 7 W. L. R. 380, referred to.—The acquiring of a residence in another country of such a character as would deprive the Courts of the country in which a man has his domicil of birth, of jurisdiction over him, is the result of a combination of fact and intention. There must be a removal to the new residence in fact, with the intention to remain there. And the onus of proving that a new residence or domicil has been chosen lies on him who asserts that the domicil of origin has been lost.—*Winans* v. *Attorney-General*, [1904] A. C. 287, followed.—There was no evidence as to whether, when the defendant first went to W., he intended to make that place his permanent abode; but he testified that when he was served with process he was resident in W., and that ever since he has resided there or at M., a place in Saskatchewan:—*Held*, in the absence of anything to shew a contrary intention, that the defendant had sufficiently established that he acquired a new residence in W. in 1904. *Fairchild* v. *McGillivray* (1911), 16 W. L. R. 562. Sask. L. R.

Jurisdiction of foreign Court — *Submission of defendants — Foreign unregistered company suing in British Columbia Court — Companies Act, ss. 123, 143—"Doing business."*]—The British Columbia Full Court held that on the evidence defendant J. had consented to the original action being tried in the Seattle Court, so could not in this action brought on the Seattle judgment set up defences which should have been raised in Seattle. Under s. 143 of above Act plaintiffs, a non-registered foreign company, is not debarred from suing here. Invoking the aid of the Courts is not "doing business" in British Columbia. *Lilly* v. *Johnston*, 10 W. L. R. 2.

Limitation of actions — *Contract — Yukon Ordinance, c. 31 of 1899 — Statute of James — Statute of Anne — Lex fori — Lex loci contractus — Absence of debtor beyond seas.*] — Under the provisions of the Yukon Ordinance c. 31 of 1899, the right to recover simple contract debts in the Territorial Court of the Yukon Territory is absolutely barred after the expiration of six years from the date when the cause of action arose, notwithstanding that the debtor has not been for that period resident within the jurisdiction of the Court. — Judgment appealed from, 2 W. L. R. 471, reversed, Girouard and Davies, JJ., dissenting. *Rutledge* v. *United States Savings and Loan Co.*, 26 C. L. T. 852, 37 S. C. R. 546.

Lis pendens—*Similar action in another province.*]—A judgment rendered in a province of the Dominion other than the province

of Quebec will not be considered as a judgment rendered in a foreign country, and the Quebec Courts are obliged to recognize a judgment so pronounced if it is in accordance with the provisions of Art. 211, C. P. 2. A defendant by a plea of *lis pendens* may except to a suit begun in the province of Quebec by alleging that a suit of the same nature, between the same parties, and for the same cause of action, is pending in another province of the Dominion. 3. But, if the action has no object but to have the judgment rendered in another province of the Dominion declared executory, the fact that the plaintiff has set up a like cause of action in another province, and that it is actually pending, does not justify a plea of *lis pendens*, provided that the Court is not asked to pronounce upon the cause of action, but only to state that the judgment has been regularly obtained. *Blackwood* v. *Percival*, 22 C. L. T. 417, 5 Que. P. R. 110, 23 Que. S. C. 5.

Motion for summary judgment—Defence. *Chambre* v. *Gundy*, 2 O. W. R. 243, 244.

Motion for summary judgment under Rule 603—*Defence that judgment obtained by fraud on foreign Court — Validity of — Alleged conflict of decisions — Court of Appeal in England — Authority.*]—The plaintiffs brought an action against the defendants, an Ontario corporation, in the province of Quebec, to recover money alleged to be due from them for services rendered. The defendants appeared in the Quebec action and defended on the merits, and judgment went against them. The plaintiffs having brought an action in Ontario on the Quebec judgment, and moved before the Master in Chambers for speedy judgment, under Rule 603, the defendants opposed the motion upon affidavit that the Quebec judgment was recovered by fraud, and deception practised upon the Court by the plaintiffs, and that they, the defendants, had a good defence to the action upon the merits:—*Held*, affirming the orders of the Master in Chambers and Britton, J., and reversing the decision of a Divisional Court, that the motion for judgment must be dismissed, and that in an action founded upon a foreign judgment the defendant is at liberty to plead, and prove, if he can, that the judgment was recovered by fraud and deception practised upon the Court.—*Codd* v. *Delap*, 92 L. T. 510, followed.—*Per* Moss, C.J.O., Osler and Garrow, JJ.A.:—There is no conflict between the above decision and the judgment of the Court of Appeal in *Woodruff* v. *McLennan*, 14 A. R. 242, as that case turned upon a different state of facts and did not call in question the principle of the decision of the English Court of Appeal in *Abouloff* v. *Oppenheimer*, 10 Que. B. D. 295.—*Per* Moss, C.J.O., and Osler, J.A.:—A decision of the highest Court of this province, while it remains unreversed by a tribunal having appellate jurisdiction over it, ought not to be set aside or ignored, simply because other Courts, not possessing appellate jurisdiction over it, and themselves subject to reversal by higher Courts, have subsequently expressed views that may appear to be not in harmony with the decision. —*Trimble* v. *Hill*, 5 App. Cas. 342, referred to. *Jacobs* v. *Beaver Silver Cobalt Mining Co.*, 17 O. L. R. 496, 12 O. W. R. 803.

Original consideration—*Ontario Judicature Act — Promoter of company — Loan to — Personal liability.*] — Under the Ontario Judicature Act, as before it, the declaration in an action on a foreign judgment may include Courts claiming to recover on the original consideration. A promoter of a joint stock company borrowed money for the purposes of the company, giving his own note as security. The lender was informed at the time of the manner in which the loan was to be, and was applied:—*Held*, that, as the company did not exist at the time of the loan, it could not be the principal debtor, nor the borrower a mere guarantor. The latter was, therefore, primarily liable for repayment of the loan. Judgment of the Court of Appeal, 27 A. R. 96, 20 C. L. T. 57, affirmed. *Bugbee* v. *Clergue*, 21 C. L. T. 136; *S. C., sub nom. Clergue* v. *Humphrey*, 31 S. C. R. 66.

Plea to—*Damages not due.*]—A defendant who is sued upon a foreign judgment declaring a contract to be executory and awarding damages by reason of its non-execution, may, notwithstanding such judgment, by virtue of Arts. 111 and 202, C. P., plead to the allegation of the debt in the declaration, that the damages claimed are not due and give the grounds for such conclusion. *Reid* v. *McCurry*, 4 Que. P. R. 251.

Pleading—*Declaration—Original cause of action.*]—An action was brought in the province of Quebec upon a foreign judgment. The defendant made an exception to the form, upon the ground that the plaintiff had failed to indicate the causes of action in the suit in which the judgment had been rendered:—*Held*, that the plaintiff bringing an action upon a foreign judgment is not bound to state the grounds of the original action, where it is shewn, by the certificate of the clerk of the Court by which the judgment was rendered, that the claim sued on was personally served on the defendant, together with the writ of summons in the action in which the foreign judgment was rendered. *Smith* v. *Beaubien*, 22 C. L. T. 419.

Pleading—Defence—False testimony in foreign Court — Jurisdiction of foreign Court — Counterclaim — Original cause of action — Jury notice. *Hallock* v. *Orillia Export Lumber Co.*, 6 O. W. R. 597.

Proof of — *Canada Evidence Act — Imp. Stat. 14 & 15 V. c. 99—Exemplification of judgment — Re-opening plaintiff's case — Examination for discovery after adjournment of trial.*]—On the trial of an action upon a foreign judgment the plaintiff, without giving any notice under the Canada Evidence Act, s. 19, tendered in evidence a copy of the judgment sued on certified under the hand of the clerk and by the seal of the Court in which it was recovered, and this was received subject to objection. The defendant adduced no evidence and judgment was reserved. The trial Judge held that the document was improperly admitted, no notice having been given, but adjourned the case to give the plaintiff an opportunity of proving his judgment.—*Held*, that the copy of judgment tendered was not an exemplification and notice of intention to use it should have been given under s. 19 of the Canada Evidence Act before it could be admitted, in spite of the pro-

visions of s. 11 of Imp. Stat. 14 & 15 V. c. 99, to which the Canada Evidence Act is not repugnant, but only adds a condition.—*Held*, further, that the trial Judge properly exercised his discretion in giving the plaintiff a further opportunity to prove his judgment by adjourning the trial.—*Held*, further, that the similarity of the name of the defendant in this action and that of the defendant named in the foreign judgment taken with the present defendant's pleas in confession and avoidance was sufficient *prima facie* evidence of the identity of the two defendants.—After the adjournment of the trial the plaintiff had secured an order for the examination of the defendant for discovery.—*Held*, that the trial having been commenced and adjourned the plaintiff was not entitled to examine the defendant for discovery. *Stevens* v. *Olson* (1904), 6 Terr. L. R. 106.

Proof of — *Exemplification — Void contract — Company — Extra-territorial contracts of carriage.*]—A default judgment obtained in a foreign jurisdiction, though liable to be set aside so long as it stands, is "final and conclusive," within the meaning of that expression as applied to foreign judgments, and consequently it may be sued on in this province. In an action on a foreign judgment the defendant is entitled to challenge the validity of the judgment on the ground that it is manifestly erroneous, such as being founded on an *ex facie* void contract. The province may create a company with power to undertake extra-territorial contracts of carriage, and so it is not *ultra vires* of a company incorporated in British Columbia to contract to carry goods from British Columbia to a point in the Yukon Territory. *Per* Martin, J.:—An exemplification of judgment under the seal of the Court in which the judgment was pronounced, is equivalent to the original judgment exemplified, and notice under the Evidence Act of intention to produce it in evidence is unnecessary. *Boyle* v. *Victoria Yukon Trading Co.*, 22 C. L. T. 377, 9 B. C. R. 213.

Proof of — *Seal — Certificate — Canada Evidence Act, 1893, s. 10.*]—A document purporting to be a transcript of the judgment roll of the Circuit Court for Walworth County, South Dakota, was tendered in evidence. The seal affixed was engraved "Clerk of the Circuit Court, Sixth Judicial District, South Dakota, Walworth County;" the certificate appended under the hand of the clerk of the Court stated: "I have hereunto set my hand and affixed the seal of the said Court."—*Held*, that the certificate, signed by the officer who would ordinarily have the custody of the seal of the Court, was *prima facie* proof that the seal was that of the Court; and that the judgment purported to be under the seal of the Court as required by s. 10 of the Canada Evidence Act. *Brebe* v. *Tanner* (1903), 6 Terr. L. R. 13.

Proof of judgment — Seal of foreign Court — Certificate of clerk — Proof of identity of plaintiffs. *Stephens* v. *Olsen* (N.W.T.), 1 W. L. R. 572.

Quebec Courts—*Company not domiciled or resident in Quebec — Nullity — 22 V. c. 5, s. 58 (C) — International law.*]—In an action brought in a County Court in the province of Ontario upon a judgment recovered in a Circuit Court in the province of Quebec, against an incorporated company, who, at the time the Quebec action was begun, had no office or agent in the province of Quebec:—*Held*, that the Act of the legislature of the province of Canada, 22 V. c. 5, s. 58, is not now in force, and *Court* v. *Scott*, 32 C. P. 148, is no longer applicable; the binding effect of the judgment sued on depended upon the rules of international law; and the defendant company not having been domiciled or resident in Quebec when served with the writ of summons, the judgment there obtained must be treated in the Courts of Ontario as a nullity. *Vézina* v. *Will H. Newsome Co.*, 10 O. W. R. 17, 14 O. L. R. 658.

Recovered in England against defendants in Ontario — *Jurisdiction — Breach of contract — Place of performance —Service out of the jurisdiction — English Order XI., Rule 1 (e)—Alternative claim on original cause of action — Merger—Election —Appeal — Parties.*] — Under Order XI., Rule 1 (*e*), of the English Rules of the Supreme Court, 1883, which corresponds substantially with Rule 162 (*e*) of the Ontario Consolidated Rules of 1897, providing that service out of the jurisdiction of a writ of summons may be ordered whenever the action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction, it is not necessary, in order to confer jurisdiction, to shew that the whole of the contract is to be performed within the jurisdiction; it is sufficient if there is a breach of that part of it, if any, which is to be performed there; but the action must be based on such a breach, and the jurisdiction of the home Court is not affected in respect of a breach of that part of the contract which is to be performed abroad, by reason of a breach of another part of it which is to be performed within the jurisdiction.—The plaintiff, living in England, brought an action in England against the defendants, an incorporated company, doing business in Ontario, for damages for breach of contract to deliver certain gods. By the terms of the contract, the delivery was to be at the port of shipment in America, and payment was to be made on receipt of and in exchange for shipping documents in England:—*Held*, that the breach upon which the action was based took place at the American port, and the defendants, not having been subject to the English Court, either by residence or by submission in the contract, there was no jurisdiction in that Court under Order XI. to summon the defendants to appear before it, or to entertain the action; and the judgment obtained in England in that action (the defendants not appearing), however effectual it might be in England, not having been moved against there, was of no avail to support an action upon it in Ontario.—*Held*, however, that the original cause of action had not merged in the judgment; and the plaintiff was entitled to succeed upon an alternative claim thereupon, made in the action brought in Ontario.—The trial Judge held both causes of action to be proved, and the plaintiff elected to take judgment in respect of the claim based upon the English judgment.—*Held*, that the plaintiff was not so bound by his election that he was prevented from having judgment upon the alternative claim

when he was held by the Court of Appeal, upon the defendants' appeal, not entitled to succeed upon the English judgment.—*Held*, also, that an order was properly made at the trial adding as plaintiffs the personal representatives of the original plaintiff, who died after the commencement of the action, and that the action was properly constituted. *Moritz* v. *Canada Wood Specialty Co.*, 17 O. L. R. 53, 11 O. W. R. 1048.

Regularly obtained in Illinois—*Submission to jurisdiction of Illinois Court — Action on in Ontario — Defences not open in Ontario that might have been open in Ill. Court.*]—Plaintiffs brought action on a judgment recovered in the Circuit Court of Cook Co., Ill., and alternatively upon the promissory note which was the subject in the Cook Co. Court. At trial Clute, J., gave plaintiffs judgment on their foreign judgment. Court of Appeal *held*, that it could not set aside the judgment of the Ill. Court, nor could it be disregarded so long as plaintiffs sought to recover upon it; that so far as the Courts of Ontario were concerned, effect must be given to it, and the defendants were precluded from here insisting upon defences that might have been open to them if there were no judgment of a Court of competent jurisdiction. *Metropolitan Trust & Savings Bank* v. *Osborne* (1910), 16 O. W. R. 226.

Res judicata—*Arrest in foreign country —Action for — Malice.*]—A foreign judgment is not *chose jugée* before our Courts; and the discussion can be re-opened on the matters which formed the basis of that judgment. 2. A person may be arrested in the State of Vermont for debt contracted in this province, according to the law of that state, without it giving rise to an action for damages against the party causing such arrest, provided it be done without fraud or malice. *Rice* v. *Holmes*, 16 Que. S. C. 492.

Security for costs—*C. P. 179, 212.*]—A suit based upon a judgment given in another province is an ordinary one, and even when the original suit is personally served upon defendant, the latter, in spite of his appearance upon the first suit, has the right to demand security for costs and a power of attorney, without having to aver that he has a legitimate defence to the suit. *Riordan* v. *McLeod* (1910), 12 Que. P. R. 352.

Statute of Limitations—Absence of defendant beyond seas — C. O. (Y.T.) c. 20, s. 1 — 21 Jac. I. — 4 & 5 Anne — Construction — Repeal. *United States Saving and Loan Co.* v. *Rutledge* (Y.T.), 2 W. L. R. 471.

Warrant of attorney — *Confession— Jurisdiction — Residence of defendant.*] — The general rule is, that a judgment valid by the law and practice of the state where it is rendered and confessed, may be sued upon as a ground of action in any other state. A judgment by confession is an instance of a party voluntarily submitting himself to the jurisdiction of the Court, whereby competence is acquired to deal with the matter submitted:—*Held*, that a judgment recovered in the State of Pennsylvania, after the defendant has ceased to be a resident of that state, upon a warrant of attorney executed there, was valid, and that the Courts there had jurisdiction to deal with the matter. *Ritter* v. *Fairfield*, 21 C. L. T. 73, 32 O. R. 350.

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2. AMENDING AND VARYING.

After entry — *Costs — Practice — Supreme Court of Canada.*]—The minutes of judgment as settled by the registrar directed that the appellants' costs should be paid out of certain moneys in Court, and in this form the judgment was duly entered and certified to the clerk of the Court below. Subsequently it was made to appear that there were no moneys in Court available to pay these costs, and upon the application of the appellants the Court amended the judgment, directing that the costs of the appellants should be paid by the respondents forthwith after taxation. *Letourneau* v. *Carbonneau*, 35 S. C. R. 701.

After entry — Neglect to provide for interlocutory costs reserved for the trial Judge — Disposition of costs. *Logan* v. *Drew*, 10 O. W. R. 643.

After entry.] — When the Court finds that the judgment as drawn up does not correctly state what the Court actually decided and intended, it may upon motion interfere after the passing and entering of the judgment. *Ainsworth* v. *Wilding*, [1896] 1 Ch. 673, followed. *Mitchell* v. *Sparling* (1909), 15 O. W. R. 37.

Application to vary — *Costs.*]—The defendant K., an auctioneer, advertised at the instance of the defendant M. certain land for sale at public auction claimed by the plaintiff and M. This suit was brought for an injunction restraining the sale and for a declaration of title. An interim injunction was granted. An ejectment action was also brought by the plaintiff against M. in respect of the same land, and judgment therein was given for the plaintiff. The defendants appeared by the same solicitor and joined in their answer in this suit. At the hearing a decree was made against the defendants with costs. K. now applied to vary the decree so far as it ordered him to pay costs, alleging that since putting in his answer he had had nothing to do with the conduct of the suit, believing himself to be but a nominal defendant, and his co-defendant to be responsible for the defence:—*Held*, that the application should be refused, but without costs. *Robertson* v. *Kerr*, 23 C. L. T. 266.

Certificate of—Court of Appeal—Power to amend after issue — Mistake — Costs. *Whipple* v. *Ontario Box Co.*, 1 O. W. R. 36.

Clerical error—*Correction after appeal —Claims made in action.*]—Where a cause has been taken to appeal and the judgment simply confirmed, the Court which gave the judgment in the first instance is disseised of the cause, and is no longer competent to correct an error in its judgment, even a clerical error.—A judgment conformable to the rights of the parties and to the whole of the allegations in the action cannot be said to be affected by a clerical error because the claims made in the action do not include all that the party had the right to exact. *Robert* v. *Montreal and St. Lawrence Light and Power Co.*, 7 Que. P. R. 480.

Clerical error in judgment of Court below—*Motion to correct it—P. 546.*]—If, following a clerical error, the judgment inscribed for review finds against "the defendant" instead of against "the defendants," the Court of Review, in affirming it, may correct the judgment and condemn "the defendants." Upon its own initiative, the Court may remedy an omission contained in the judgment *a quo* and determine within what delay an accounting is to be made by defendants. *Beullac Limited* v. *Simard* (1911), 12 Que. P. R. 316.

Correcting slip — Jurisdiction—Practice —Costs. *Wallace* v. *Davis*, 4 E. L. R. 272.

Correction of calculation.]—The adjudication should be affirmed with costs, with an appropriate reason shewing the correctness of calculation and change of items, notwithstanding that there was no cross-appeal. *Strubbe* v. *Bellhouse, Dillon Co.* (1910), 17 R. de J. 180.

Correction of errors in judgment as entered — *Rule 638.*]—Until the judgment pronounced in an action is entered, the Court has full power to rehear or review the case; but, after the judgment has been entered, the Judge who pronounced it has no power to amend or alter it if it correctly represents the actual decision, even although based on a misapprehension.—*In re Suffield* v. *Watts*, 20 Que. R. D. 393, *In re Lyric Syndicate*, 7 Times L. R. 162, and *Preston* v. *Allsup*, [1895] 1 Ch. 141, followed.—Clerical mistakes or accidental slips or omissions may, however, be corrected under Rule 638 of the King's Bench Act. *Monroe* v. *Heubach*, 18 Man. L. R. 547, 10 W. L. R. 416.

Correction of interlocutory by final judgment.]—A judgment dismissing an exception to the form, in which the defendant, a married woman, separate as to property, complained of being sued alone, can be corrected by the final judgment. *Ogilvie* v. *Fraser*, 3 Que. P. R. 540.

Date of—*Amendment—Death of plaintiff between argument and judgment — Administrator ad litem.*]—Plaintiff died after the argument of an appeal by him from a judgment of High Court dismissing his action with costs, but before judgment was given on such appeal. The Court was not informed of the death, and gave judgment dismissing the appeal with costs. The defendants, in ignorance of the death, obtained the issue of the certificate of judgment, which bore date as of the day on which the judgment was pronounced. Upon an application made by defendants some months later, the Court directed that the certificate should be amended by dating it as of the day of the argument, and by inserting in the body thereof a direction that it be entered as of the day of the argument. *Turner* v. *London and South-Western Rw. Co.*, L. R. 17 Eq. 561, and *Ecroyd* v. *Coulthard*, [1897] 2 Ch. 554, followed. The defendants were entitled to have an administrator *ad litem* appointed to represent the plaintiff's estate in order that the costs of the action and appeal might be recovered. *Gunn* v. *Harper*, 22 C. L. T. 208, 225, 3 O. L. R. 693, 1 O. W. R. 366.

Ex parte application — Changing personal into proprietary judgment — Leave to amend — Rescinding order. *Bolster* v. *Booth*, 2 O. W. R. 890.

Mistake in date — Correction—Consent —Amendments — Costs. *St. Mary's Creamery Co.* v. *Grand Trunk Rw. Co.*, 2 O. W. R. 328, 472, 3 O. W. R. 472.

Modification — *Alimentary allowance—Reduction — Petition — New action.*] — One who has been condemned to pay an alimentary allowance cannot, upon a simple petition filed in the original cause, ask to be relieved from the payment on account of a change in his means (Art. 179, C. C.), but he must, if he wishes to have the judgment modified, proceed by writ of summons in the ordinary form. *Noreau* v. *Bacquet*, 17 Que. S. C. 77; *Pelletier* v. *Jutras*, *ib.* 79. *Sed vide Delisle* v. *Pillet*, *ib.* 75.

Motion to vary — *Custody of infant—Neglect to provide for — Inscription in review.*]—Where the plaintiff, in an action for separation from bed and board, also prays for the custody of a minor child, some order should be made by the Court of first instance, in delivering judgment, with respect to this portion of plaintiff's conclusions. 2. Where the Court of first instance has omitted to make such order, the plaintiff is not entitled by motion not notified to the opposite party, to ask that an addition be made to the judgment, disposing of the prayer for the guardianship of the minor, it appearing in this case that the omission complained of was not a mere clerical error. 3. On an inscription in review from the first judgment, the Court of Review may either make such order, or, if it seem to be more desirable, may send the record back to the Court of first instance, for such further proceedings as may be proper or necessary to enable the latter tribunal to adjudicate as to the custody of the minor. *Smith* v. *Cooke*, 24 Que. S. C. 14.

Motion to vary — Difficulty arising in proceeding under judgment — Deaths of members of Court — Lapse of time. *Uffner* v. *Lewis*, 2 O. W. R. 441, 3 O. W. R. 306, 5 O. W. R. 39.

Motion to vary — *Rehearing — Costs—Parties.*]—In a suit to restrain the sale of property by K., an auctioneer, at the instance of M., and for a declaration of the plaintiff's title, K. appeared and jointly answered with M. M. thereafter undertook the conduct of the suit, and alone appeared at the hearing, K. holding himself to be but a nominal party. Judgment with costs having been given against both defendants, an application by K. to have the suit reheard for the purpose of varying so much of the decree as ordered him to pay costs, was refused. *Robertson* v. *Kerr*, 23 C. L. T. 269, 2 N. B. Eq. 494.

Motion to vary judgment—*Disposition of costs — Clerical error.*]—A disposition in a final judgment awarding costs in a manner absolutely contrary to that which the Judge wished to direct, as appears in consideration of the whole text of the judgment, may be corrected on application to the Judge, this correction being considered as the correction of a clerical error provided for by Art. 546, C. P. C. *Gervais* v. *Lesly*, 1 Que. S. C. 44,

followed. *Regina* v. *Stadacona Water, Light, and Power Co. and Town of Famborn*, 25 Que. S. C. 525.

Order-in-Council — *Varying.*] —An Order-in-Council, founded upon the report of the Judicial Committee on an appeal from the Court of Queen's Bench in Lower Canada, simply directed the reversal of the judgment. Upon the Order being transmitted to Canada, the Court of Queen's Bench recorded it, but was of opinion that it was unable to act further, on the ground that as a Court of Appeal, it had no jurisdiction to make of its own accord such an Order on the Court below as would give effect to the Order of Her Majesty in Council. Upon petition by the appellants, the Judicial Committee varied the Order-in-Council by adding to the reversal of the judgment of the Court of Queen's Bench, a further direction, that the judgment of the Superior Court (the original Court from whence the appeal was brought), be also reversed, and the verdict given vacated, and that the cause be remitted back to the Superior Court, with directions to that Court to award a *venire facias de novo*. *McGillivray* v. *Montreal Assurance Co.* (1861), C. R. 3 A. C. 475.

Petition to vary — *Final judgment — Contestation of dividend sheet — Curators — Inscription — Notice.*]—A judgment maintaining the contestation of a dividend sheet is a final judgment, subject to review or appeal, and can only be modified by the Court which pronounced it in accordance with one or other of the modes provided by Arts. 1163 *et seq.*, C. P. 2. There is ground for a petition against such a judgment when it alleges that the curators affected by the judgment had no notice of the last inscription of the contestation. *Baycur* v. *Scath*, 5 Que. P. R. 241.

Power to vary after formally issued — *Practice in cases where judgment is to be varied.*]—Tenant moved for mandamus to compel landlord to replace certain fixtures he had removed from tenant's premises and for an injunction preventing landlord from interfering with tenant's rights, etc. Settlement was arranged whereby tenant agreed to give up possession on 1st May, when landlord should pay him $30. This was reduced to writing and signed and sealed by tenant, but not by landlord. A copy was given the tenant. Later the tenant went to defendant and obtained a signed consent to have the action dismissed. Tenant took this document to the M.-in-C. and obtained an order containing terms not agreed to by landlord, who moved before the M.-in-C. to have above order varied. This motion was granted. Tenant's appeal was dismissed by Sutherland, J. On the matter coming before Riddell, J., *held*, that the M.-in-C. had no power to make original order. *Mitchell* v. *Sparling* (1909), 15 O. W. R. 37, and *Ainsworth* v. *Wilding*, [1896] 1 Ch. 673, followed.—That where an order or judgment correctly sets out what the Court did actually decide and intended to decide there is no power in that Court to vary the order, upon motion after the order has formally issued. —That where such orders have been varied in this way, the Court in appeal has power to make the order which should have been made in the first instance. Order made accordingly. No costs. *Broom* v. *Pepall* (1911), 19 O. W. R. 262, 2 O. W. N. 1104. *See* 19 O. W. R. 512, 2 O. W. N. 1275.

Procedure — *Inscription — Proof — C. P. 293.*]—Judgment, in contested case, on merits upon inscription for hearing only, and not for proof and hearing, will be reversed in review, and record returned to Superior Court for purpose of proceeding to proof and rendering judgment according to respective rights of parties. *Bruneau* v. *Genereux* (1910), 16 Que. R. L., n. s. 364.

3. Appeal Against.

See Appeal.

4. Assignment of Judgment.

Execution in name of original plaintiff — *Opposition — Interest of opponent.*] —The transferee of a judgment has a right to sue out an execution in the name of the original plaintiff.—An opposition *à fin d'annuler* founded on the fact that the judgment was transferred for a consideration which was paid by the transferee, will be dismissed for want of interest in the opposant. *Desserres* v. *Atlantic and Lake Superior Rw. Co.*, 7 Que. P. R. 383.

Fraud—*Equities—Notice.*]—The assignee of a judgment, void as against creditors under 13 Eliz. c. 5, takes the judgment subject to the rights of the creditors, notwithstanding the assignment is for value; and, *per* Rouleau and McGuire, JJ., without notice: *per* Wetmore, J., at all events, with notice. *Totten* v. *Douglas*, 16 Gr. 243, 18 Gr. 341, discussed. *Shorey* v. *Stobart*, 1 Terr. L. R. 262.

5. Charges on Lands.

See Charges on Lands.

6. Confession of Judgment.

Company.]—A confession of judgment by a joint stock company, signed on its behalf by its president and secretary and bearing its seal, is irregular and will be rejected from the record on motion. *Rouleau* v. *Bishop Construction Co.* (1911), 12 Que. P. R. 307.

Conditional and partial — *Refusal of plaintiff to accept it—Right of plaintiff to discontinue in part his action—C. P. 527.*]— When an in part conditional confession of judgment is not accepted by plaintiff, said confession does not limit or disturb plaintiff's control over his action, which he may discontinue in whole or in part. *Moreau* v. *Jodoin* (1909), 10 Que. P. R. 353.

Defence arising after action—*Judgment for costs—Waiver of other defences.*]— Action for damages for trespass to land and for an injunction. An interlocutory injunction was granted, but afterwards discharged

by consent, the right to acquire the land having been obtained after action. The defendants then obtained leave to plead, and pleaded that since the commencement of the action, the town of B. had expropriated the plaintiff's land, etc., and had paid him the damages awarded, and that the said award included all damages done to the plaintiff's land by the defendants, as well as all the trespasses, acts, and grievances complained of in the statement of claim. The plaintiff confessed this defence, and entered judgment for his costs to be taxed:—*Held*, that this defence operated as a waiver of other defences; and a motion to set aside the judgment was refused. *Calder* v. *Middleton & Victoria Beach Rw. Co.*, 23 C. L. T. 22.

Defence arising after action brought —*Confession — Judgment for costs without Judge's order — Other defences.*]—The defendant under Order 24, Rules 1 and 2, pleaded a defence arising after action brought, which was a good answer to the whole action. The plaintiff confessed this defence and signed judgment against the defendant for costs under Rule 3 of Order 24, which provides that the plaintiff may deliver a confession of such defence, and may thereafter sign judgment for his costs up to the time of pleading such defence, unless the Court or a Judge shall otherwise order. The defendant moved to set aside the judgment because (1) it was entered up by the prothonotary without a Judge's order, (2) such judgment could not be entered while the other defences remained undisposed of:—*Held*, that the words of the Rule specifically enable the plaintiffs to sign a judgment without further proceedings except taxing costs, unless the defendant obtain an order otherwise. The subsequent defence amounts to a waiver of the original defence pleaded. It would be futile to go to trial on the remaining defences, as there is no question remaining to be tried as in *Hught* v. *Tottenham*, [1802] W. N. 88. *Bridgetown, &c., Co.* v. *Barbadoes, &c., Co.*, 38 Ch. D. 378, distinguished. *Ruggles* v. *M. and V. B. R. W. Co.*, 22 C. L. T. 432. Affirmed 35 N. S. R. 553.

Invalidity.]—A confession of judgment signed by the attorney, and not by the party, is void as such, but is valid as an admission that the defendant owes the amount which he has confessed. *Thurston* v. *Hughes*, Q. R. 16 S. C. 472

Motion to reject—*Costs—Confession by the wife—Authorisation—C. P. 527, C. C. 210.*]—In an action to recover the possession of some movable and immovable property, defendant may confess judgment, but with costs against plaintiff; it is for the latter to declare whether or not he will accept such an offer.—A wife separate as to property may, without her husband's authority, admit, by a confession of judgment, that some property attached in her hands belongs to the plaintiff; she does not thereby alienate any of her property but simply does an act of administration. *Picher* v. *Gaumont* (1910), 12 Que. P. R. 391.

Offer to suffer judgment — *Particulars*]—A defendant is not obliged to give particulars of the amount offered by a confession of judgment, nor the grounds of his confession. *Lusher* v. *Watson*, 9 Q. P. R. 328.

Partnership — *Validity — Non-acceptance — Notice — Time.*]—A partner cannot confess judgment, either for the firm or the other members thereof, in an action brought against the co-partnership.—If the plaintiff, relying on his objection to the validity of a confession of judgment, has not filed in writing his refusal to accept it, judgment will be rendered for the amount so offered, unless he chooses within a certain delay to give notice that he does not accept the same and pay the costs of the inscription. *Marazza* v. *O'Brien*, 8 Q. P. R. 415.

Qualification in—*Interference by appellate Court with estimate of damages made by trial Court.*]—In view of the qualification attached by the defendant to his confession of judgment, there was ground upon which the Superior Court could disregard the confession and proceed to fix the amount of damages, and that judgment should not have been varied by the Court of Review by reducing the amount by fifteen dollars. Appeal allowed, and judgment of trial Court restored. *Desbiens* v. *Tremblay* (1910), 17 R. de J. 179.

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7. Declaratory Judgments.

Rule 152—*Consequential relief — Assessment and taxes—School taxes.*]—In an action brought in the Supreme Court the plaintiffs asked for a declaration that the defendants were "owners" or "occupants," within the meaning of the School Assessment Ordinance, of certain lands, and that the defendants had an estate or interest in those lands liable to taxation under the Ordinance. There was no allegation that the lands had ever been assessed by the plaintiffs, or that they were liable to pay taxes to the plaintiffs, and it was admitted by the plaintiffs that the defendants had not been assessed for the lands by the plaintiffs:—*Held*, that, as there could be no consequential relief, the plaintiffs were not entitled, under Rule 152 or otherwise, to the declaration sought.—Scope of the Rule defined.—*Offin* v. *Rockford Rural District Council*, [1906] 1 Ch. 342, and *Honour* v. *Equitable Life Assurance Society*, [1900] 1 Ch. 852, specially referred to. *Viola School District Trustees* v. *Canada Saskatchewan Land Co.* (1910), 16 W. L. R. 176, Sask. L. R. .

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8. Default Judgments.

Action on bond — *Writ of summons—Special endorsement — Statement of claim —Service by posting—Motion for judgment — Assessment of damages.*] — An action against the sureties in an appeal bond to recover the plaintiffs' costs of an appeal is in the nature of a claim for damages requiring assessment (see Rule 580), and a special endorsement of the writ of summons is inappropriate, and a judgment for default of appearance or default of defence is a nullity, not curable by delay or acquiescence. The defendants in this case not having appeared, the plaintiffs filed and posted up copies of a statement of claim, without filing the writ of summons and affidavit of service:—*Held*, that the posting of the statement could not,

having regard to Rule 574, be treated as a service upon the defendants. But, even if it could be so treated, a motion for judgment thereon and an assessment of damages would be necessary. *Star Life Assurance Society* v. *Southgate*, 18 P. R. 151, 18 C. L. T. 229, followed. Leave to appeal refused. *Appleby* v. *Turner*, 20 C. L. T. 209, 253, 19 P. R. 145, 175.

Appearance.]—A judgment signed for default of appearance to a writ, not specially endorsed by authority of the rules of Court, would be a nullity and not a mere irregularity and susceptible to cure by amendment, but by virtue of Con. Rule 575 of 1897, notwithstanding a claim for interest on an account stated, final judgment may be rightly signed for liquidated demand upon the account stated, while as to the rest of the claim, the judgment should be interlocutory only; and if under these circumstances judgment for the whole claim has been entered, it is not a nullity but a mere irregularity, and terms may be rightly imposed on setting it aside. *George* v. *Green* (1907), 8 O. W. R. 247, 787, 13 O. L. R. 189, 10 O. W. R. 292, 14 O. L. R. 578, affirmed, 42 S. C. R. 219.

Application to set aside — Affidavit of merits — Discretion — Appeal — Practice. *Jones* v. *Murray*, 9 W. L. R. 204.

Application to set aside — Affidavit of merits — Grounds of defence — Arrangement between solicitors — Conditional leave to defend — Payment into Court — Costs. *Imperial Life Assurance Co. of Canada* v. *Best*, 7 W. L. R. 446.

Application to set aside — *Affidavit of merits—Grounds of defence—Practice.*]—On an application to set aside a regular judgment on default, a mere statement that the defendant has a good defence on the merits is not sufficient; but there must be facts set forth which will enable the Court or Judge to decide whether or not the defendant has a probable defence to the action. *Stewart* v. *McMahon*, 7 W. L. R. 643, 1 Sask. L. R. 309.

Application to set aside—Delay—Failure to explain satisfactorily — Negotiations for settlement—Dispute as to part of claim —Prejudice by delay—Refusal to open up case. *Regina Trading Co.* v. *Godwin*, 7 W. L. R. 651.

Application to set aside — *Infant defendant — Procedure — Guardian — Rule 88.*]—A judgment recovered in default of appearance against an infant, before a guardian has been appointed under Rule 88 of the Judicature Ordinance, will be set aside, even if the plaintiff was not aware of the infancy of the defendant. *Westaway* v. *Hamer*, 7 W. L. R. 473, 1 Sask. L. R. 50.

Application to set aside—*Meritorious defence to part only of unsevered claim.*]—The plaintiff secured judgment, regularly, against the defendants in default of pleading. The claim was for $5,000 for commission on sale of bonds and for securing legislation validating such bonds, the amount claimed in respect of each of such services not being specified. The defendants moved to set aside the judgment, disclosing a defence as to the claim for commission, but not as to the other part of the claim:—*Held*, that a meritorious defence sufficient to warrant the setting aside of a regular judgment as such a defence as would entitle the defendant to have the matter inquired into by the Court.—2. That, as the plaintiff had not severed his claim for different services, the disclosure of a meritorious defence as to one part of the claim was sufficient to warrant the judgment being set aside. *Stratton* v. *City of Saskatoon*, 1 Sask. L. R. 426, 9 W. L. R. 136.

Application to set aside — Solicitor's slip — Meritorious defence to part of unsevered claim — Evidence — Affidavits — Judgment set aside on terms — Costs. *Stratton* v. *City of Saskatoon*, 9 W. L. R. 136.

Application to set aside — Summary judgment for part of claim—Proceeding for whole claim—Statement of claim — Irregularity—Judgment vacated. *Sovereign Bank* v. *Laughlin*, 13 O. W. R. 691.

Application to set aside default judgment — Consent — Mistake — Laches—Estoppel—Rules of Court. *Canadian Bank of Commerce* v. *Syndicat Lyonnais Du Klondike* (Y.T.), 6 W. L. R. 424.

Debt — *Interest—Unliquidated demand—Irregularity.*]—Where in an action for a debt or liquidated demand, there is also a claim for interest as accruing prior to the issue of the writ, but no allegation in the statement of claim of any contract, express or implied, to pay it, it cannot, being an unliquidated demand, be included in a judgment signed by default under Rule 90. Such judgment will be set aside as irregular. *Ewing* v. *Latimer*, 5 Terr. L. R. 499.

Defective service—*Petition in review.*]—If a defendant has not been legally served in any of the ways mentioned in Art. 1175, C. P., he may demand to be permitted to proceed against the judgment rendered against him by default by a petition in review. *Awed* v. *Girnaill*, 9 Que. P. R. 31.

Defence — Account—Setting aside judgment—Terms—Costs. *Pringle* v. *Waller*, 9 O. W. R. 35.

Defendant not appearing—*Submission to jurisdiction.*]—The Court will pronounce judgment in favour of the plaintiff where the defendant has not appeared, even where there is no jurisdiction *ratione personæ*. *Massey-Harris Co.* v. *Bélanger*, 9 Que. P. R. 303.

Delay in entering—Order for leave to enter—Terms—Leave to apply. *Millar* v. *Bingham*, 11 O. W. R. 264.

Dismissal of action—*Default of plaintiff —Application by plaintiff for relief—Service on defendant's solicitor—Duration of retainer —Absent defendant.*] — On 20th December, 1904, the usual præcipe order for security for costs was taken out and served. Owing to a change in the firm of plaintiffs' solicitors, the order was not complied with; and on 18th January, 1905, an order issued un-

der Rule 1203 dismissing the action with costs; but no judgment was entered or costs taxed. On 23rd January this order came to the knowledge of plaintiffs' solicitors; they at once moved under Rule 358 to be allowed to put in security and proceed with the action. Notice of this motion was served on defendant's solicitor (as appeared by admission endorsed thereon). But on the return of the motion on 28th January, he stated that defendant had been informed by him that the action had been dismissed, and that defendant had left the province, without giving any address; and that the solicitor did not consider himself any longer entitled to act:—*Held*, wherever a judgment has been entered on default of either party, a possible remedy is provided by Rule 358; and that, so long as that Rule can be invoked, the action is still pending. In all such cases the motion has to be made in the action, which must therefore be viewed as still pending—otherwise no motion could be made—and the only remedy would be by petition, if any remedy existed. Then it follows that if the action is pending, the solicitor on the record is still solicitor until a change has been made as directed in Rule 335. [See *Newcombe* v. *McLuhan*, 11 P. R. 461.—Ed.] *Muir* v. *Guinane*, 5 O. W. R. 324, 6 O. W. R. 64, 10 O. W. R. 367, see, also, 6 O. W. R. 383, 844.

Dower—Writ of summons—Acceptance of service by solicitor—Defendant not appearing—Order xiii., Rule 13—Irregular judgment. *Cameron* v. *Chisholm*, 40 N. S. R. 610.

Ex parte application — *Default note—Motion to set aside judgment—Costs.*]—A statement of defence filed after the pleadings have been noted as closed for default of defence under Rule 263, is irregular, but not a nullity, and should be regarded as evidence of an intention to defend; and where, as now permitted by Rule 586, a motion for judgment upon the statement of claim is made *ex parte*, and the fact of the defence having been filed is brought to the knowledge of the Judge, he should direct notice to be served in order to give the defendant an opportunity to make his defence regular. In this case judgment having been granted *ex parte*, it was ordered that there should be no costs of the defendant's motion for relief under Rule 358, which was granted. *Jackson* v. *Gardiner*, 20 C. L. T. 177, 19 P. R. 137.

Ex parte proceedings—*Setting aside—Practice—Petition.*]—A defendant cannot by simple motion demand the dismissal of an action which has been adjudged against him *ex parte* by the Court; whatever allegations of irregularities in the procedure of the plaintiff are made, the defendant can only proceed against them by petition presented under Arts. 1175 and 1176, C. P., for the purpose of reviewing and annulling the judgment already entered against him, and by observing the procedure laid down in Art. 1176. *La Banque Nationale* v. *Desrochers*, 9 Que. P. R. 59.

Failure to comply with order for security for costs — Judgment issued *ex parte*—Terms of order—Motion to set aside judgment—Merits. *Thomas* v. *Clark* (Y.T.), 1 W. L. R. 512, 2 W. L. R. 126.

Interrogatories — *Default of reply — Company — Service.*]—*Faits et articles* addressed to a corporation, and served at the domicil of the secretary, are not to be taken as admitted; and a judgment rendered thereon, upon the ground only of default to reply to these *faits et articles*, will be reversed. *Rackland* v. *Club de Chasse à Courre Canadien*, 8 Que. P. R. 136.

Irregular delivery of statement of claim—Validation by agreement of solicitors—Date of validation—Time for delivery of defence—Judgment entered prematurely — Setting aside—Costs. *McDowell* v. *Martin*, 12 O. W. R. 1263.

Irregularity — Motion to set aside — Merits—Delay in applying—Questionable defence — Counterclaim — Affidavits — Intituling — Misnomer — Re-swearing—Amendment. *Sandhoff* v. *Metzer* (N.W.T.), 4 W. L. R. 18.

Irregularity — *Time for pleading—Confession of judgment—Refusal to accept—Notice.*]—The production by the defendant of a confession of judgment, within the delay to plead, is a bar to the plaintiff's obtaining a default judgment against him. He must be served with a notice that the confession is not accepted, and from such service the delay to plead is computed. Hence, when a defendant files a confession of judgment on the sixth day after his appearance, a judgment by default, registered against him on the seventh by the prothonotary, is irregular and will be set aside on an inscription for review. *Bruneau* v. *Magnan*, 34 Que. S. C. 179, 9 Que. P. R. 318.

Issue as to validity of default judgment—Motion to set aside judgment after 15 years — Service of writ of summons — "Signing judgment" — Sufficiency — Form of judgment—Special endorsement of writ—Price of goods sold—Stated account—Interest — Nullity of judgment — Irregularity — Setting aside judgment—Terms. *Green* v. *George*, 8 O. W. R. 247, 787.

Judgment entered for more than amount claimed in writ. *Fawcett* v. *Norton*, 2 E. L. R. 146.

Leave to defend — *Solicitor's slip — Merits—Discretion of judicial officer — Appeal.*]—When a judgment is regularly entered in default of a defence, a good defence on the merits should be shewn on an application to set it aside and allow a defence to be filed, even if it was by the error of the clerk of the defendant's solicitor, in not carrying out his instructions, that the defence intended was not filed in time. *Watt* v. *Barnett*, 3 Que. B. D. 363, approved. Where, however, the Referee has exercised his discretion in favour of the defendant and made an order giving leave to defend, such order should not be reversed on appeal, although the Judge cannot find that any defence on the merits has been shewn. *Moore* v. *Kennedy*, 12 Man. L. R. 173, followed. *McCaul* v. *Christie*, 15 Man. L. R. 358, 1 W. L. R. 332.

Motion for judgment in default of defence in an action to rescind a land pur-

chase contract to have moneys paid returned and other relief. Defendant's counsel having raised a question of law worthy of consideration, defendant allowed to defend on terms notwithstanding his solicitor's affidavit in answer was insufficient. *Miller* v. *Ross* (1909), 12 W. L. R. 315.

Motion to set aside—Absence of seal—Alleged nullity — Irregularity — Costs — Failure to give notice of taxation—Striking out part of judgment—Application for leave to defend on merits — Defence — Failure to give credit. *American-Abell Engine and Thresher Co.* v. *Snider* (N.W.T.), 4 W. L. R. 542.

Motion to set aside—Defence—Counterclaim — Security for costs — Summons or notice of motion—Affidavit of merits—Security in hands of defendants. *Moyie Lumber & Milling Co.* v. *May* (N.W.T.), 1 W. L. R. 152.

Motion to set aside—Defence—Merits—Leave to defend—Terms—Judgment standing as security—Costs. *Bank of Nova Scotia* v. *Ferguson*, 8 O. W. R. 907.

Motion to set aside—Defence on merits—Delay in moving—Terms—Costs. *Gillard* v. *McKinnon*, 6 O. W. R. 365.

Motion to set aside—*Defendant never served with writ—Trial of issue ordered—Security for costs.*]—Defendant moved to set aside a judgment obtained by default alleging that he was never served with a writ of summons. It was suggested that another person having a similar name had by mistake been served for defendant. Master in Chambers directed that a trial of an issue as to whether applicant was served or not could be had upon applicant giving security for costs within two weeks.—*George* v. *Green*, 13 O. L. R. 189, 14 O. L. R. 578, followed. *Dancey* v. *Wighton* (1910), 16 O. W. R. 919, 2 O. W. N. 27.

Motion to set aside — Irregularity—Computation of time for appearance—Delay in moving—Absence of explanation—Absence of merits—Dismissal of motion. *Scott* v. *Hoffner* (N.W.T.), 3 W. L. R. 247.

Motion to set aside — Irregularity in service of process—Waiver—Delay in moving—Dismissal of motion—Costs. *Piggott* v. *French*, 7 O. W. R. 679, 783.

Motion to set aside — *Laches—Irregularity—Issue of writ of summons from wrong office — Construction of Rule of Court.*] — Upon an application, made in 1910 (under s.-s. 2 of s. 57 of the Judicature Act), to set aside a judgment of the Supreme Court of the North-West Territories, entered in 1898, for default of appearance to a writ of summons personally served upon the defendant, upon the ground that the writ was void by reason of being issued out of the office of the clerk of the Supreme Court for the judicial district of East Assiniboia, instead of out of the office of the deputy clerk of the said judicial district of Yorkton, where the defendant resided and the cause of action arose:—*Held*, that, under the Rule in force in 1898, the writ could be issued either from the office of the clerk or the deputy clerk; or, if not, that the issue from the office of the clerk was a mere irregularity, which was cured by the laches of the defendant; and, no merits being shewn, the application should be dismissed.—*Saskatchewan Land and Homestead Co.* v. *Leadly*, 6 Terr. L. R. 82, distinguished. *Lawlor* v. *Ashdown* (1910), 14 W. L. R. 330.

Motion to set aside—*Terms—Security for costs.*]—As the defendant is a foreign corporation, and being substantially the actor, *held*, that further security for costs should be given. *Marks* v. *Michigan Sulphite Fibre Co.* (1909), 14 O. W. R. 567. See 14 O. W. R. 83.

On appeal, it was *held*, that defendants had produced very strong evidence to support their contention that they did not owe plaintiffs anything, and that the Master's findings ought not to be disturbed. *Marks* v. *Michigan Sulphite Fibre Co.* (1909), 14 O. W. R. 1018, 1 O. W. N. 208.

Motion to set aside order dismissing action — Default of security for costs—Rule 1203. *Sparrow* v. *Blue Ribbon Theatrical Co.*, 6 O. W. R. 389.

Nonsuit — *Judgment as in case of—Negligence.*]—Where defendant seeks to obtain judgment as in case of non-suit for not proceeding to trial according to notice, plaintiff, to prevent it, must shew that his not proceeding to trial was not caused by his own negligence. *Weir* v. *Shaw* (1861), 1 P. E. I. R. 189.

Opening up—*Breach of faith—Merits.*]—Where a judgment is entered in breach of good faith between solicitors, and without notice, and pending negotiations for a settlement, it is not necessary to disclose a good defence on the merits to have the judgment opened up. *Tupper* v. *Sutcliffe*, 38 N. S. R. 332.

Opposition sur opposition ne vaut means that one cannot allow himself to be condemned by default, to file an opposition, to again default on such opposition and to meet the judgment upon it with another opposition.—It is not forbidden to renew an opposition which has been annulled on a point of form. *Lamarche* v. *Archambault* (1910), 12 Que. P. R. 165.

Order setting aside — Merits—Discretion — Appeal — Delay. *Anticknap* v. *City of Regina* (Sask.), 7 W. L. R. 163.

Petition in revision — *Irregular procedure—Arts. 136, 1175, C. C. P.*]—A petition for the revision of a judgment by default under Art. 1175, C. C. P., lies in favour of a defendant who has not been summoned in any one of the ways provided by law generally, and is not restricted to cases where a defendant is ordered to appear by advertisement in newspapers under Art. 136, C. C. P. *Awed* v. *Gimaill*, 32 Que. S. C. 111.

Practice — *Affidavit.*]—It is necessary to file an affidavit of default when judgment is signed for want of statement of defence. *Hyslop* v. *Ostrom*, 9 O. W. R. 933, 14 O. L. R. 136.

Res judicata—*Judgment for defendant by default at trial — New action for same cause—Proof of identity.*]—A judgment in favour of the defendants in default of the plaintiff's appearance at the trial, under O. 34, R. 29, is to be considered a dismissal of the action on the merits, and when set up as a defence in a second action in respect of the same subject matter, which may be established by the specially endorsed writ in the first action, is a bar. The proper course for the plaintiff was to have applied to the Judge who heard the clause to set aside the judgment and for a re-hearing. *Mumford* v. *Acadia Powder Co.*, 37 N. S. R. 375.

Rules 586, 593—Statement of claim—Assignment of mortgage procured by fraud — Re-assignment — Damages — Indemnity. *Damm* v. *Crandall*, 11 O. W. R. 668.

Service of process on person of same name as defendant—*Judgment pursuant to service—Petition by real defendant to set aside judgment — Discontinuance — Costs.*]—A judgment rendered against one who has been served and who is named in the writ of summons as the defendant, but who is in reality only a person of the same name as the true defendant, does not afford ground in favour of the latter for a petition, upon the ground that process in the action has not been served on him. He is only a third person in regard to the suit. A discontinuance of the action and the judgment, notice of which is given to the party served and against whom judgment has gone, puts an end to the proceeding. A petition by the debtor will, in such case, be dismissed, regard being had to the circumstances in the disposition of costs. *Morcault* v. *Thibaudeau*, 34 Que. S. C. 270, 10 Que. P. R. 92.

Service of statement of claim by publication — *Action for declaration of trusteeship of land and to transfer title to plaintiff — Substitutional service — Man. Rule 183.*]—Motion by plaintiff for judgment for possession of land, plaintiff claiming defendant was a bare trustee. Defendant was served by publication. No defence filed. Motion refused, it not appearing that publication took place where defendant might have been reached. *Howard* v. *Lawson*, 12 W. L. R. 213.

Service of writ of summons — *Company—Abuse of process of Court—Right of parties interested to intervene.*]—The plaintiff obtained judgment by default in an action against the defendant company, of which he was president. The writ in the action was served upon the plaintiff only, and there was no other service upon, or notice of the pendency of the action, given to anyone connected with the company or concerned in its affairs. The judgment having been set aside at the instance of the respondents, who were trustees for the bondholders of the company, and had recovered judgment against the company for a large amount:—*Held*, that the mode of service was one that could not be adopted, and that it should be set aside as an abuse of the process of the Court.—*Per* Weatherbe, J., dissenting, that, as plaintiff's judgment was one which could not be set off against respondents' claim, they were not prejudiced by it and should not be allowed to set it aside. *Holmes* v. *Stewiacke Rw. Co.*, 32 N. S. R. 395.

Setting aside — Abatement of action—Delay. *Doble* v. *Frontenac Cereal Co.*, 7 O. W. R. 266.

Setting aside.]—To set aside a default judgment the affidavit in support of the application must shew not only a good defence on the merits, but disclose what the character of the defence is, as judicial discretion must be exercised according to the rules of law. *Jones* v. *Murray*, 9 W. L. R. 204.

Special indorsement — *Nullity—Irregularity — Account stated — Interest — Setting aside judgment — Terms — Signing and entry of judgments—Directing issue.*]—The claim for interest on an account stated was not a proper subject of special endorsement under Con. Rule 245 of 1888, and is not under the present Con. Rule 138, inasmuch as an account stated does not of itself entitle the creditor to interest. Interest is not chargeable upon such an account unless a fixed time for payment was agreed upon or a demand for payment was subsequently made, or upon an account endorsed shewing that the parties have themselves in adjusting their accounts allowed interest upon balances outstanding, though a jury might and probably would allow such interest as damages.—A judgment signed for default of appearance to a writ, the endorsement upon which is not a special endorsement authorised by the Rules of Court, would be a nullity and not merely irregular, and susceptible of cure by amendment, but by virtue of Con. Rule 711 of 1888, and now of Con. Rule 575 of 1897, notwithstanding such a claim for interest, final judgment may be rightly signed for the liquidated demand upon the account stated, while as to the rest of the claim, the judgment should be interlocutory only; and if under these circumstances judgment for the whole claim has been entered, it is not a nullity but merely irregular, and terms may be rightly imposed on setting it aside:—*Held*, also, that the requirements of Con. Rules 764 and 775 (1888) (*cf.* now Con. Rules 628 and 637 (1897)) as to the signing and entry of judgments, were satisfied by the proper officer placing his signature upon the back of the judgment under the words "judgment signed October 6th, 1890," followed by a memorandum in the judgment book in his office signed by him, although he did not sign the judgment on its face.—The propriety of directing that a question as to the validity of a default judgment impugned because of alleged defects in the endorsement of claim upon the writ should be determined by the trial of an issue, is open to grave doubt. *Green* v. *George*, 8 O. W. R. 247, 787; *George* v. *Green*, 13 O. L. R. 189. Affirmed by the Court of Appeal, Meredith, J.A., dissenting, 10 O. W. R. 292, 14 O. L. R. 578.

Summary judgment for part of claim—*Proceedings for whole claim—Irregularity—Judgment vacated.*] — Plaintiffs had obtained an order for judgment against one defendant on 2 out of 3 promissory notes. Then they delivered a statement of claim for the full amount. This they can do, but the costs of the motion for judgment must be to

plaintiffs; in any event the judgment must be vacated. *Sovereign Bank* v. *Laughlin*, 13 O. W. R. 691.

Time for filing defence—*Computation*—Vacation—Sunday—Irregularity. *Handley* v. *Scott and Warren* (N.W.T.), 2 W. L. R. 341.

Two defendants—*Discontinuance against remaining defendants — Irregularity—Setting aside judgment.*]—Two defendants, F. and W., not defending an interlocutory judgment was entered against them. Notice of discontinuance as to remaining defendants was filed and final judgment entered against F. and W., the names of the other defendants having been admitted from the final judgment. The notice of discontinuance was not served on remaining defendants for about a year after final judgment entered. Judgment set aside and defendants F. and W. allowed in to defend. Plaintiff's solicitor, who entered final judgment, to pay costs. *Macdonald* v. *Fairchild*, 11 W. L. R. 236.

Undertaking to appear — *Failure to appear—Setting aside—Costs.*]—The defendant's solicitor accepted service of process and undertook to enter an appearance, which he failed through inadvertence to do, and afterwards advised the plaintiff's solicitor, and requested him to have the interlocutory judgment signed for default set aside by consent, and allow the defendant to defend: —*Held*, that, when a solicitor accepts service and undertakes to appear and does not, the only course is to proceed against him by attachment; nothing short of personal service will justify entering judgment. *Rice* v. *Stewart*, 20 C. L. T. 414.

Validity of judgment.]—The propriety of directing that a question as to the validity of a default judgment impugned because of alleged defects in the endorsement of claim upon the writ should be determined by the trial of an issue is open to grave doubt. *George* v. *Green* (1907), 8 O. W. R. 247, 787, 13 O. L. R. 189, 10 O. W. R. 292, 14 O. L. R. 578, affirmed, 42 S. C. R. 219.

Want of jurisdiction ratione personæ vel loci—*Waiver—Duty of Court.*]—Want of jurisdiction *ratione personæ vel loci* is only waived by the appearance of the defendant and his default to plead it within the delays; it does not give a Court power to condemn by default a defendant improperly summoned. If want of jurisdiction is pleaded on appeal by the defendant, the duty of the Court is to put the parties out of Court, reserving the plaintiff his recourse before the competent tribunal. *Canadian General Electric Co.* v. *Canada Wood Manufacturing Co.*, 7 Que. P. R. 140.

Writ of summons not specially indorsed—Setting aside—Delay in moving—Issue of execution. *Hogaboom* v. *Hill*, 7 O. W. R. 873.

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9. Interlocutory or Final.

Account — *Time fixed by judgment for rendering — Damages in default — Death of defendant during time fixed — Revivor — Universal legatee — Payment of costs.*]—On 16th November, 1901, the judgment of the Court required the defendant to render to the plaintiff, within 30 days, an account of a quantity of wood which defendant had to dispose of for plaintiff, and, in case of default to render the account, to pay to the plaintiff $9,000, with interest, and costs in any case. On 30th November, 1901, the defendant died, leaving his wife his universal legatee. His decease was not entered on the roll. On 2nd December, 1901, the widow, as universal legatee, paid the costs of the action. On 13th January, 1902, the plaintiff served the judgment on the universal legatee, with a demand for payment of the $9,000 within eight days, in default of which the judgment would be executed against her. On 21st January, 1902, she presented a petition alleging the death of her husband, her capacity of universal legatee, and asking that she should be added as a party to the suit in place of her husband and allowed to proceed in it. The plaintiff answered that the 30 days having expired, the judgment had become final as to the $9,000; that the petitioner had acquiesced in the judgment by paying the costs; and that there was no suit to which the petitioner could be made a party:—*Held*, that the plaintiff had not at the time of the defendant's death acquired a right to the $9,000, since it was not due till after the expiry of 30 days, and then only in default of the account being produced within that time.—2. That the decease of the defendant stopped the running of the 30 days, for a dead man cannot render an account; and it was not a case within Arts. 268, 269, C. P., which say that suits are valid up to the day of service of notice of a party's death, for as against the defendant there had been no suit since his death.—3. That the universal legatee, in paying the costs of the action, acquiesced in the judgment, but did not acquiesce in the default to render an account and to pay the $9,000.—4. That the universal legatee was in a position to take up the suit at the point where it was at the death of the defendant.—5. *Quære*, as to the effect of the judgment, whether the defendant, if he had lived, could, after the expiry of the 30 days, have demanded and obtained further time to render the account. *Girard* v. *Letellier*, 21 Que. S. C. 192.

Appeal — *Plea of compensation.*] — 1. Leave to appeal from an interlocutory judgment will not be granted where in the opinion of the Judge, the judgment *a quo* is correct.—2. In an action on a promissory note, an appeal will not lie from an interlocutory judgment rejecting a plea of compensation for work done; this allegation must be pleaded in an appropriate form of separate action. *Laplante* v. *Laplante*, 11 Que. P. R. 46.

Appeal from an interlocutory judgment—*Motion to strike out the inscription.*] A judgment maintaining a partial inscription in law is an interlocutory judgment and there is no appeal to the Court of Revision from this judgment. *St. Jacques* v. *St. Jacques* (1909), 10 Q. P. R. 411.

Assessment of damages — *Slander.*]—The action was commenced by writ of summons indorsed—"The plaintiff's claim is for damages for slander." No appearance having

been entered, the plaintiff signed interlocutory judgment against the defendant according to form 146, and set the cause down for assessment of damages at a sittings of the High Court:—*Held*, that there being nothing to shew that the action was brought under R. S. O. c. 68, s. 5, it must be treated as an ordinary action of slander; Rule 578 therefore applied to the cause; the delivery of a settlement of claim was unnecessary; and the plaintiff had no right to sign interlocutory judgment and have the damages assessed as he proposed. Origin of Rule 578. *Stanley* v. *Litt*, 20 C. L. T. 64, 19 P. R. 101.

Court of Review—*Power of the Court of original jurisdiction, as to the same, when dealing with the case upon the merits—Action to account—Consistency in pleading thereto—Admission of position and acts involving accountability and denial of the same on the ground of nothing to account for.*]—A judgment of the Court of Review, reversing that of the Superior Court, which had dismissed an action on the ground that the evidence tendered by the plaintiff was inadmissible, and ordering a re-trial with leave to adduce the same evidence, is not conclusive, nor binding on the Court, when dealing with a case upon its merits, but is subject, like all other interlocutory judgments, to be then set aside. A party sued to account for his administration of an estate as trustee, cannot, while admitting his accentance of the trust and the performance of such acts as paying small debts and funeral expenses, deny his accountability on the ground that he never was possessed with any money or property of the trust to administer or account for. An account rendered, judicially closed, is intended not only to cover and dispose of the matters in it, but also to establish that there is no further accountability. *Slater* v. *Currie* (1908), Q. R. 18 K. B. 246.

Declinatory exception dismissed — *Appeal as of right — Costs—8 Edw. VII. c. 74.*]—A judgment dismissing a dilatory exception, which asks that certain other parties be called into the case, reserving defendant's right to appeal from the judgment, is an interlocutory judgment from which an appeal does not lie as of right.—If it is the Court itself which raises its want of jurisdiction, no costs will be allowed. *Letang* v. *Decarie*, 11 Que. P. R. 87.

Interim injunction—*Leave to appeal.*]—The judgment granting an interlocutory injunction does not fall under Art. 46, C. P., and leave to appeal therefrom will not be granted. *Wright* v. *City of Hull*, 4 Q. P. R. 52.

Judge at the trial—*Review by.*]—The Judge at the trial cannot review an interlocutory judgment of the Superior Court, for, although it may be this Court that sits at the trial and becomes seised of the merits of the case, it is only so seised of the merits when the trial is over, and it is only in deciding on the merits that it can review the interlocutory judgment. Whilst the case has not reached the stage when it is under consideration by the Judge, he is not in a position to judge of the merits even, and he plainly cannot modify an interlocutory judgment on a question of law. *Galindez* v. *The King*, Q. R. 26 S. C. 171.

Revocation of stay of execution — *Leave to appeal.*]—An interlocutory judgment is one which is rendered in a cause between the institution of the suit and the final judgment therein, and is given in an intermediate state of the cause on some intermediate question before the final decision. A judgment revoking the stay of execution previously ordered by the Court, and ordering the bailiff to proceed with the execution of the property seized, is a final judgment, and a petition for leave to appeal therefrom cannot be granted. *Shannon* v. *Turgeon*, 4 Q. P. R. 49.

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10. Interest on Judgments.

Creditor in England who obtains a judgment against a railway in Quebec may recover interest at 4 per cent. per annum against the company. *Royal Trust Co.* v. *Baie de Chaleurs Ry. Co.* (1908), 13 Ex. C. R. 9.

Interest — *Verdict.*]—The plaintiff obtained a verdict at the trial, but the trial Judge dismissed the action. The Court *en banc* allowed an appeal by the plaintiff and ordered that judgment be entered for the amount of the verdict:—*Held*, that the plaintiff was entitled to interest from the date of the verdict. *Gordon* v. *City of Victoria* 7 B. C. R. 339.

Judgments bearing interest pronounced before the coming into operation of 62 Vict. (Que.), c. 51, such interest is prescribed by the term of 30 years and not that of 5 years under Art. 2250 of the Civil Code, as it stood before the passing of that Act. *Royal Trust Co.* v. *Baie de Chaleurs Ry. Co.* (1908), 13 Ex. C. R. 9.

Judgments for costs bear interest only from date of taxation. *Star Mining Co.* v. *White* (1910), 15 B. C. R. 11.

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11. Merger in Judgments.

See Merger.

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12. Relief Against Judgments.

Action — *Petition—Fraud—Affidavit.*]—The revocation of a judgment may be demanded by a direct action, while it may also be effected by means of a petition.—2. One who attacks, on the ground of fraud, a judgment against him, and alleges that it causes him serious prejudice, is not obliged to make it appear in his declaration that, but for the alleged fraud, the judgment would have been different from what it is.—3. A petition should be accompanied by an affidavit, but if, upon an inscription in law against a direct action, the absence of such affidavit is not set up as a ground, the Court cannot, of its own motion, take notice of the absence of the affidavit. *Charette* v. *Leveillé*, 4 Q. P. R. 310.

Action to annul — *Fraud — Parties—Creditors.*]—A decree, like a contract, may be attacked for fraud by a party interested.

—2. An action to annul a decree is subject to the same rules as an action to set aside a conveyance, and, in the same way, enures to the benefit of all the creditors interested. *McNally* v. *Préfontaine*, 4 Que. P. R. 125.

Action to rescind—*Right of appeal.*]—A direct action to set aside a judgment does not lie if the judgment is appealable. *Crépault* v. *Provencher*, 35 Que. S. C. 377.

Action to set aside — Assignment of salary—Previous garnishing proceeding in Division Court—*Res judicata*—Fraud—False testimony. *Johnston* v. *Barkley*, 4 O. W. R. 453, 6 O. W. R. 549, 10 O. L. R. 724.

Action to set aside—*False evidence—Materiality.*]—When an action or petition in revocation of judgment is founded on the subsequent discovery of the falsity of documents, or of evidence adduced at the trial, or on the subsequent discovery of new evidence of a conclusive nature not then available, it is essential that the documents or evidence in question should be material and such that, according as they would have been omitted in the first case, or adduced in the second, the judgment sought to be revoked would have been different. Hence, an action to revoke a judgment settling boundaries will not be maintained on the ground that the report and evidence of a surveyor, heard at the trial, was subsequently discovered to be false, if it appears that the judgment would have been the same, had the report and evidence in question not been before the Court. *American Asbestos Co.* v. *Johnsons Co.*, 34 Que. S. C. 185.

Action to set aside — *Jurisdiction — Fraud—Pleading.*]—Where a judgment has been obtained by fraud, the Court has jurisdiction, in a subsequent action brought for that purpose, to set the judgment aside; but a statement of claim alleging that "the plaintiff believes and charges the fact to be that no service of the writ of summons in the said action was ever made upon him, and that the said liability of the plaintiff to the defendants and co-indorser was satisfied and discharged either prior or subsequent to the institution of said action, as defendants well knew at the time, is insufficient as not alleging that the judgment in question was obtained by fraud, or, if it can be held to do so, as not positively averring the recovery of the judgment against the plaintiff, which is also essential. *Richards* v. *Williams*, 11 B. C. R. 122, 1 W. L. R. 9.

Action to set aside—*Superior Court—Territorial jurisdiction — Parties.*]—A party cannot, in another cause, begun in another district, have annulled and set aside a judgment rendered by the Superior Court in a cause in which the parties were not identically the same as in the second cause. *Henderson* v. *Harbec*, 8 Que. P. R. 73.

Application to set aside judgment of Court after trial in absence of defendant—Delay in applying—Negligence of defendant — Reference for taking accounts under judgment proceeding without notice to defendant—Setting aside report on terms—Costs. *Siemer* v. *Johanson* (Yuk.), 6 W. L. R. 156.

Consent — Misrepresentations — Motion to stay—Motion to vacate—Forum. *Dominion Syndicate* v. *Oshawa Canning Co.*, 2 O. W. R. 674.

Consent—*Provisions for payment of purchase money for land—Date of payment fixed —Mistake as to date—Default—Power of Court to relieve — Terms—Costs.*]—Defendant purchased land from plaintiff on an agreement. Defendant made default. An action was brought and judgment was pronounced at the hearing by consent of counsel. The judgment intended to place the rights of the parties upon a clear and definite basis. By the judgment defendant was to pay $75 on 28th December, 1910, or stand absolutely debarred from all rights under the judgment. This date was named as one month after the 28th November, 1910, a date formerly arranged between the parties. Defendant thought he had one month from date of judgment, 8th December, 1910, in which to make the payment. On default accruing, plaintiff issued a writ of possession. Defendant moved for an order relieving him from the consequences of his mistake. — Middleton, J., *held*, 23 O. L. R. 29, that defendant should be relieved upon payment within a week (a) the $75 and interest upon that sum at 5 per cent. until paid, computed from December 28th, 1910; (b) the costs of the writ of possession and incidental to its issue, fixed at $10, and the sheriff's fees in addition; (c) the costs of this motion, fixed at $25; (d) and upon his paying now as an evidence of his good faith, the next instalment, $75, which under the judgment would fall due on June 28th, 1911. *Lovejoy* v. *Mercer* (1911), 18 O. W. R. 176, 2 O. W. N. 531, 23 O. L. R. 29.

Consent judgment — *Setting aside.*]—A judgment declaring the contestation to an opposition maintained by consent cannot be set aside upon petition, unless it is attacked by way of improbation. *Beaubien Produce and Milling Co.* v. *Corbeil*, 3 Que. P. R. 435.

Construction—Order to refund money retained by executors—Joint or several liabilities—Reference—Leave to appeal from reports—Terms — Interest. *Boys' Home* v. *Lewis*, 3 O. W. R. 625, 779, 4 O. W. R. 243, 5 O. W. R. 39.

Default—Application to set aside—Delay —Discovery of defence — Condition of payment into Court. *Cayley* v. *Graham*, 2 O. W. R. 400.

Default — Opening up—Terms—Alimony. *Edgeworth* v. *Edgeworth*, 2 O. W. R. 408, 3 O. W. R. 71.

Default judgment—*Motion to set aside —Order reducing amount— Power to make — Costs — Mala fides.*]—An action having been brought in a County Court to recover an amount claimed for taxes, an agreement was entered into on behalf of the defendant to pay the amount claimed for debt and costs within a day or two from a time fixed, the 16th or 17th May, 1901. On the 18th May an amount was paid on account of costs, and on the 21st, the balance not having been paid, judgment by default was entered for the full

amount claimed for debt and costs, without giving credit for the amount paid on account. An application to set aside the judgment was refused, but an order was made reducing it to the proper amount:—*Held*, that under O. xiii., r. 10, the Judge of the County Court had power to make such an order. Inasmuch as the application was a necessary one, the defendant should have had the costs of the motion below, but, as there was a substantial condition in respect of which he had not succeeded, there should be no costs of the appeal.—*Semble*, that, if the judgment had been entered in breach of good faith, the amendment should not have been granted, but that in this case it was the defendant's duty to have seen that the terms of the arrangement as to payment were complied with. *Halifax* v. *Bent*, 33 N. S. R. 546.

Default judgment — *Statement of defence—County Court.*]—An order made in an action in a County Court for services of notice of a writ out of the jurisdiction provided that the defendant should have twelve days after service "within which to appear to notice of the writ and file his defence to the action." Within the twelve days an appearance in the usual form was entered, the following words being added: "The defendant admits only $103, but otherwise disputes plaintiff's claim in this action."—*Held*, that this was in effect a statement of defence; that filing was, under the order, all that was necessary, and that a judgment entered for default of defence was void. *Voight Brewery Co.* v. *Orth*, 23 C. L. T. 168, 5 O. L. R. 443, 2 O. W. R. 304.

Default judgment—*Petition for review—Declinatory exception.*]—A defendant who does not reside in Canada and has been summoned by way of publication, may, with his petition for review of a judgment rendered against him by default, file preliminary exceptions, and notably a declinatory exception, if the contract set up by the plaintiff has not been made in the province of Quebec and the cause of action has not arisen there. *Levy* v. *Arkbulatoff*, 5 Que. P. R. 204.

Default of appearance—*Motion to set aside service of writ of summons out of jurisdiction—Stay of proceedings—Irregular judgment.*]—A notice of motion by the defendant to set aside an order for service of a writ of summons out of the jurisdiction, on grounds of irregularity, operates as a stay of proceedings until finally disposed of, so that the time for entering the appearance does not run in the meanwhile. A judgment signed by the plaintiffs, for default of appearance on the same day that an order dismissing the defendant's motion was issued, was set aside as irregular. *Confederation Life Assoc.* v. *Moore*, 24 C. L. T. 25, 6 O. L. R. 603, 2 O. W. R. 941, 1030, 1087, 1120.

Default to shew cause—*Motion to set aside—Merits—Improvidence.*]—On a motion for judgment under Order XIV., after due service of notice of motion, affidavits, and exhibits, the defendant did not appear, and the plaintiff secured an order. This was an application to set aside the order, on the ground that the defendant's affidavits to resist the motion were misdirected to Toronto instead of to Halifax. The order was set aside on payment of costs. On such an application the merits will not be looked at, the sole question being: "Has the judgment been improvidently entered?" A subsequent day was appointed for the argument of the merits. *Le Gresley* v. *Le Moine*, 21 C. L. T. 88.

Defendant ordered to complete contract — *Loss of the money deposited as security — C. P. 541, C. C. 1241.*]—When a final judgment orders the plaintiff to complete his contract with the defendant within a certain delay, under pain of forfeiture of a sum of money deposited with the defendant, there is *res judicata* as to the forfeiture of such deposit if the plaintiff does not comply with the terms of the judgment; and the plaintiff cannot afterwards ask for another decision respecting that part of his conclusions concerning such deposit. *Brazer* v. *Elkin* (1909), 11 Que. P. R. 292.

Exception to petition — *Validity as tierce-opposition.*] — A Court document intituled "petition for revocation of judgment," but not containing any of the necessary grounds, will not be rejected upon exception to the form if it can be held valid as a tierce-opposition. *Re Montreal Cold Storage & Freezing Co.*, 5 Que. P. R. 91.

Fraud of defendant — *Judgment procured by—Remedy of plaintiff — Petition to set aside — New action for same cause — Res judicata.*]—The remedy open to a plaintiff whose action has been dismissed by a judgment procured by the fraud of the defendant, suppression of evidence, false testimony, etc., is by way of petition. A new action, although described as an action for damages, and for different amount, interest being added, is, under this disguise, an action for the same cause as that already disposed of, and will be dismissed, upon inscription in law, upon the ground of *res judicata*. *Dussault* v. *Tanguay*, 17 Que. K. B. 97.

Inferior Court—*Res judicata—Collateral attack — Confession — Proof of execution.*] —A judgment of an inferior Court signed on a confession obtained by fraud is void, and may be attacked collaterally.—A confession is not such a written instrument as is contemplated by C. S. N. B. 1903 c. 121, s. 35, and judgment cannot be signed on it in an inferior Court without proof of its execution. *Rogers* v. *Porter*, 37 N. B. R. 235.

Interpretation—*Reasons for judgment.*] —If the reasons for a judgment shew that there is a mistake, ambiguity, or obscurity in the adjudication, they may be taken into consideration in order to shew the meaning. *Adam* v. *Gagné*, 22 Que. S. C. 367.

Laches.]—Judgment was signed against the defendant for $542.68 and costs, in default of appearance, on the 2nd July, 1892. In 1901 he moved to set it aside on the grounds that he was never served with the writ of summons and that he did not owe any money to the plaintiff. The plaintiff's husband swore that on the 21st June, 1892, he personally served the defendant, with whom he was well acquainted, with the writ of summons in the usual way, in the presence and hearing of the plaintiff's solicitor, and the affidavit of the solicitor shewed that he was present on the occasion in question, when the defendant, after being served with the writ of summons, admitted that the amount set

out in the endorsement was correct and that he had no defence:—*Held*, that, the defendant not having explained the delay on his part of nearly nine years, nor satisfied the Court that he had any merits, and the judgment being regular, the application should be refused. *Fooks* v. *Cox*, 22 C. L. T. 44.

Man. Rule 585.]—A company and S. both being defendants, judgment had, before trial, been signed by plaintiff against the company. The company delivered a defence, but it was struck out for default in discovery, the effect of which was, under Rule 398 of the King's Bench Act, as amended by 5 & 6 Edw. VII. c. 17, s. 5, that the company was in the same position as if it had not defended. Rule 585, as amended by 7 & 8 Edw. VII. c. 12, s. 12, declares that, where there is more than one defendant, judgment may be signed against such as do not defend, without prejudice to the right of the plaintiff to proceed with the action against any other defendant:—*Held*, that this latter Rule, if it was to have the effect of avoiding the usual result of judgment against one of several joint debtors, must be confined strictly to the case for which it provided, namely, of default of defence in the first instance; and the defendant S. would be entitled to the benefit of the defence that the plaintiff had elected to take judgment against the co-debtor, leave to amend by adding that defence being given. *Wilson* v. *Stuart* (1911), 16 W. L. R. 403, Man. L. R.

Motion to issue execution.]—Where the enforcement of a lien of a judgment creditor against unsold lands involves questions of value and deductions by reason of partial releases, it must be made the subject of an action, and, where the proper parties are not before the Court, it cannot be accomplished on motion for leave to issue execution. *Re Bank of Liverpool*, 6 E. L. R. 321, 43 N. S. R. 205.

Motion to set aside—*Action for value of services — Appearance — Affidavit—Account — Service of copy — Default judgment —Evidence.*]—An action by a civil engineer for the value of services rendered, detailed in an account, such services consisting in the preparation of a plan, is not a summary matter within the meaning of Art. 1150, C. P. C., and, therefore, when the writ is returned during the vacation, the defendant is not obliged to file with his appearance an affidavit stating that such appearance is entered in good faith and not with the object of unjustly delaying the proceedings. 2. The neglect to serve upon the defendant with the original process a copy of the account sued upon is not a ground for setting aside a judgment rendered *ex parte* against the defendant, where such account has been filed with the writ and afterwards served upon the solicitors for the defendants, with a notice to plead within two days, the time for pleading having then expired. 3. In an action by a civil engineer for the value of professional services, with a detailed account to support it, the plaintiff, when the defendant has been noted in default of a plea, is not obliged to set the case down for *enquête*, but he may at once set it down for judgment, filing with his inscription an affidavit that the amount claimed is due to him; and the defendant cannot move against the judgment upon the ground that he has had no opportunity to cross-examine the plaintiff, inasmuch as he could have subpœnaed him for that purpose if he had thought well. 4. In such an action *viva voce* evidence is admissible to prove the plaintiff's claim. *Kennedy* v. *Canadian Construction Co.*, 18 Que. S. C. 507.

Motion to set aside—*Service of writ—Departure from usual practice — Leave to enter appearance — Costs.*]—On a motion to set aside a default judgment, Master in Chambers allowed defendant leave to defend and enter an appearance forthwith, so trial could be had before the close of the year. Costs to plaintiff in the cause. *Borrette* v. *Stewart* (1910), 17 O. W. R. 295, 2 O. W. N. 219.

Motion to set aside consent judgment—Jurisdiction of Master in Chambers —Third party notice after judgment. *McLean* v. *Can. Pac. Ry. Co.*, 6 O. W. R. 369.

Non-service of process—*False return—Opposition — Merits.*]—The defendant may, in an opposition to a judgment rendered against him by default, allege reasons based upon the default of service of the process in the action and the falsity of the bailiff's return, and reasons based upon the invalidity of the plaintiff's claim; and an inscription in law against the opposition based on the ground that such reasons cannot be invoked at the same time, will be dismissed.—2. A defendant who has not been served with a writ cannot be debarred from demanding the setting aside of a judgment rendered against him, and that although he may have no good plea to the action. *Marion* v. *Leroux*, 2 Que. P. R. 557.

Opening up judgment—*Delay in moving — Notice of trial — Defence on merits.*] —Application to open up a judgment, dismissed, as defendant had not sufficiently accounted for the delay and his affidavit as to merits was lamentably insufficient. *McKay* v. *Chisholm*, 6 E. L. R. 241; 43 N. S. R. 227.

Opposition—*Defendant not served—Petition in review — Exception to form.*]—An opposition to a judgment, based upon the fact that the defendant has not been served with process in the action, must shew the grounds of defence of the defendant in the action, and, if it is begun after the time fixed, it cannot be regarded as a petition in review if it does not contain such grounds. 2. *Semble*, that an exception to the form must reserve the recourse of the plaintiff. *Hénault* v. *Fulton*, 5 Que. P. R. 213.

Opposition — *Petition for review—Nullity of service — Saisie-gagerie — Irregular sale — Damages — Res judicata.*]—The defendant may proceed by way of opposition to a judgment or of petition for review of a judgment rendered without the defendant having been heard or called upon, and in such a case it is sufficient to allege the nullity of the service without any other ground of defence. 2. A party whose effects have been sold upon a writ of *saisie-gagerie en expulsion*, which has not been served upon him, may claim damages for the irregular sale of his effects, and the order dismissing his opposition to a judgment based upon the defective service, does not constitute *res judicata* against him in his suit for damages. *Fulton* v. *Hénault*, 5 Que. P. R. 258.

Partial release of lands under execution.]—Where judgment debtor in his lifetime and his personal representatives after his death alienate portions of land found by a judgment, and the judgment creditor released a portion of the land sold, from any claim under the judgment, the full amount of the judgment cannot be enforced against owners of the unsold portions of the land, who are only liable to be called upon to pay *pro rata* according to the value of lands released. *Re Bank of Liverpool* (1908), 43 N. S. R. 205, 6 E. L. R. 321.

Persons affected by judgment—*Right of appeal.*]—Any person who has a real interest in a cause, though not a party to it, may appeal from the judgment rendered in the cause if it puts his interest in peril. *Prévost v. Prévost*, 14 Que. K. B. 309.

Petition — *Alimentary allowance.*]—The rescission or revocation of a final judgment granting an alimentary allowance cannot be obtained upon summary petition. *Roach* v. *Morahan*, 17 Que. S. C. 372, 3 Que. P. R. 141.

Petition—*Discovery of fresh evidence—False swearing — Delay.*] — The plaintiff claimed against his father, the defendant, five-twelfths of a parcel of land which he said had belonged to his deceased mother, but, on default of proof of the ownership of the mother, and the defendant having sworn that he had the land from certain persons to take care of, paying the taxes, his action was finally dismissed by the Supreme Court of Canada on the 1st May, 1897. On the 11th May, 1897, the plaintiff discovered two documents: one, a deed of sale of the 25th November, 1867, whereby his mother had acquired the land, the defendant having signed the deed to authorise his wife; the other, a report of experts dated the 30th March, 1868, by virtue of which a builder's privilege had been registered against the land as the property of the mother. The defendant moved against the judgment of the Supreme Court by a petition which was to have been presented to a Judge of the Superior Court on the 25th October, 1897, but which was adjourned to a later date by agreement between the solicitors. The petition was presented on the 3rd November, but the Judge having granted an enlargement to the defendant to allow him to file an answer in writing, it was not received until the 3rd Dec., 1897:—*Held*, that the discovery of these documents, added to the fact that the defendant, who must have known of them, had sworn falsely in affirming that he had himself acquired the land, was a good ground for the petition and justified the opening up of the judgment. 2. That, as the reception by the Judge of the petition referred back to the date of its presentation, delay could not be urged aginst the applicant. *Durocher* v. *Durocher*, 16 Que. S. C. 370.

Petition — *Documents since produced—Peremption.*] — Letters or documents addressed to the attorneys of the plaintiffs and in their possession at the time when a demand for peremption is made, if not produced at the time when the demand is contested, cannot after judgment thereon afford ground for a petition to set aside such judgment. *Durocher* v. *Bilodeau*, 17 Que. S. C. 119.

Petition for revocation of a judgment granting provisional allowance.]—The revocation of a judgment cannot be pronounced upon a motion; it must be demanded either by an action under the common law or by a writ of prohibition upon the execution of the judgment. *Ouimet* v. *Gaudreau* (1913), 16 R. de J. 421.

Petition in revocation of judgment—*Personal fraud by defendant — New evidence — Coroner's enquete — C. P. 1177.*]—The articles of the Code of Civil Procedure concerning the *requete civile* must be strictly interpreted, especially where the parties have been heard *contradictoirement* at *enquete* and merits. If it is alleged that fraud and artifice were employed by the adverse party, it must be fully described in what consisted the fraud, and that the opponent was a party to it. The allegation that new evidence has been discovered, namely, the evidence taken before the coroner's jury, is no ground for the granting of a *requete civile*, especially when the petitioner's attorney was present at the taking of such evidence. *Duchaine* v. *Dussault* (1910), 11 Que. P. R. 255.

Petition to open up—*Cause heard ex parte.*]—Where judgment was given by a Court without hearing one of the parties, in consequence of a misunderstanding between the solicitors, such party may, on petition, have the judgment opened up. *Fabien* v. *Gougeon*, 18 Que. S. C. 242.

Petition to open up—*Error as to statute.*] — Where the parties and the Judge have, by a common error, supposed that a certain statute had been promulgated and was applicable to the case in hand, whereas, though it had been passed by the Legislative Assembly, it had been modified by the Legislative Council so as to make it inapplicable to pending causes, there is ground for proceeding by petition against a judgment rendered in accordance with such supposed law. *Lamalice* v. *La Campagnie d'Imprimerie Electrique*, 4 Que. P. R. 63.

Petition to reopen—*Discovery of fresh evidence.*]—A party cannot by petition demand the setting aside of a judgment upon the allegation that he has since found letters of such a nature that they would have the effect of changing the judgment, if such letters were in his possession at the time of trial. *Warin* v. *Werthemer*, 5 Que. P. R. 462.

Petition to set aside — *Con. Rules 47, 48, 200, 368.*]—On a petition to set aside a judgment of a local Judge, it appeared that the petitioners were not formally parties to the action, and that the solicitors for all those who were formally parties did not reside in the county:—*Held*, that before an order could be made by a local Judge binding those not formally before the Court, they must either agree that the motion be heard by him or have a solicitor residing within the county. A local Judge is not "the Court" and has no power under Con. Rule 200. *Re Reid* (1909), 13 O. W. R. 1026. Judgment of Elliott, Co.C.J., at London (1909), 12th June, set aside. *Chisholm* v. *Herkimer* (1909), 14 O. W. R. 919, 1 O. W. N. 139.

Petition to suspend operation of—Rule 642 — Motion to set aside default judgment — Rule 639 — Leave to defend—

Terms — Security — Costs — Practice. *Imperial Bank* v. *Travers*, 12 O. W. R. 703.

Powers of Court—*Con. Rule 261—Interpretation — Summary judgment on pleadings—Setting aside judgment.*]—Divisional Court *held*, that where the merits of a case have been dealt with and the rights of the parties have been rightly determined, the Courts are very loath to set aside the adjudication on any ground—especially where the whole complaint is as to practice. When a Judge acts under C. R. 261, his judgment cannot be set aside unless it is wrong in law. None of the cases pertaining to C. R. 261 decide that the Court has discretionary jurisdiction or power to act under the rule. Judgment of Latchford, J., 18 O. W. R. 422, 2 O. W. N 625, varied. *Kennedy* v. *Kennedy* (1911), 19 O. W. R. 346, 2 O. W. N. 1173.

Procedure — *Opposition.*]—A defendant who has had judgment entered against him *ex parte* after default regularly noted cannot proceed by way of *requête civile* to have the judgment rescinded, but must apply by way of opposition to the judgment. *Cantin* v. *Braham*, 16 Que. S. C. 225.

Procurement by fraud and perjury—*Right to attack in subsequent action — Fraudulent assignment — Action to set aside —Res judicata — Garnishing proceeding in Division Court.*]—When it can be shewn that a judgment, whether foreign or domestic, has been obtained by fraud, it cannot be held binding upon the party against whom the fraud has been practised; and such fraud may be shewn although it may involve a reconsideration of the very facts upon which the former judgment was recovered, and although it may consist in the presentation to the Court of evidence that the judgment impeached was obtained by perjured evidence to which the Court upon the first trial gave credit. There is no distinction between the fraud which consists in presenting perjured evidence to the Court, and that which is collateral to the merits of the case.—In an action to set aside as fraudulent and void an assignment of salary by one defendant to the other, the defendants pleaded *res judicata*, upon which the plaintiff joined issue. At the trial the defendants proved a judgment of a Division Court, in a garnishee proceeding, to which the plaintiff and defendants were parties, and in which the validity of the same assignment was the question for determination. The trial Judge found that by suppressing material facts and by giving evidence that was wilfully false, the claimant in the Division Court proceeding, who was one of the defendants in the action, procured from the Judge in the Division Court an adjudication that the assignment was valid:—*Held*, that the plaintiff was entitled to impeach the judgment in the Division Court, though he had not directly attacked it, as he should have done by amendment when *res judicata* was pleaded; and, upon the evidence, that the assignment was fraudulent and void. *Abouloff* v. *Oppenheimer*, 10 Que. B. D. 295, and *Vadala* v. *Lawes*, 25 Que. B. D. 310, followed.—*Woodruff* v. *McLennan*, 14 A. R. 242, and *Hilton* v. *Guyot*, 159 U. S. 113, not followed.—Judgment of Anglin, J., reversed. *Johnston* v. *Barkley*, 10 O. L. R. 724, 6 O. W. R. 549.

Proposition of settlement for smaller amount—Without prejudice—Default judgment signed — Motion to set aside — Master allowed defendant four days to deliver statement of defence — Judgment to stand as security in meantime — Costs of motion to plaintiff in any event — No breach of faith in entry of judgment. *Whelihan* v. *Kehoe* (1910), 17 O. W. R. 202, 2 O. W. N. 166.

Reference by consent to experts—*Misunderstanding of counsel as to purpose of reference — Opening up judgment.*]—In a proceeding before a Master in a mechanic's lien matter, an understanding was arrived at between the counsel for the plaintiff and defendant, and orally communicated to the Master. When the time arrived to act on the understanding, the counsel disagreed in their recollection of what their understanding was. The Master entered judgment for the amount found due by certain experts, in accordance with the understanding of the agreement:—*Held*, that the judgment given by the Master, whose recollection of the understanding was the same as that of the plaintiff's counsel, in favour of the plaintiff, must be re-opened and the matter referred back, as the parties were not *ad item*. *Wilding* v. *Sanderson*, [1897] 2 Ch. 534, referred to. *Beaudry* v. *Gallien*, 23 C. L. T. 46, 5 O. L. R. 73, 1 O. W. R. 793.

Remedy against an ex parte judgment rendered after foreclosure from pleading is not a petition in revocation of judgment. An appeal should be taken. *Duclos* v. *Vezina* (1911), 17 R. L. n. s. 209.

Re-opening judgment—*Grounds—N. S. County Court Act, s. 86 — Refusal to re-open — Extension of time to appeal from original order for judgment — Costs.*]—Application under above section to re-open a judgment and vacate the order made upon it:—*Held*, no authority to make the order asked for. Plaintiff claimed on an implied contract, whereas the conduct of the parties shewed there was an express agreement. Application dismissed. *Matthews* v. *Smith*, 7 E. L. R. 332.

Revocation — *Amendment — Default of adjudication.*]—A petition in revocation of judgment will lie against a final judgment which does not adjudicate upon the issue raised by an amendment to a pleading. *Lusher* v. *Pulmoti*, 6 Que. P. R. 331.

Revocation — *Contestation of account — Grounds.*]—If a petition in revocation of a judgment is granted and a party allowed to contest an account by means of newly discovered evidence, he cannot, nevertheless, insert in the contestation which he is allowed to file, grounds of contestation not set forth in the petition in revocation. *Hill* v. *Campbell*, 6 Que. P. R. 424.

Refusal by trial Judge of application to vacate—*Execution of judgment—Subsequent petition to set aside — Appeal.*]—Where the trial Judge has refused the plaintiff's application to vacate a judgment dismissing the action, and further proceedings have taken place in execution of the judgment, a petition to set aside the judgment will not be entertained, as it would, in effect, be an appeal from it. *Gamache* v. *Desnoyers*, 9 Que. P. R. 349.

Setting aside — *Grounds — Defective notice—Laches.*] — Defendant failed to appear on the trial of the action against him, and judgment was entered against him. An application to set aside the judgment so entered was dismissed, on the ground that defendant had not sufficiently accounted for his delay in moving, and no merits were disclosed in his affidavit.—Before the order was taken out, defendant discovered that the notice of trial given by plaintiff was insufficient, and gave notice that when the order was applied for, he would oppose the granting of it on that ground:—*Held*, that such notice was both irregular and too late.—All the grounds should have been stated in the first notice.—The Court will not entertain repeated applications of this sort, when proper enquiry would have disclosed all the information desired in the first instance. *McKay* v. *Chisholm*, 43 N. S. R. 227, 6 E. L. R. 241.

Stay of execution pending trial of counterclaim — *Landlord and tenant.*]—In an action for rent the plaintiff obtained summary judgment for $800, but the defendant, asserting a counterclaim for $2,000 for damages for injury to goods on the demised premises caused by non-repair, asked to have execution upon the judgment stayed pending the trial of the counterclaim:—*Held*, following *Sheppard* v. *Wilkinson*, 6 Times L. R. 13, that the stay should, in the circumstances of the case, be granted. The counterclaim was so far plausible that it was not unreasonably possible for it to succeed if brought to trial. It was suggested that the defendant was not able to pay his debts as they matured; but that was not a reason for depriving a defendant of his right to wipe out the plaintiff's claim by a counterclaim. *Wells* v. *Knott* (1910), 15 W. L. R. 285.

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13. Review of Judgments.

See Appeal.

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14. Satisfaction of Judgments.

Arrest of defendant—*Unauthorised release — Action to revive judgment — Satisfaction.*] — The defendant, having been arrested under execution issued on a judgment recovered against him by the plaintiff, was discharged from arrest without the authority of the plaintiff or her solicitor:—*Held*, that such unauthorised discharge did not constitute a satisfaction of the judgment, and was no answer to an action to revive the judgment. *Conrad* v. *Simpson*, 2 E. L. R. 53, 3 E. L. R. 115, 41 N. S. R. 468.

Evidence of—*Payment out of Court of judgment creditor of money paid in by garnishee—Arrangement between solicitors out of Court — Practice — Affidavit — Irregularity.*]—Money paid into Court by a garnishee was paid out to plaintiff's solicitor. In reality there had been an arrangement between the plaintiff's solicitor and the solicitor for the claimant that only a portion should be applied on plaintiff's claim:—*Held*, that defendant not entitled to have satisfaction entered on record. Where plaintiff had forgotten in his affidavit to credit the money so received, costs of preparing and filing his affidavit refused. *Putnam* v. *Riffen*, 11 W. L. R. 559.

Set-off of judgment purchased by defendants — Equitable right — Discretion—Attachment of debts. *Bleasdell* v. *Boisseau*, 4 O. W. R. 155, 239.

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15. Summary Judgments.

Action against executor—Recovery of legacy — Assent —Admission of assets — Abatement. *McCarthy* v. *McCarthy*, 7 O. W. R. 749.

Action for mortgage money—Defence —Agreement to postpone — Unconditional leave to defend—Writ of summons — Special indorsement — Interest. *McGavin* v. *Campbell*, 6 O. W. R. 94.

Action for possession of land — *Defence — Rule 603.*]—Master refused to grant judgment to plaintiff on motion under Con. Rule 603. *Gillies* v. *Mansell* (1909), 14 O. W. R. 942, 1 O. W. N. 152.

Action on bills of exchange—Defence —Illegality — Powers of company. *Canada Permanent and Western Canada Mortgage Corporation* v. *Briggs*, 6 O. W. R. 180.

Action on bills of exchange—Endorsement — Collateral agreement — Failure to establish — Correspondence. *Imperial Bank* v. *Tuckett*, 6 O. W. R. 121, 461.

Action on guaranty — *No proof of amount due — Liability — Reference—Rule 603.*]—Action on a guaranty. Motion for summary judgment dismissed as no proof of amount due by defendant. *Sovereign Bank* v. *McPherson* (1909), 14 O. W. R. 59.

Action on promissory notes—Defences —Agreement for advances — Construction—Powers of company — Accommodation indorsers — Sureties — Discharge — Counterclaim — Damages — Accounting. *Ontario Bank* v. *Capital Power Co.*, 7 O. W. R. 180.

Admission of part of claim—*Set-off as to balance — Form of judgment — Stay of execution — Costs.*]—In an action to recover an amount claimed for work and labour, where the defendant admitted the greater portion of the amount claimed, but pleaded a set-off for passage money paid and other expenditures made on behalf of the plaintiff, the plaintiff moved at Chambers to set aside the plea of set-off as false, fraudulent, and vexatious, and the Judge, treating the set-off as a counterclaim, ordered final judgment under O. 31, r. 6, for the plaintiff for the amount claimed, and stayed execution on payment into Court within a fixed time of the amount of the claim less the amount of the set-off:—*Held*, that this was error; that the proper form of order would have been for judgment for the plaintiff for the amount of his claim, less the amount of the set-off, with a provision for stay of execution on payment of the amount into Court; and that this order should be made, and that the defendant should be permitted to prosecute the claim to the set-off on payment into Court of the amount admitted to be due.—As both

parties were wrong in their contentions, both at Chambers and on appeal, there should be no costs. *Fisher* v. *Grand River Lumber Co.*, 38 N. S. R. 189.

Admissions — *Payment into Court of part "in full satisfaction" — Payment out— Rules 419, 616.*]—In an action for a balance alleged to be due in respect of a contract, the defendants paid money into Court with their statement of defence under Con. Rule 419, alleging it in their pleading to be "balance due in respect of all the said matters," and that they brought it "into Court in full satisfaction of the plaintiffs' claim herein:" —*Held*, that the plaintiffs were not entitled, on motion under Con. Rule 616, to judgment with leave to proceed for the balance of their claim, and for payment out of the money paid in, for by so moving they accepted the statement of defence, and were not entitled to the benefit of it severed from the accompanying statement that the amount admitted was the entire sum due.—*Held*, further, that whatever discretion the Court may have under the words "subject to further order" in Con. Rule 419, it should not be exercised to enable the plaintiffs to take as payment on account moneys which the defendants had offered only "in full satisfaction." *Barrie* v. *Toronto & Niagara Power Co.*, 11 O. L. R. 48, 6 O. W. R. 741, 935.

Admissions — *Pleading—Rules 259, 261, 616.*]—Rule 616 is not intended to apply to the case of alleged insufficiency in law of the statements of facts pleaded in the defence. A motion for judgment should not under such circumstances be made under that Rule, but the procedure indicated in Rule 259 or Rule 261 should be adopted. *Edward* v. *Cole*, 24 C. L. T. 360, 8 O. L. R. 141, 8. C. *sub. nom. Edwards* v. *Cook*, 4 O. W. R. 112.

Admissions in pleadings — Judgment for amount admitted — Leave to proceed for amount not admitted — Charge on land — Declaratory judgment. *Ross* v. *McBride* (N.W.T.), 3 W. L. R. 561.

Admissions of fact—*Pleading—Costs— Rule 615 (Man.)*]—The words "admissions of fact in the pleadings" in Rule 615 of the King's Bench Act, R. S. M. 1902, c. 40, are not confined to such admissions made by an opposite party, and this Rule may be availed of by the party making the admissions and an order made accordingly; and, when the defendant in his statement of defence consents to the relief asked for by the plaintiff and offers to give the conveyance required by him, such consent and offer, although strictly speaking not an admission of fact, should be treated as one for the purposes of the Rule, as its object is to save further proceedings and further costs when the need of trying issues is removed by admissions. The statement of defence, besides the consent and offer referred to, denied the allegations of the statement of claim:—*Held*, that, as the defendant, by making an application under Rule 615, had put it out of the power of the plaintiffs to prove their allegations and out of the power of the Court to decide, on the merits, who should pay the costs of the action, the case should be treated, for the purpose of awarding costs, as if the defendant had admitted the truth of the plaintiffs' pleadings, as well as submitted to the relief asked for, and that the defendant should pay the main costs of the action, including the costs of the motion. *Houghton* v. *Mathers*, 24 C. L. T. 246, 14 Man. L. R. 733.

Admission of part of claim—Division of claim — Interest — Rule 228. *Lisle* v. *De Lion* (Y.T.), 1 W. L. R. 274.

Alberta Rule 326—*Action to set aside bill of sale — Finding on trial of interpleader issue — Adoption on motion for judgment.*]—Motion for summary judgment dismissed, as no direct admission in transcript of evidence in another action that bill of sale in question was fraudulent. *Farley* v. *Duvall* (1909), 12 W. L. R. 378.

Alberta Rule 326 — *Scope of—Judgment before appearance — Grounds for — Practice.*] — By leave granted under above Rule plaintiffs moved for summary judgment, the notice being served with the writ of summons and statement of claim and being returnable within two or three days after service. The defendant's effects were being advertised for sale under a valid chattel mortgage, but there was a defect in the renewal statement:—*Held*, that above Rule does not apply to a case of this kind, and motion dismissed. *Tuckett* v. *Wickett* (1909), 12 W. L. R. 210.

Conditional leave to defend — Claim on contract — Mining coal—Lien—Counterclaim — Writ of attachment — Setting aside —Absence of fraud. *Fey* v. *Scimer* (Y.T.), 2 W. L. R. 566.

County Court — *Affidavit.*]—The materials used in support of a motion for speedy judgment in a County Court action in which the plaintiff sued on an account stated were an affidavit of the plaintiff verifying his cause of action, and an affidavit of the plaintiff's solicitor verifying the defendant's signature to the account, and stating that he believed the plaintiff had a good cause of action and that the defendant had no defence:—*Held*, that the materials were sufficient to support a judgment for the plaintiff.—*Quære*, whether an affidavit of the plaintiff, verifying his cause of action, and an affidavit of his solicitor stating that the defendant had no defence, would be sufficient under s. 94 of the County Courts Act to support a speedy judgment. *Bremner* v. *Nichol*, 24 C. L. T. 413, 11 B. C. R. 35.

County Court, B. C.—*Defences—Leave to defend — Affidavit — Cross-examination.*] —On a motion for speedy judgment in a County Court action, it is open to the defendant to set up other defences than those disclosed in his dispute note. 2. On the facts, the defendant was entitled to unconditional leave to defend. 3. *Per* Irving, J.:—The defendant should have been allowed to cross-examine the plaintiff on his affidavit. *McGuire* v. *Miller*, 9 B. C. R. 1.

Defence — *Company—Indebtedness exceeding statutory limit — Directors' liability.*]—In an action against a company incorporated under R. S. O. 1897 c. 199, for goods sold and delivered, the amount claimed being admitted, in which the defendants set up that their indebtedness when the goods were purchased largely exceeded the limits prescribed by ss. 11 and 40 of that Act, and that the

directors were personally liable, and not the company, a motion for summary judgment was dismissed. *Jacobs* v. *Booth's Distillery Co.*, 85 L. T. R. 262, followed. *Canadian General Electric Co.* v. *Tagona Water and Light Co.*, 24 C. L. T. 61, 6 O. L. R. 641, 2 O. W. R. 1055.

Defence—Conditional leave to defend—Terms—Payment into Court—Costs. *Mendell* v. *Gibson*, 2 O. W. R. 857, 3 O. W. R. 551, 4 O. W. R. 336, 5 O. W. R. 233.

Defence — *Counterclaim—Payment into Court.*]—The plaintiff employed the defendant to sell a property at Sydney, of which the plaintiff had an option. The defendant was not a regular real estate broker, and the parties did not settle upon any rate of payment for the service. The defendant effected a sale for $13,200, at a profit of $2,200 for the plaintiff. The defendant became possessed of the $2,200 profit after having effected the sale, and wired the plaintiff that he had effected a sale and held this amount. The defendant to effect the sale, had personally undertaken that certain necessary steps to vest title in the purchaser would be duly taken. The plaintiff moved for judgment under Order XIV. for $2,000. He gave credit to the defendant for $200, which the plaintiff alleged to be sufficient commission on the sale, questioned the defendant's solvency by affidavit, and sought immediate judgment for the amount in the defendant's hands, less the $200. The sum in the defendant's hands was all he was to receive from the purchaser, but there was, at the time of the hearing of the motion for judgment, a matter of the transfer of a mortgage from the original mortgagee of the property to another, still incomplete. The Judge ordered the sum of $2,000 to be paid into Court to abide the event of the action. Costs to be costs in the cause. *Le Gresley* v. *Le Mouie*, 21 C. L. T. 89.

Defence — Municipal debentures—By-law —Payment of principal —Statute. *Standard Life Assce. Co.* v. *Tweed*, 2 O. W. R. 731, 747, 922, 983.

Dismissal of action — *Admissions.*]—The Court or a Judge has power, in a proper case, to dismiss the action on an application under Rule 616. In an action to recover a debt alleged to have been due by the defendant to the plaintiff's deceased father, the claim for which was assigned to the plaintiff by her mother, as administratrix of the father's estate, the plaintiff, on being examined for discovery, admitted that she had no personal knowledge on which she could succeed, but was relying upon an entry made in a book of her father, that he had lent the defendant money on a certain day:—*Held*, that she could not be obliged to tell what evidence she was going to use nor what witnesses she meant to call; she could have been asked if she had disclosed her whole case; but, not having been asked that, it was open for her to say that she had evidence of facts outside of those within her own knowledge which might tend to establish her case; and the action should not be dismissed. *Coyle* v. *Coyle*, 20 C. L. T. 76, 19 P. R. 97.

Ex parte proceeding — Proof of plaintiffs' case. *Moose Mountain Lumber & Hardware Co.* v. *Anderson* (N.W.P.), 6 W. L. R. 354.

Foreign.]—Motion under Ont. Rule 603 for summary judgment on a judgment obtained in Manitoba. The only evidence offered was an affidavit by an Ontario solicitor who could only speak on information and belief derived from letters and telegrams received from Winnipeg solicitors:—*Held*, that the motion should be dismissed as the evidence offered did not satisfy the rule. *Great West Life Assce. Co.* v. *Shields* (1910), 15 O. W. R. 166.

Foreign.] — Plaintiff moved under Ont. Rule 603 for summary judgment on a judgment obtained in the Yukon Territory:—*Held*, that the defendants had produced sufficient evidence to entitle them to defend the action. Motion refused with costs in the cause. *Johnston* v. *Occidental Syndicate* (1910), 15 O. W. R. 127.

Implied covenant for payment—Instrument of charge — Defence — Unconditional leave to defend — Terms. *Farmers' Loan & S. Co.* v. *Munns*, 2 O. W. R. 503, 823.

Leave to defend—*Allegations of fraud —Costs, refusal of.*]—When a defendant intends to rely on a defence of fraud, he should set it up definitely in his statement of defence, and, in meeting a motion for leave to sign judgment under Rule 603 of the King's Bench Act, he should file an affidavit in answer shewing such definite facts pointing to the alleged fraud as to satisfy the Judge that it would be reasonable that he should be allowed to raise such defence. In this case the only evidence in support of the allegation of fraud consisted of some general statements of defendants in their examinations on their affidavits filed in answer to the plaintiff's motion, and it was held that an order allowing the plaintiff to sign judgment was right. *Wallingford* v. *Mutual Society*, 5 App. Cas. 685, followed. Costs of appeal refused partly on account of the great mass of material heaped up, including diffuse examinations on affidavits. *Canadian Motive Plow Co.* v. *Cook*, 21 C. L. T. 422, 13 Man. L. R. 439.

Manitoba Rule 615 — *Admissions in pleading — Partition or sale — Judgment as to part of lands.*]—In an action for partition or sale of lands, if the defendant in his statement of defence admits the plaintiff's claim in respect of part of the lands, the plaintiff may, under Rule 615 of the King's Bench Act, have judgment for partition or sale of the lands in respect of which the admission is made, without waiting for the result of the litigation as to the remaining land. *Kelly* v. *Kelly*, 18 Man. L. R. 362, 9 W. L. R. 509.

Money demand—*Action by assignee of claim — Defence — Set-off or counterclaim against assignor — King's Bench Act, s. 39 (f) — Independent cause of action — Unliquidated damages.*]—Upon a motion by the plaintiff for summary judgment in an action for a balance due under an agreement for purchase of land assigned to the plaintiff:—*Held*, in regard to a defence asserted by the defendant, that the latter could not set off against the debt a claim against the assignor for unliquidated damages arising out of transactions wholly unconnected with the purchase in question. Section 39 (*f*) of the King's Bench Act, R. S. M. 1902 c. 40, only permits, as against an assignee, a set-off of

anything which would be recognised in a Court of Equity as a proper subject of set-off, and a counterclaim for unliquidated damages arising out of a cause of action in no way connected with the claim assigned, is not a defence or set-off which would at any time have been recognised. *Government of Newfoundland* v. *Newfoundland Ry. Co.*, 13 App. Cas. 199, distinguished. *McManus* v. *Watson*, 8 W. L. R. 106, 17 Man. L. R. 567.

Mortgage — Defence—Release—Conveyance. *Farmers' Loan & S. Co.* v. *Earheart*, 2 O. W. R. 454.

Mortgage — *Immediate possession—Recovery of land.*]—A writ of summons was indorsed, under Rule 141, with claims for foreclosure of a mortgage, for immediate delivery of possession of the mortgaged premises, and for immediate payment of the mortgage money:—*Held*, that it could not be said to be specially indorsed under Rule 138 so as to entitle the plaintiffs to move under Rule 603 for summary judgment for recovery of land. *Supreme Court I. O. F.* v. *Pegg*, 20 C. L. T. 32, 19 P. R. 80.

Motion by plaintiff—*Dismissal of action.*]—*Held*, that, upon a motion by the plaintiff for summary judgment under Rule 616, where all the facts were before the Court, and the conclusion was against the plaintiff, it was proper to pronounce judgment dismissing the action instead of merely dismissing the plaintiff's motion. *Hill* v. *Hill*, 21 C. L. T. 560, 2 O. L. R. 541.

Motion for—Action on covenant in mortgage—Defence—Denial of execution and consideration. *Farmers' Loan & S. Co.* v. *Stratford*, 2 O. W. R. 1060, 1142, 3 O. W. R. 297.

Motion for—*Affidavit of plaintiff—Cross-examination on—Discretion to refuse.*]—On the return of a summons for judgment under Order XIV., an application was made on behalf of the defendant for leave to cross-examine the plaintiff on his affidavit filed in support of the summons. No affidavit of merits had been filed on behalf of the defendants:—*Held*, refusing the application, that it is only in exceptional cases that a defendant will be permitted to cross-examine the plaintiff on his affidavit, and then only after the defendant has filed an affidavit of merits. *Ward* v. *Dominion Steamboat Line Co.*, 22 C. L. T. 424, 9 B. C. R. 231.

Motion for — Defence — Company—Indebtedness exceeding statutory limit. *Grose* v. *Yagona Water & Light Co.*, 3 O. W. R. 353.

Motion for — Defence—Guaranty—Condition of taking effect—Admission of liability — Premature action. *Dominion Bank* v. *Crump*, 3 O. W. R. 58.

Motion for—Defence—Money demand—Assignment of claim—Company—Shares — Counterclaim. *MacLean* v. *World Newspaper Co.*, 3 O. W. R. 57.

Motion for — *Delay—Con. Rule 603.*]—The intention of Con. Rule 603 is that a motion for summary judgment shall be made within a reasonable time after the appearance of the defendant; and a motion for judgment in an action in which the writ was issued in June, the appearance entered in July, and the motion not launched until November—the delay not being explained—was refused.—*McLardy* v. *Slatcum*, 24 Q. B. D. 504, followed. *German American Bank* v. *Keystone Sugar Co.*, 12 O. L. R. 555, 8 O. W. R. 634.

Motion for.]—On a motion for summary judgment upon a promissory note counsel for defendants were refused permission to cross-examine plaintiff on his affidavit in reply to defendant's affidavit of defence, and judgment was entered:—*Held*, that the defendants should have had an opportunity of disproving, if they could, the statements in the last affidavit by cross-examination. Appeal allowed and case sent back to County Court Judge for his disposal after defendants have had a full defence. *Farmers' Bank* v. *Big Cities R. & A. Co., Ltd.* (1910), 15 O. W. R. 241.

Motion for — Rule 616—Pleadings—Admissions in examination of defendant — Recovery of possession of land — Motion for judgment—Forum. *Traplin* v. *Traplin*, 3 O. W. R. 793.

Motion for, after delivery of pleadings — Delay — Onus—Defence. *Ontario Bank* v. *Farlinger*, 7 O. W. R. 315.

Motion for on mortgage—Execution of mortgage and debt admitted—Defence that mortgage was given to stifle prosecution for embezzlement—Motion dismissed as it is necessary in public interest that this matter should be investigated. *Jones* v. *Merioneth*, [1892] 1 Ch. 183, 184, followed. *Williams* v. *Kehr* (1909), 14 O. W. R. 1016, 1 O. W. N. 219.

Motion for speedy judgment—*Filing of defence — Accounting for delay.*]—Upon a motion for speedy judgment launched after the statement of defence has been delivered, it is not essential that the delay in moving should be accounted for.—*McLardy* v. *Slatcum* (1890), 24 Que. B. D. 504, 60 L. T. 151, 38 W. R. 349, 59 L. J. Q. B. 154, not followed. *Victoria Lumber Co.* v. *Magee* (1905), 6 Terr. L. R. 187.

Motion for trial under C. R. 603—*—Defendant filed affidavit of defence—Plaintiff asked enlargement to cross-examine defendant on affidavit under C. R. 490—Local Judge refused application—Discretion of local Judge—Appeal allowed—Plaintiff allowed to cross-examine.*]—Plaintiff brought action on a promissory note alleged to have been made by defendant, in favour of one Currie, who endorsed it to plaintiff. Plaintiff moved for judgment under C. R. 603 before the Local Judge at Barrie, after appearance to the specially endorsed writ. Defendant denied making of note and alleged good defence on the merits. Plaintiff made application to Local Judge to cross-examine defendant upon her affidavit. The Local Judge refused the application and dismissed the motion for judgment and plaintiff appealed from that order and claimed the right to cross-examine:—*Held*, that there was no discretion under C. R. 490 in the Local Judge to refuse the application to cross-examine. Appeal allowed, order set aside and matter referred back to enable plaintiff to cross-examine defendant

on her affidavit. Motion for judgment may thereafter be disposed of by Local Judge. Costs to plaintiff. *Payganni* v. *Lockpas*, [1880] W. N. 100; *Kingsley* v. *Dunn*, 13 P. R. 300, and *Townsend* v. *Hunter*, 3 C. L. T. 310, specially referred to. *Morrison* v. *Wright* (1910), 15 O. W. R. 873.

Motion refused—Costs—Cross-examination—Substitution as discovery. *Lawrence* v. *Smith*, 2 O. W. R. 521.

Motion to strike out appearance and defence—Affidavit in support—Status of deponent—Form of affidavit—Verification of cause of action. *Codville & Co.* v. *Smith* (N.W.T.), 3 W. L. R. 197.

Nova Scotia Order XIV. — Action on judgment of inferior Court—Municipal Courts Act — Defence — Unconditional leave to defence. *Somers* v. *McLeod* (N.S.), 6 E. L. R. 371.

Ontario Rule 603—*Action against firm —Single liability of partner.*]—Summary judgment was granted against members of a firm of solicitors for mortgage moneys collected by them and credited to plaintiff in their books. Defendant E. urged that there were personal dealings between plaintiff and the defendant D., which should be disposed of at a trial. *Best* v. *Edmison*, 12 O. W. R. 1153.

Ontario Rule 603—*Action for calls on stock—Defence—Infancy—Ratification after majority — Unconditional leave to defend.*]—Motion for summary judgment under above rule to recover calls on stock in plaintiff company. Defence was that he was an infant when he subscribed. After attaining 21 he had received dividends, given a proxy and offered to sell his stock:—*Held*, that defendant has a right to a trial if he wants it. *Traders Fire Ins. Co.* v. *Humphries* (1909), 14 O. W. R. 88.

Ontario Rule 603—*Action for possession of land — Defence — Statute of Limitations—Foreclosure proceedings.*]—Motion for summary judgment under above rule in action to recover possession of land, dismissed, as defence set up which, if proved, would be complete. *Smith* v. *Kennedy* (1909), 14 O. W. R. 250; affirmed, 14 O. W. R. 934.

Ontario Rule 603—*Action for promissory note for stock subscriptions.*]—Action on a note given for 25 shares of plaintiffs' stock. Defendant alleged that plaintiffs' agent represented that as soon as a dividend was paid the stock would be taken off his hands. There appeared to be corroboration of this, and defendant's dealing was consistent with his contention. Motion dismissed. *Farmers Bank* v. *Hunter*, 13 O. W. R. 402.

Ontario Rule 603—*Balance of price for goods sold.*]—Defendant did not deny liability but would not say that the account was correct and claimed he had a good counterclaim against plaintiffs for malicious prosecution arising out of the same matter and had recently begun an action. Order granted under Ont. Rule 607 to ascertain amount due plaintiffs; further directions and costs reserved until the action for malicious prosecution is determined. *Gunns Limited* v. *Cochrane* (1910), 1 O. W. N. 419.

Ontario Rule 603—*Bills of exchange—Bank suing after charging bill to drawers.*]—Plaintiff had discounted a draft before acceptance. The drawee finding the goods unsatisfactory refused payment. Draft was charged back to drawers and action was for latter's benefit. Motion for summary judgment refused. *Merchants* v. *Butler*, 12 O. W. R. 1071.

Ontario Rule 603—Defence not raised on first affidavit — Leave to use second — Costs. *McPhillips* v. *Stevenson* (1910), 1 O. W. N. 940.

Ontario Rule 603—Defence to action on promissory note. *Dominion Bank* v. *Toronto Mica Co.* (1910), 1 O. W. N. 895.

Ontario Rule 603—Lease—Company — Leave to defend as to part of claim. *Eckhardt* v. *Henderson Roller Bearing Co.* (1910), 1 O. W. N. 894.

Ontario Rule 603—*Promissory note—Action by endorsee—Partnership—Accommodation—Notice.*]—Motion for summary judgment under above rule granted. One ground of defence was that the note was given to S., plaintiff's debtor, as accommodation growing out of partnership dealing, all of which was known to plaintiff's solicitor. Plaintiff swore she knew nothing of this partnership and solicitor had not been examined as a witness on the pending motion. *Bain* v. *Brown*, 13 O. W. R. 759.

Ontario Rule 603—Promissory note—Given in settlement of account—Reliance of defendant on plaintiff's assurance that amount represented true state of accounts—Defence —Alleged representations untrue—No amount due plaintiff—Master in Chambers held note no estoppel between parties—Order for account made under Con. Rule 607—F. D. and costs reserved. *Northern Crown Bank* v. *Yearsley*, 15 O. W. R. 792, 1 O. W. N. 655, and *Farmers' Bank* v. *Big Cities*, 15 O. W. R. 241, 1 O. W. N. 397, followed. *Wallace* v. *Stevenson* (1910), 17 O. W. R. 207; 2 O. W. N. 166.

Ontario Rule 603—*Promissory notes—Defence—Evidence — Unconditional leave to defend.*]—Where the notes sued upon were connected intimately with 200,000 shares of Cobalt Development Co., Ltd., it was *held*, that the speedy relief granted by Con. Rule 603 is intended for plain and simple cases, not for transactions which are of complicated and difficult character. This case was not one for unconditional judgment. The parties should plead and go to trial in the ordinary way. Costs in the cause. *Northern Crown Bank* v. *Yearsley* (1910), 15 O. W. R. 792.

See *Niles* v. *Crysler* (1910), 1 O. W. N. 895, 940.

Ontario Rule 603—Special indorsement of writ of summons — Defence. *Stokes* v. *Reynolds* (1910), 1 O. W. N. 1051, 1099.

Ontario Rule 615— — *Admissions in pleading — Partition — Judgment as to part of lands in question.*]—Action for partition or sale of certain lands held by parties as tenants in common. Defendant admitted this, but claimed to own one lot absolutely. Judgment given under Manitoba Rule 615 for partition or sale of all except said one lot. *Kelly* v. *Kelly*, 9 W. L. R. 509.

Order XIV. (Nova Scotia)—Defence filed after summons issued—Practice. *Hobrecker* v. *Saunders*, 5 E. L. R. 509.

Payment into Court — Payment out without prejudice. *Dominion Paving & Contracting Co.* v. *Magann*, 1 O. W. R. 220.

Pleading—*Rule 616, breach of promise of marriage — Admission of no breach before action.*]—Defendant moved under Rule 616 for summary judgment dismissing an action for breach of promise of marriage, on the grounds: (1) that the statement of claim did not allege that there was a breach of the alleged contract before action, and (2) that plaintiff in her examination for discovery admitted that there was no breach before this action. Motion refused, as it was a matter to be left to a jury to say if there was or was not such a breach. *Barnum* v. *Henry*, 5 O. W. R. 56, 9 O. L. R. 319.

Powers of Referee—Rescinding order—Appeal — Setting aside judgment — Costs. *Walker* v. *Robinson* (Man.), 1 W. L. R. 181.

Powers of Referee in Chambers (Man.) — *Rescinding order — Appeal—Dismissal of action.*]—1. The Referee in Chambers has no power to rescind his own order not made *ex parte*. *Re St. Nazaire Co.*, 12 Ch. D. 80, and *Preston* v. *Allsup*, [1895] 1 Ch. 141, followed.—2. An appeal will not lie from the refusal of the Referee to rescind such an order.—3. The Referee has no jurisdiction under Rule 449 of the K. B. Act or otherwise, even with the consent of the parties, to make an order for the entry of judgment for the defendant, after the action has been entered for trial. Such a judgment can then only be pronounced by a Judge sitting in Court.—4. The Referee would have power, under Rule 422 (d) of the Act, to dismiss an action by the consent of the parties.—5. When the judgment entered in an action is unauthorised and unsupported by any order or pronouncement of the Court, an appeal will lie from the refusal of the Referee to set it aside on motion before him, although such motion also included an application to him to rescind his own order previously made not *ex parte* in the same action. *Walker* v. *Robinson*, 15 Man. L. R. 445, 1 W. L. R. 181.

Promissory note — Contemporaneous agreement. *Lander* v. *Blight*, 2 O. W. R. 553.

Promissory note — *Defence—Unconditional leave to defend.*]—In an action upon a promissory note the defendant set up, in answer to a motion for summary judgment under Rule 603, that the consideration for the note consisted in whole or in part of the purchase money of a patent right, and that the note had not the words "given for a patent right" written or printed across the face, and was, therefore, void under the Bills of Exchange Act, s. 30, s.-s. 4, in the hands of the plaintiff, who was alleged to have notice of such consideration. The plaintiff denied that the note was given for such consideration:—*Held*, that the defendant was entitled to unconditional leave to defend. *Davey* v. *Sadler*, 21 C. L. T. 343, 1 O. L. R. 626.

Promissory note—Fraud—Notice—Costs of motion—*Merchants Bank* v. *Irvine*, 2 O. W. R. 47.

Promissory note — *Holder for value — Fraud—Onus.*]—Where the maker and one of the indorsers of the promissory note sued on, in answer to a motion by the plaintiff for summary judgment under Rule 603, swore that they were induced to become parties to the note by certain fraudulent misrepresentations made by their co-defendants, whereof they had reason to believe the plaintiff had notice:—*Held*, having regard to s. 30, s.-s. 2, of the Bills of Exchange Act, that they were entitled to unconditional leave to defend, notwithstanding the plaintiff's affidavit that he was a holder for value. *Fuller* v. *Alexander*, 47 L. T. N. S. 443, followed. *Farmer* v. *Ellis*, 21 C. L. T. 398, 2 O. L. R. 544.

Promissory note — Mortgage—Mining claim — Representation work — Conditional leave to defend—Terms—Costs. *Alaska Mercantile Co.* v. *Ballentine* (Y.T.), 1 W. L. R. 504, 2 W. L. R. 115.

Promissory note — Renewal—Banking—Notice — Leave to defend. *Bank of New Brunswick* v. *Montrose Paper Co.*, 4 O. W. R. 404.

Recovery of land — *Money claim — Counterclaim—Trial.*]—The defendant having entered into possession of land which he had contracted to purchase from the plaintiffs, and having, as alleged, made default in payment of instalments of the purchase money, the plaintiffs brought an action against him to recover possession of the land and also for a money demand. The writ of summons being specially indorsed, and the plaintiffs having moved for summary judgment under Rule 603, the defendant set up that he had been induced to enter into the contract by fraud and misrepresentation, for which he intended to counterclaim, and that nothing was due to the plaintiffs in respect of their money demand. The Master ordered judgment for the recovery of the land, but stayed the operation of it until after judgment upon the plaintiffs' other claim and the defendant's counterclaim, which he allowed to go to trial:—*Held*, reversing this order, that many serious questions might arise at the trial as to the recovery of the land and the terms upon which it might be recovered, and the trial Judge ought not to be hampered with a final judgment for the recovery of the land in adjudicating upon the questions likely to arise upon the trial of the action. *Spears* v. *Fleming*, 20 C. L. T. 122, 19 P. R. 127.

Recovery of possession of land—Action by assignee of mortgagee—Unconditional leave to defend. *Hall* v. *Barclay*, 6 O. W. R. 976.

Rule 103 — Affidavit verifying cause of action—Action on foreign judgment recovered against firm—Defence — Partnership—Members of firm—Dissolution—Carrying on business — Jurisdiction. *Mills* v. *Magrath* (Alta.), 7 W. L. R. 74.

Rule 103 (N. W. T.)—*Action for instalment of purchase money—Defence—Want of*

title—Equitable relief — Interest—Leave to defend.] — Where, on motion for summary judgment, in answer to the claim of a plaintiff for payment of an instalment alleged to be due on an agreement for sale of lands, the defendant shews that the plaintiff is not owner of the property, and it is not shewn that the plaintiff has the right to acquire the title at the time he may be called upon to convey the land, a motion for summary judgment under Rule 103 will not be granted. *Grieves* v. *Mason*, 8 W. L. R. 265, 1 Alta. L. R. 259.

Rule 103 (N. W. T.)—Action for purchase money of land—Covenant to pay—Defence—Title of plaintiff—Acceptance by defendants—Terms of contract. *Mansell* v. *Moore*, 7 W. L. R. 808.

Rule 103 (N. W. T.)—*Affidavit—General verification of cause of action—Defence—Probability—Leave to defend.*]—On an application for speedy judgment under Rule 103 of the Judicature Ordinance, it is sufficient to verify the cause of action generally. —2. On an application for speedy judgment (following *Ward* v. *Plumbley*, 6 Times R. 198), if the defendant shews a fair probability of a good defence he should be allowed to plead. *Alloway* v. *Pamranke*, 8 W. L. R. 134, 1 Sask. L. R. 127.

Rule 103 (N. W. T.)—*Affidavit verifying cause of action—Action on foreign judgment recovered against firm—Defence—Partnership — Members of firm — Dissolution—Carrying on business—Jurisdiction—Waiver —International law.*]—The plaintiffs had recovered a judgment in Ontario against W. J. McGrath & Co.—a firm name for one W. J. McGrath. They brought an action in Alberta on this judgment, naming W. J. McGrath & Co. as the defendants. The writ was served on W. J. Magrath, a resident of Alberta, W. J. Magrath entered an appearance. On notice to strike out appearance, and enter summary judgment, under J. A. Rule 103:—*Held*, that an affidavit stating that "the defendant is justly and truly indebted to the plaintiffs in the sum of $—— upon a certain judgment recovered by the plaintiffs against the defendants in the High Court of Justice for Ontario on the 8th day of October, 1904," although not stating that this was the judgment sued upon, or in any way referring to the statement of claim, was a sufficient verification of the cause of action.—*Murphy* v. *Nolan*, 18 L. R. Ir. 468, distinguished.—*Semble*, that form 23 A., pt. 22, appendix B., vol. II., Snow's Annual Practice, 1907, is not a form prescribed by English Rules of Court; and, even if it is, need not be followed; it is sufficient if the affidavit describes the cause of action with sufficient particularity to enable the Court to determine that it is the cause of action sued upon. —*Held*, that under Rule 37 (2), a person having carried on business in the name of a firm, elsewhere than in Alberta, may be sued here in such firm name, and it is no answer that the defendant has long since ceased to use such firm name, and has never carried on business within this jurisdiction under such firm name.—Discussion as to allegations necessary in the defendant's affidavit, and right to read supplemental affidavit on hearing of motion.—History of the Rules relating to actions by and against parties, or an individual, in a firm name.—Questions of international law arising under these Rules discussed; and *Western National Bank* v. *Perez*, [1891] 1 Q. B. 304, and *Russell* v. *Cambefort*, 23 Que. B. D. 526, distinguished.—An objection going to the jurisdiction of the Court or Judge is not waived by appearance, or by the defendant's filing affidavits and appearing to oppose a motion for summary judgment. *Mills* v. *McGrath*, 7 W. L. R. 74, 1 Alta. L. R. 32.

Rule 103 (N. W. T.)—Defence—Denial —Unconditional leave to defend—Pleading. *Prince* v. *Richards*, 7 W. L. R. 836.

Rule 103 (N. W. T.)—*Delay in applying.*]—Upon a motion for speedy judgment launched after the statement of defence has been delivered, it is not essential that the delay in moving should be accounted for.—*McLardy* v. *Stateum*, 24 Q. B. D. 504, 60 L. T. 151, 38 W. R. 349, 59 L. J. Q. B. 154, not followed. *Victoria Lumber Co.* v. *Magee*, 6 Terr L. R. 187, 2 W. L. R. 1.

Rule 103 (N. W. T.)—Objections to motion—Material omission in copy of affidavit served—Non-compliance with Rules of Court — Re-service and amendment allowed on terms—Action for same cause pending in District Court—Bar to prosecution of action in Supreme Court — Dismissal of motion. *Craftsmen Limited* v. *Hunter* (Sask.), 8 W. L. R. 435.

Rule 326 (N. W. T.)—*Special circumstances.*] — A motion for judgment under Rule 326 will be entertained only where special circumstances exist which necessitate a hearing out of the ordinary course. *White* v. *Edgar*, 7 W. L. R. 634, 1 Alta. L. R. 102.

Rule 603—Action against executor for interest on legacy—Defence in law. *Down* v. *Kennedy*, 10 O. W. R. 627.

Rule 603—Action on foreign judgment—Defence—Defective service of process—Leave to defend—Terms. *Molsons Bank* v. *Hall*, 4 O. W. R. 452, 5 O. W. R. 625.

Rule 603—Action on promissory note—Defence—Note given on conditional undertaking. *Haines* v. *Yearsley*, 8 O. W. R. 856.

Rule 603—Action on promissory note—Nominal plaintiff—Defence—Renewal—Payment—Indemnity—Action in foreign Court—Stay of proceedings — Addition of parties. *Todd* v. *Labrosse*, 10 O. W. R. 772.

Rule 603—Compromise of claim—Repudiation — Authority of solicitor — Unconditional leave to defend. *Hill* v. *Edey*, 5 O. W. R. 689, 719.

Rule 603—"*Debt or liquidated demand*" —*Contract—Ascertainment.*]—The defendant, having entered into an agreement to manufacture for and deliver timber to the plaintiff, received from him certain advances in

money, exceeding the value of the timber actually delivered, and failed to complete his contract. No adjustment of accounts took place, nor was the amount to be paid for the delivered timber ascertained. In an action to recover the balance of the advances overpaid:—*Held*, that the claim was not a debt or liquidated demand within the meaning of Con. Rule 138, and an order of a local Judge giving leave to sign judgment under Con. Rule 603 was set aside. *McIntyre* v. *Munn*, 23 C. L. T. 297, 6 O. L. R. 280, 2 O. W. R. 694, 3 O. W. R. 41.

Rule 603 — Defence — Counterclaim—Leave to proceed—Terms—Damages—Execution—Costs. *Powell* v. *American Henderson Roller Bearing Co.*, 9 O. W. R. 377.

Rule 603—Defence—Failure to shew—Refusal of leave to file second affidavit—Conditional leave to defend—Payment into Court. *Crown Bank* v. *Bull*, 8 O. W. R. 8, 77.

Rule 603 — Delay in moving—Motion made before expiry of time for delivering statement of claim—Defence to action—Invalidity of orders of Railway Committee of Privy Council — Adverse determination in previous action—Res judicata—Ultimate appeal to Privy Council. *Grand Trunk Ry. Co.* v. *Toronto*, 9 O. W. R. 29, 671.

Rule 603—Lease—Company — Directors —Estoppel. *Eckardt* v. *Henderson Roller Bearing Co.* (1910), 1 O. W. N. 859.

Rule 603 — Leave to defend—Costs of motion—Defective special indorsement—Promissory note payable on demand—Days of grace. *Bank of British North America* v. *Newman*, 9 O. W. R. 433.

Rule 603—Liability of defendants—Finding of fact on correspondence, affidavits and depositions. *Globe Printing Co.* v. *Sutherland*, 1 O. W. R. 589.

Rule 603 — Mortgage—Possession—Defence — Fraud — Leave to defend. *Euclid Avenue Trust Co.* v. *Hohs*, 10 O. W. R. 474.

Rule 603—Promissory note—Action on —Defence—Indorsement by defendants before payees of note—Authority of previous decisions. *Williams* v. *Cumming*, 10 O. W. R. 561.

Rule 603 — Promissory note—Defence—Absence of consideration — Unconditional leave to defend. *Bochmer* v. *Bochmer*, 6 O. W. R. 348.

Rule 603 — Promissory note—Defence—Collateral security—Sureties—Extent of liability. *Nisbet* v. *Hill*, 5 O. W. R. 155, 283, 337, 402.

Rule 603—Promissory notes—Purchase of patent right—R. S. C. 1906 c. 119—Defective patterns—Plausible defence—Leave to defend. *Hays* v. *Roade*, 9 O. W. R. 743.

Rule 603 — Suggested defence—Bank—Account — Reference. *Montgomery* v. *Ryan*, 8 O. W. R. 430, 467.

Rule 603 (Ont.)—Action against solicitors for money received by firm for client—Defence—Single liability of one partner—Personal dealings—Time for moving—Delay. *Best* v. *Edmison*, 12 O. W. R. 1153.

Rule 603 (Ont.)—Action by assignee of mortgage on covenant for payment—Defence —Validity of assignment — Question as to amount due on mortgage—Nominal plaintiff —Parties. *Pringle* v. *Hutson*, 12 O. W. R. 1186.

Rule 603 (Ont.)—Action by assignees of chose in action—Defence—Receivers. *Sovereign Bank* v. *Wilson*, 12 O. W. R. 862.

Rule 603 (Ont.)—Action for wages—Defendants disputing only amount claimed—Reference—Rules 176, 607—Costs. *Bilow* v. *Larder Lake Proprietary Gold Fields Ltd.*, 11 O. W. R. 573.

Rule 603 (Ont.)—Action on bill of exchange against acceptor—Bank suing after charging bill to drawers—Defence available as against drawers—Leave to set up. *Merchants Bank* v. *Butler*, 12 O. W. R. 1071.

Rule 603 (Ont.)—Action on promissory note—Holder for value in due course—Transfer before maturity — Consideration — Suggested defence — Fraud of payees of note. *Baird* v. *McEwen*, 12 O. W. R. 758.

Rule 603 (Ont.)—Action to recover instalments of mortgage money—Defence—Payment—Appropriation of payments. *Kent* v. *Davis*, 12 O. W. R. 309.

Rule 608—Action for money demand—Effect of delay—Payment into Court. *Lakefield Portland Cement Co.* v. *Bryan Co.*, 8 O. W. R. 305.

Rule 615 (Man.)—Admissions in pleading—Partition or sale—Judgment as to part of lands in question. *Kelly* v. *Kelly*, 9 W. L. R. 509.

Rule 616—Payment into Court—Money demand—Acceptance of amount paid in but not in full—Leave to proceed for balance—Pleading—Separation of issues. *Barry* v. *Toronto and Niagara Power Co.*, 6 O. W. R. 741, 935, 11 O. L. R. 48.

Rule 616 — Refusal — Appeal—Amendment—Duty of municipal corporation as to defending frivolous actions. *Moore* v. *Toronto*, 9 O. W. R. 665.

Rule 616 (Ont.)—Dismissal of action on pleadings and admissions—Powers of local Judge—Forum—Court or Chambers—Appeal —Discretion—Costs. *Jasperson* v. *Romney*, 12 O. W. R. 115.

Saskatchewan Rule 103—*Action by drawer on dishonoured bills of exchange—No endorsation by payees—Bills of Exchange Act.*] — Action on three bills of exchange drawn by plaintiff on defendants to the order of the Dominion Bank and accepted by the defendant. The bills were dishonoured and the bank returned them to the defendant. The Judge made an order for summary judg-

ment, and on appeal the full Court was evenly divided. *Velie* v. *Hemstreet*, 11 W. L. R. 297.

Saskatchewan Rule 103 — *Foreign judgment—Affidavit in support of motion—No verification of amount claimed.*]—Plaintiffs moved for summary judgment on a foreign judgment under above rule. The affidavits in support did not verify the amount claimed. Doubted, if an application can be made for a summary judgment after the cause is at issue. Motion dismissed. *Gaetz* v. *Hall*, 10 W. L. R. 630.

Special indorsement on writ—*Order III., Rule 6—Order XIV.—Particulars.*]—Where a party is placed in the position of having judgment signed against him, summarily, he is entitled to have sufficient particulars to enable him to satisfy his mind whether he should pay or resist. *Bank of Montreal* v. *Thompson*, 7 W. L. R. 144, 13 B. C. R. 218.

Summons—*Abridging time for return.*]—Notwithstanding the provisions of Rule 548 a Judge has no power to abridge the time for the return of a summons for speedy judgment taken out under Rules 103 and 104 of the Judicature Ordinance. *Toronto Rw. Co.* v. *Bain*, 4 Terr. L. R. 28.

Time—*Appearance—Collusive judgment—Motion to set aside—Affidavit.*]—An order allowing the plaintiff to sign judgment on a specially indorsed writ may be made under s. 73 of 60 V. c. 24 (Supreme Court Act), though the time limited for appearance by the writ has not expired. A judgment will not be set aside on the ground of collusion and undue preference where the affidavit in proof of the collusion is founded on information and belief only, and does not state the origin of the information, and no circumstances are assigned for the deponent's belief. *Dominion Cotton Mills Co.* v. *Maritime Wrapper Co.*, 35 N. B. R. 676.

Writ of summons — *Special indorsement.*] — The particulars of the plaintiffs' claim indorsed on the writ of summons were: —"1899. November 30. To balance of account rendered, which balance has been stated $51.70. To balance of account rendered and stated owing to Hunter Brothers, and duly assigned for value by assignment dated the 1st day of December, 1899, to the plaintiffs, and of which express notice in writing has been given to the defendant, $167.15; $218.85."—*Held*, not a special indorsement such as would support a summary judgment under Order XIV. *Rogers* v. *Reed*, 20 C. L. T. 219, 7 B. C. R. 139.

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16. Terms of Judgments.

Carrying out—Testing machinery—Differences between parties—Reference to person to be named—Appointment by Court. *Fuel Economizer Co.* v. *Toronto*, 3 O. W. R. 366.

Claim for chattels.] — Motion by the plaintiff to vary the minutes of a consent judgment. The minutes said that the plaintiff was to "release all claims on farm and chattels upon new agreement being executed:" —*Held*, that no exception could be made in favour of the plaintiff as to household furniture claimed by him. *Hanna* v. *Hanna* (1910), 1 O. W. N. 393.

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17. Verdict of Juries.

Amendment of.]—H. had been manager of the bank and certain losses were made which the bank claimed he was liable to make good. On reference to arbitration an award for $1,718 was found against him. He then brought this action for three quarters' salary, and defendants pleaded the award as a set off. A verdict for $1,703 was found in plaintiff's favour. The bank moved to amend the verdict by entering it for the bank for $13, and in support of the motion produced affidavits from all the jurors, stating that what they intended was to find the amount plaintiff was entitled to for three quarters' salary, leaving him liable for the amount of the award: — *Held*, that the verdict must be amended as moved, without sending the case to another jury. *Heard* v. *Union Bank* (1877), 2 P. E. I. R. 237.

Disregarding findings of jury.]—The power conferred on the Court by Rule 615 to give judgment on the evidence before it, may be exercised though th result may be to disregard the findings of a jury, but it must be used with great caution. *Clayton* v. *Patterson*, 21 C. L. T. 117, 32 O. R. 435.

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18. Miscellaneous Matters.

Abandonment — *Powers of solicitor.*]—The attorney *ad litem* has authority to abandon a judgment homologating the report of an expert accountant, which is a mere incident in the procedure. *Stephens* v. *Higgins*, 3 Que. P. R. 155.

Account—Reference—Rule 607. *Proctor* v. *Hill*, 11 O. W. R. 342.

Authority — *Res judicata—Appeal.*]—The provisional authority of a judgment rendered by the Superior Court in review is at an end when the cause is submitted to the Court of Appeal. *Brock* v. *Wolf*, 9 Que. P. R. 152.

Compromise of action—*Enforcement by order of Court—Forum—Jurisdiction of Master in Chambers—Practice—Motion to Court.*] —Appeal by plaintiffs from order of M. in C. dismissing application for order allowing plaintiffs to enter judgment against defendant for $100, the amount which the parties had agreed should be paid by defendant in settlement of the action:—*Held*, since the Judicature Act the Court has jurisdiction to enforce in the action a compromise of it to which the parties have agreed. The proper practice in such cases is to apply to a Judge in Court for such order as may be necessary to enforce the compromise. Where the compromise is to be carried out by a stay or dismissal of the action, the M. in C. may have jurisdiction to make the order. It

follows that plaintiffs fail in their appeal. But treating their substantive motion as having been transferred into and heard by a Court: order made for payment by defendant of the $160 to plaintiffs forthwith. *Pirung* v. *Dawson*, 4 O. W. R. 499, 25 C. L. T. 71, 9 O. L. R. 248.

Court of Review—*Right to appeal to—Interlocutory order.*] — In an action for salary by a land surveyor, a judgment ordering plaintiff to file some plans before adjudicating on the merits, is an interlocutory order and a matter of judicial discretion; an inscription in review from said order will be discharged, as an appeal from the final judgment would give a complete remedy. *Hébert* v. *Canada Resort & Devel. Co.*, 11 Que. P. R. 38.

Declaring rule nisi absolute—*Its nature—Right of appeal therefrom—C. C. P. 52, 83, 805.*]—A judgment which declares a rule *nisi* to be absolute is a final judgment. Such judgment can be taken to the Court of Review or to the Court of Appeal. A witness threatened with a rule *nisi* may contest it through counsel, without being obliged to first appear in person. *Semble*, a witness may simply appeal from a judgment which has declared a rule *nisi* to be absolute, without also being obliged to appeal from the judgment which ordered the rule to issue and the delay to go to appeal only commences from the date of the last judgment. *Collins* v. *Can. North. Que. Ry. Co. & Richardson*, 11 Que. P. R. 133.

Declinatory exceptions — *Burden of proof — Exhibits filed by plaintiff—Allegation of the declaration — C. P. 94, 170.*] — Judgment may be rendered upon a declinatory exception if plaintiff has alleged and sufficiently established by the exhibits that the transaction between him and the defendant took place in the district where the writ has issued; the Court has not then to pronounce whether these allegations are true or not. *Lacroix* v. *Peck Co.* (1910), 12 Que. P. R. 325.

Delivery — *When delivered.*]—*Held*, that a judgment signed by the Judge and left by him for deposit in the mail at Victoria on the 11th August, 1899, was pronounced on that date, although the judgment did not apparently reach the Vancouver Registry, to which it was addressed, until the 15th. *Attorney-General* v. *Dunlop*, 20 C. L. T. 396, 7 B. C. R. 312.

Desistment — *Appeal pending—Jurisdiction of Court below — Costs.*]—Where the action has been dismissed, and the plaintiff appeals from the judgment dismissing it, and the parties in whose favour the dismissal has been granted desist from the judgment in their favour, the Superior Court is, in spite of such desistment, *functus officio* in the cause, and cannot take recognisance of subsequent proceedings as long as the appeal is pending. — 2. A motion dismissed upon a ground not set up by the parties will be dismissed without costs. *Lamothe* v. *Piche*, 5 Que. P. R. 172.

Desistment—*Proof of—Authority of attorney—Ratification.*]—The authority of an attorney *ad litem* to file a desistment from a judgment in the name of his client, or the ratification of such desistment by the client, cannot be proved by witnesses, when the judgment is for more than $50, without a commencement of proof by writing. *Gauthier* v. *Barcelo*, 19 Que. S. C. 498, 4 Que. P. R. 224.

Effect — *Novation.*]—A judgment does not operate novation of the debt upon which it is based. *Foisy* v. *Levesque*, 9 Que. P. R. 130.

Effect of, as evidence—*Contradicting.*] —A judgment of the Superior Court is an authentic document which makes full proof of the statements contained therein, and their veracity cannot be impeached by parol evidence, except upon inscription *en faux*. *Beaubien Produce & Milling Co.* v. *Corbeil*, 18 Que. S. C. 484.

Identity of cause and purpose—*Judgment reducing rent for a partial non-performance of the conditions of the lease—Subsequent action to recover damages for the total non-performance of the same conditions.*]—The authority of a judgment is no obstacle to a second suit depending on new facts forming an aggravation of those on which it had been pronounced in a previous trial. Hence, when in an action by a lessee against his lessor to recover damages for the partial non-performance of the terms of the lease, a judgment granting a reduction of rent for the three months preceding the suit, and for the future, so long as the defendant does not fulfil his contract, etc., it cannot be raised as an objection to a new suit by the lessee to recover damages for the total non-performance of his obligations in the lease, happening since. *Saumure* v. *Ouimet*, 1909, 36 Que. S. C. 121.

Impossibility of execution — *Uncertainty—Inscription for review—Remittal to Court below to reform.*] — A judgment requiring a defendant to repair defects in the construction of a building and to put it in the condition specified in the contract is too general and vague, and is not capable of execution; the cause will be remitted by the Court of Review to the Court of first instance to proceed anew to judgment. *Curé et Marguilliers de St. Charles de Lachenaie* v. *Archambault*, 9 Que. P. R. 369.

Lien on after-acquired land.] — The registration of a judgment creates a hypothec on land acquired by the judgment debtor after the recovery of judgment. *McClure* v. *Crateau*, 18 Que. S. C. 336.

Life of — Execution —Arrest of debtor—Discharge—Statute of Limitations—Effect of execution in keeping judgment alive. *Boak* v. *Fleming* (N.S.), 6 E. L. R. 503.

Life of judgment—*Statute of Limitations—Payment—Sale under execution—Purchase by execution creditor—Crediting price — Ex parte order for execution — New right.*]—At a sale of land under execution, the lands sold were bid in by the judgment creditor, and the amount of the bid credited on the execution by the sheriff on account of the judgment debt:—*Held*, that this was

not a payment by or on behalf of the debtor to take the case out of the Statute of Limitations.—*Held*, further, that an order for the issue of a writ of execution, made by a Judge *ex parte*, during the currency of the period of twenty years from the recovery of the judgment, the judgment debtor having died out of the province intestate, and no administrators having been appointed, conferred no new right upon the defendant sufficient to keep the judgment alive, and unbarred by the statute.—*Held*, that to obtain a new right against anyone, by reason of such an order, the defendant must have given notice, which he could have done, either by applying as a creditor to have administrators appointed, or by notifying the heirs. *Lefurgey* v. *Harrington*, 36 N. S. R. 88.

Life of judgment injectment — Revivor — Possession — Mortgage—Execution Costs. *Re Ling, Ex p. Ling*, 5 E. L. R. 494.

Opposition — *Admissions.*]—A plaintiff has a right, in answer to an opposition to judgment, to allege admissions of liability made by the defendant subsequently to the institution of the action, on the production of the opposition, and such allegations will not be rejected on motion. *Marion* v. *Leroux*, 2 Que. P. R. 564.

Opposition—*Allegations of petition to set aside judgment—Order allowing opposition to remain on files as petition—Costs.*]—Where an opposition to judgment contains the essential allegations and conclusions of a petition, it may remain on file as a petition, in spite of its irregular filing as an opposition to judgment, but the opposant will be ordered to pay the costs of an exception to the form, because of the error or false description of the method of recourse adopted by him. *Dubs* v. *Beaulieu*, 9 Que. P. R. 342.

Order for — Necessity for issue—Reference to assess damages—Practice. *Jackson* v. *Ingram*, 40 N. S. R. 630.

Petition in revocation of judgment —*Ex parte judgment — Failure to file exhibits in support of the action—C. P. 155, 1177.*]—A petition in revocation of judgment will be dismissed when the petitioner could have raised the grounds of complaint therein contained, in this case failure to file exhibits in support of the action, either by appealing from the judgment he wishes to have set aside, or by an opposition to the judgment. *McIntyre* v. *Eastmure* (1910), 12 Que. P. R. 196.

Proof of — *County Court — Entries by clerk in book — Irregularity.*]—To prove a County Court judgment the plaintiff produced the procedure book of the County Court shewing the entries therein of the different proceedings in the action in which such judgment was alleged to have been recovered, and also filed a copy of such entries, certified as a true copy by the clerk of the Court, pursuant to s. 46 of the County Courts Act. Amongst the entries so proved was one of judgment by default against M., which entry itself, by s. 103 of the Act, constituted the judgment of the County Court:—*Held*, that, as the entry of the judgment in the procedure book constituted the judgment, and as the Court itself was a Court of record, the entry of the judgment became a record of a Court of record. If so, its production, or the statutory proof of it by a certified copy, proved the jurisdiction of the Court over the matters in respect of which the judgment was recovered, and the recovery, existence, and validity of such judgment. It was argued that the procedure book shewed on its face that the judgment was invalid, as it did not shew the note required by s. 105 to be made in such book:—*Held*, that the making of such note was only a ministerial act to be performed by the clerk; it was not a part of the judgment itself; the validity of the judgment did not depend on such note being made. The failure to make it would seem to be merely an irregularity. *Dixon* v. *Mackay*, 22 C. L. T. 374.

Prothonotary — *Irregularity.*]—A judgment rendered by the prothonotary in an action for wages is valid on its face, although it appears to have been rendered by the Judge. *United Counties Rw. Co.* v. *Letendre*, 3 Que. P. R. 295.

Reference for trial — Report—Motion for judgment—Practice—Costs. *Upper Ontario Steamboat Co.* v. *Cahill* (1910), 1 O. W. N. 679.

Registered judgment—Release of lands affected by—Execution against other lands —Registry Act — Equities. *Re Bank of Liverpool*, 5 E. L. R. 389.

Registration—*Lien on lands—Effect as to lands conveyed by judgment debtor, where conveyance not registered.*]—The defendants recovered judgments against B. in 1903, and registered them so as to bind his lands. At that time 2,000 acres of land belonging to the plaintiffs and conveyed to the plaintiffs by B. stood in the name of B. owing to the conveyance not being registered: — *Held*, that, as the lands were not the lands of the judgment debtor, and there was no laches on the part of the plaintiffs, there should be a declaration that these judgments did not bind the lands.—When a person registers a judgment which, like a drag-net, is to catch everything, he cannot complain if he only gets the interest which the debtor had in any thing he encloses. *Stanboo Pulp Co.* v. *Carrier Lane Co.*, 40 N. S. R. 546.

Registration against land in which judgment debtor has interest—Prior unregistered assignment not affected. *Mooney* v. *McDonald*, 1 E. L. R. 78.

Registration of — *Effect — Lands purchased by debtor—Conveyance to nominee of debtor.*]—A creditor who registers his judgment against an immovable bought by his debtor at a sheriff's sale, but the purchase money of which has not been paid, cannot maintain an hypothecary action against a person who has afterwards become the transferee of the purchaser's rights and has paid the purchase money to the sheriff, who has given him the title to the immovable. *Lemieux* v. *Mitchell*, 3 Que. P. R. 367, 18 Que. S. C. 528.

Reminute—*Priority.*]—A failure to reminute an existing judgment does not give priority to a subsequent judgment which has been reminuted previous to the date for reminuting the first judgment, although it would give priority to a judgment recovered and reminuted subsequent to that date. *Rattenburg* v. *Connolly* (1881), 2 P. E. I. R. 439.

Service of—*Opposition—Interruption of right.*]—The service of judgment required by Art. 1166, C. P., as a means of interrupting the defendant's right to file an opposition thereto, must be that of a duly stamped and certified copy of said judgment. *Migneron* v. *Yon*, 4 Que. P. R. 185.

Signing and entry of judgments.]—The requirements of Con. Rules 628 and 637 of 1897, as to the signing and entry of judgments, are satisfied by the proper officer placing his signature upon the back of the judgment under the words "judgment signed October 6th, 1890," followed by a memorandum in the judgment book in his office by him, although he did not sign the judgment on its face. *George* v. *Green* (1907), 8 O. W. R. 247, 787, 13 O. L. R. 189, 10 O. W. R. 292, 14 O. L. R. 578, affirmed, 42 S. C. R. 219.

Time for delivering—*Appeal to County Judge—Under Municipal Drainage Act—10 Edw. VII. c. 90, s. 48—Construction of—Imperative or directory enactments?—Leave to appeal to Divisional Court granted.*]—Municipal Drainage Act, 10 Edw. VII. c. 90, s. 48, enacts: "At the Court so holden, the Judge shall hear the appeals and may adjourn the hearing from time to time, but shall deliver judgment not later than 30 days after the hearing.—Meredith, C.J.C.P., *held*, that above section was directory only. —*Re Nottawasaga & Simcoe* (1902), 4 O. L. R. 1, 1 O. W. R. 278, distinguished.—Riddell, J., granted leave to appeal to Divisional Court on ground of conflicting decisions. *Rowland* v. *McCallum & McKillop* (1910), 17 O. W. R. 557, 2 O. W. N. 305.

Transcript — *County Courts Act—Real Property Limitation Act.*]—*Held*, that s. 24 of the Real Property Limitation Act, R. S. M. c. 89, applies to any judgment whether charged on land or not, and that no proceedings can be taken to enforce a judgment after the lapse of ten years from the date of its recovery. That the filing in 1892 of a transcript of a County Court judgment in the Queen's Bench, under s. 193 of the County Courts Act, R. S. M. c. 33, since repealed, had not so far the effect of making the same a new judgment as to give a new point of time for the running of the statute. *Jay* v. *Johnstone*, [1893] 1 Q. B. 25, and *McKenzie* v. *Fletcher*, 11 Man. L. R. 544, followed. *Blanchard* v. *Muir*, 20 C. L. T. 140, 13 Man. L. R. 8.

Ultra petita — *Alternative relief—Declaration — Defence in denial—Interest.*]—A defendant cannot complain of a judgment because it does not given him an alternative which the declaration of the plaintiff conceded to him. If he refuses to take advantage of it by absolutely denying in his plea the contract sued upon.—The Court of Appeal will not reverse the judgment of the Court of first instance for an interest purely theoretical. *Lavoande* v. *Timossi*, 8 Que. P. R. 239.

JUDGMENT CREDITORS.

See MONEY IN COURT.

JUDGMENT DEBTOR.

Arrest — *Disclosure — Discharge—Transfer with intention to defraud—Question for officer taking examination—Discretion.*]—In disclosure proceedings the question whether the debtor has transferred any property intending to defraud the plaintiff, or since his arrest given any preference to any other creditor, are for the officer taking the examination, and the Court will not interfere with his discretion merely because the circumstances of the transfer are suspicious. *Rex* v. *Ebbett, Ex p. Smith*, 38 N. B. R. 559; 5 W. L. R. 337.

Collection Act, N. S. — *Examination—Power of examiner to direct assignment—Discretion — Statute—Imperative or directory.*]—Section 28 of the Collection Act, R. S. N. S. c. 182, provides that upon the examination of a debtor the examiner may verbally require that the debtor shall execute an assignment of all his real and personal property, not exempt from levy or execution, to the creditor in trust for the payment due on the judgment. The examiner in the present case ordered the assignment, holding that he had no discretion in the matter: — *Held*, on appeal, that the examiner had a discretion, and that the statute was not mandatory as to directing an assignment. *McMillan* v. *Watson*, 21 C. L. T. 446.

Collection Act, N. S.—*Wilful and malicious tort—Committal.*]—Action for assault. The defendant, with a defence denying liability, paid money into Court. The plaintiff took it out of Court and entered judgment under Order XXII., R. 7. Upon an examination of the defendant before a commissioner under the Collection Act, the plaintiff made application to have the defendant committed to gaol under s. 27 (*f*) of the Act. The commissioner refused the application, on the ground that the evidence that the tort was wilful and malicious was not receivable, as there had not been an adjudication of a tort by the Court:—*Held*, that the commissioner was in error in assuming that it was necessary to have a formal adjudication by the magistrate that a tort had been actually committed. The expression in this sub-section—"cases of tort"—does not mean cases where a judgment has been given expressly finding a tort, but is merely intended to deal with all actions of tort in the same manner as preceding sections cover actions upon contracts. *Etter* v. *Graham*, 21 C. L. T. 484.

Commitment of judgment debtor.]—An order of committal against judgment debtor, under Manitoba King's Bench Rule 755, for contempt in refusing to make satisfactory answers on examination for discovery is not a "matter" or "judicial proceeding" within the meaning of s.-s. (c) Supreme Court Act, s. 2, but merely an ancillary proceeding by which the judgment creditor is authorised to obtain execution of judgment, and no appeal lies in respect thereof to Supreme Court of Canada. *Danjou* v. *Marquis*, 3 Can. S. C. R. 258, referred to. *Bateman* v. *Svensson* (1900), 42 S. C. R. 146, affirming 18 Man. L. R. 493.

Committal—*Conditional order — Service —Arrest—Terms of discharge—County Court Practice—Registrar's minute.*]—An order to commit a judgment debtor under s. 193 of the County Courts Act must be absolute, not conditional. Where an order to commit a party is made in his absence, he must be served with a copy of the order before arrest. Orders to commit should be drawn up and should contain the terms on which discharge out of custody may be obtained, as required by Order XIX., R. 13. Where a registrar is present and takes a minute of an order, the minute so taken is conclusive, even though the Judge's recollection of the order is different. *Wallace* v. *Ward*, 9 B. C. R. 450.

Committal — *Imperial Debtors Act, 1869.*]—The Imperial Debtors Act, 1869, is in force in the province of Alberta (Sifton, C.J., and Newlands, J., dissenting). *Fraser* v. *Kirkpatrick*, 5 W. L. R. 287, 6 Terr. L. R. 403.

Committal for fraud — Assignment—Collection Act, Nova Scotia—*Habeas corpus* —Order for arrest — Irregularity—Release. *McFatridge* v. *Marcus*, 4 E. L. R. 11.

Examination — *Assignment for creditors — Examination under Assignments Act.*] — The fact that the judgment debtor had, before judgment, made an assignment for the benefit of his creditors, and had been examined as an insolvent assignor under the provisions of s. 34 of R. S. O. 1897, c. 147, does not deprive a judgment creditor, after obtaining his judgment, of the right to examine the debtor under Rule 900. *Bank of Hamilton* v. *Scott*, 24 C. L. T. 268, 3 O. W. R. 716, 717.

Examination — *Collection of Debts Ordinance, 1904, sec. 9, sub-sec. 4—Order for payment of judgment debt by instalments—Default—Motion to commit—Dismissal not on merits — Second motion not barred — Practice — Affidavits — Service—Filing—Merits—Discretion—Delay in moving—Suspension of order—Dismissal of motion.*]—Upon the 25th August, 1908, the defendant was examined as a judgment debtor under the Collection of Debts Ordinance, 1904, and was ordered to pay $25 a month, beginning on the 5th September, 1908. In October, 1910, the plaintiff moved to commit the defendant, under sec. 9, sub-sec. 4, of that Ordinance, for contempt in not paying the instalments ordered. The defendant made the first 3 payments, in September, October, and November, 1908, since when he had paid nothing. The plaintiff's motion was dismissed, because notice of it was given in the name of a firm of solicitors not on the roll of the Territorial Court. A second motion was then made, upon the same material, properly served and filed:—*Held*, that the dismissal of the first motion was not a bar to the second, the merits not having been passed upon so as to make them *res adjudicata*.—*Held*, also, that copies of the affidavits in support of the motion having been served with the notice of motion and the affidavits filed before the return-day, the motion was regularly made: Rules 292 (*a*) and 467; and it was not necessary that the affidavits should be filed before the notice of motion was served.—*Held*, as to the merits, that it is not compulsory upon the Judge to make an order of commitment upon an affidavit proving default, as provided for in s. 9, s.-s. 4, of the Ordinance; and the Judge has no power to vary or suspend the order for payment by instalments, or to give a new date; the powers of the Judge are confined to the making of the first order and enforcing it strictly on default; but he has a discretion to refuse to commit.—And *held*, that, if the plaintiff had moved promptly on default, he would have been entitled to a committal order; but he had himself suspended the order for payment and allowed it to lie dead for 2 years, and he must have done so because he conceived that the defendant was unable to pay; and he had, by his own laches, put himself in a position where he could not ask for a committal order; and the motion was refused. *Palm* v. *Thompson* (Yuk.) (1910), 15 W. L. R. 433.

Examination—*Committal for fraud—Imprisonment — Habeas Corpus Act, s. 1— Warrant of commitment — "Process."*]—Upon return of a writ of *habeas corpus* a motion for discharge of prisoner dismissed. Prisoner was in custody under a warrant issued as result of his examination as Division Court judgment debtor. The Judge having found facts suggesting fraud, the warrant is good on its face. The warrant is "process" under s. 1 above. *Re Stickney*, 13 O. W. R. 1205.

Examination—Concealment of property —Unsatisfactory answers — Committal — Leave to apply for discharge. *Campbell* v. *Ellman* (1910), 1 O. W. N. 998.

Examination — *Default—Motion to set aside summons.*] — The examination of a debtor, after judgment, can only take place in the cases mentioned in Art. 590, C. P.—2. A debtor who has made default to appear upon a summons wrongly issued, may nevertheless demand, by motion, the setting aside of the summons. *Alden Knitting Mills* v. *Hershfield*, 5 Que. P. R. 390.

Examination—Default of attendance on adjourned appointment — Costs. *Moran* v. *McMillan*, 2 O. W. R. 410.

Examination — Insufficient answers — Further examination. *Ivey* v. *Moffat*, 1 O. W. R. 519.

Examination — Judgment summons—Issue of second while first pending—Necessity for special motion. *Brownlee* v. *Eads* (Y. T.), 2 W. L. R. 123, 216.

Examination—Making away with property—Committal. *Hunt* v. *Robins*, 1 O. W. R. 80.

Examination — *Opposition pending.*]—A judgment debtor cannot be called upon for examination as such while an opposition to the seizure made under the judgment against him is pending. *Duplessis* v. *Quinn*, 6 Que. P. R. 222.

Examination—*Refusal to attend—Contempt of Court.*]—A defendant who has been duly summoned under Act. 590, C. C. P., upon a writ valid in form, for examination as to his property and assets, and who has made default to appear on the day fixed, is not entitled to be heard by counsel on the rule issued for contempt, or to ask for security for costs of contestation of the rule, until he have first obeyed the writ. *Galt Knitting Co.* v. *Coté*, 16 Que. S. C. 425.

Examination— — *Scope — Rule 610—Arrest and Imprisonment for Debt Act, s. 19.*]—Under Rule 610 of the Supreme Court Rules, 1906, the debtor must answer all questions affecting his property anterior to the recovery of the judgment.—Section 19 of the Arrest and Imprisonment for Debt Act has not been displaced by Rule 610. *Jackson* v. *Drake, Jackson & Helmcken*, 6 W. L. R. 44, 13 B. C. R. 62.

Examination — Scope and relevancy of questions—Rule 380 — Enquiry as to property alleged to belong to wife of debtor. *Clinton* v. *Sellers* (N. W. T.), 6 W. L. R. 367.

Examination — Second examination—Application for—Rule 900. *Kingswell* v. *McKnight*, 10 O. W. R. 15.

Examination—*Unsatisfactory answers—Committal to gaol for contempt of Court—Manitoba Rules 748, 755—Meaning of "satisfactory" answers.*]—On the defendant's examination as a judgment debtor she admitted having on her person sixteen thousand dollars in cash and diamonds worth from fifteen hundred to two thousand dollars. The judgment was for five thousand dollars. On being asked if she would pay the judgment and why she did not pay it, and if she refused to pay it, on the advice of her counsel, she refused to answer these three questions and was subsequently committed for contempt to one year's imprisonment. On appeal the Manitoba Court of Appeal was equally divided as to the meaning of "satisfactory" answers on such an examination. An appeal has since been taken to the Supreme Court of Canada. Subsequently the defendant was released on bail, she having purged her contempt and her solicitor having undertaken to pay the judgment and costs if appeal not allowed. *Bateman* v. *Svenson*, 10 W. L. R. 361.

Examination—Unsatisfactory answers—Disposition of property — Pending actions. *Gault* v. *Pentecost*, 2 O. W. R. 636.

Examination—Unsatisfactory answers—Preference — Committal. *Hepburn* v. *Vankorne*, 1 O. W. R. 506.

Examination of—*Committal—Incurring debt by fraud—Appeal.*]—The defendant received from the plaintiff several sums of money, part of which was to be invested and part expended on the plaintiff's farm. The defendant placed these moneys to his wife's credit, made no investments, kept no accounts, and could not account at all for a large portion, although he said it had been expended on the farm. Before the plaintiff got judgment, and while the action was pending, the defendant allowed his wife and sister-in-law to get judgments against him:—*Held*, by the full Court, reversing the order of Drake, J., that the defendant had not incurred the debt by fraud or false pretences within the meaning of s. 15 of the Arrest and Imprisonment for Debt Act. An appeal lies direct from an order committing a debtor to gaol, and no preliminary motion to the Judge for discharge is necessary. *Bullock* v. *Collins*, 21 C. L. T. 191, 8 B. C. R. 23.

Examination of—Examination of transferee—Disposition of costs. *Traviss* v. *Hales*, 8 O. W. R. 118.

Examination of—*Order for—Refusal to obey — Contempt of Court — Attachment for—Privilege—Judge of Supreme Court.*]—The proceedings for the oral examination of a judgment debtor under s. 36 of 59 V. c. 28, should be by summons and order; and not by an *ex parte* order in the first instance. A Judge of the Supreme Court has no privilege against an attachment for any contempt which is of a criminal and not of a civil kind. The process of attachment which may be issued under the provisions of s. 36 of 59 V. c. 28, against a judgment debtor for contempt of an order calling upon him to appear and be examined orally as to any and what property he has, which by law is liable to be taken in execution, is punitive or criminal in its nature; therefore, a Judge of the Supreme Court cannot protect himself by his privilege against an attachment issued against him for refusing to obey such an order. *In Re Burkhardt* v. *Van Wart* — *Ex p. Van Wart*, 35 N. B. R. 78.

Examination of—*Unsatisfactory answers—Committal for contempt—"Satisfactory"—Rules 748, 755—Release pending appeal.*]—The defendant, on her examination as a judgment debtor under Rule 748 of the King's Bench Act, R. S. M. 1902, c. 40, admitted that she had upon her person more than enough money to pay the judgment, but refused to answer whether she would pay it or to say why she would not. Afterwards upon the plaintiff's application, under Rule 755, the defendant was ordered by Mathers, J., to be committed to gaol for twelve months, on the ground that, within the meaning of that Rule, she had not made satisfactory answers to the questions. On appeal:—*Held, per* Howell, C. J. A., and Perdue, J.A., following *Merrill* v. *McFarren*, 1 C. L. T. 133, and *Metropolitan Loan Co.* v. *Mara*, 8 P. R. 390, that the order was justified and should not be set aside.—*Per* Richards and Phippen, JJ.A., that the word "satisfactory" in Rule 755 only means "full and truthful," and that, as Rule 748 does not provide for any questions as to the debtor's willingness to pay or as to his reasons for refusing to pay,

there should be no order to commit under Rule 755 for refusal to answer such questions.—The Court being equally divided, the appeal was dismissed without costs.—Subsequently an order was made on consent providing for the release of the defendant, pending an appeal to the Supreme Court of Canada, on terms satisfactory to the plaintiff. *Bateman* v. *Svenson*, 18 Man. L. R. 493, 10 W. L. R. 361.

Examination of agent or employee—Rule 903—Unpaid agent acting under power of attorney. *Smith* v. *Clergue*, 14 O. W. R. 31.

Examination of transferee—Evidence of transfer. *Holme* v. *McGillivray*, 2 O. W. R. 519.

Examination of transferee — *Third mortgage — "Exigible under execution."*]— A third mortgage upon real estate made by a judgment debtor is not a transfer of property "exigible under execution," within the meaning of Rule 903, and the third mortgagee is not, therefore, liable to be examined as a person to whom such a transfer has been made. The words quoted refer to legal execution and do not include equitable execution or the appointment of a receiver. *Canadian Mining & Investment Co.* v. *Wheeler*, 22 C. L. T. 123, 3 O. L. R. 210, 1 O. W. R. 103.

Fraudulent disposition of property—*Order for committal — Refusal to execute assignment — Term of imprisonment—Collection Act.*] — A judgment was recovered against the defendant for debt, the amount of which at the time of the proceedings to be referred to was $50.32, and was unsatisfied. The defendant entered into a recognisance for $45, and justified on oath as being worth, in personal property, consisting of household furniture, $45, over and above all his debts, including the judgment mentioned and another, which were specifically brought to his notice. An execution was issued, and the sheriff, five days later, demanded the property, but the defendant replied that he had sold it for $60, which he gave to his wife to buy household supplies. The defendant, being examined under the Collection Act, shewed that he had conveyed away other property to relatives, etc. The examiner made an order under the Collection Act, s. 27 (e), committing the defendant to gaol for two months for a fraudulent disposition of his property, or until he should pay $61.42, the amount due on the judgment: — *Held*, that the examiner was fully justified in making the order for imprisonment. — 2. That where the debtor refuses to execute the assignment mentioned in s. 28 of the Collection Act, and the Judge or examiner determines to commit him under s. 27 of the Act, the warrant or order of committal cannot then direct an assignment to be executed, but such refusal of the debtor to execute it can be taken into consideration by the officer or Judge only in fixing the term of imprisonment. *Heuniger* v. *Brine*, 24 C. L. T. 143.

Garnishee—Order for payment—Examination of debtor of garnishee—Rules 835, 903, 904. *Roaf* v. *Ditzel*, 6 O. W. R. 931.

Judgment summons — Collection of Debts Ordinance — Power to issue second summons — Functions of clerk — Power of Judge to direct — Power to amend defective summons — Procedure — Action — Trial. *McLellan* v. *Thompson, Irwin* v. *Kelly*, 9 W. L. R. 41.

Legal and equitable interest — Motion by the plaintiff for an order continuing an injunction.]—*Held*, that the Courts never presume to enlarge a judgment creditor's rights.—*Holmes* v. *Millage*, [1893] 1 Q. B. 551, followed. *Reilly* v. *Doucette* (1911), 19 O. W. R. 51, 2 O. W. N. 1053.

Married woman — *Judgment debt—Collection Act—(N.S.)—Examination of debtor — Prohibition — Costs.*] — A commissioner acting under the above Act was prohibited from taking the examination of a married woman as a judgment debtor. *Adams* v. *Slaughenwhite*, 8 E. L. R. 57.

Motion to commit — Imperial Debtors Act in force in N. W. T.—Non-payment of judgment — Examination of debtor—Refusal to disclose property. *Iverson* v. *Enwright* (N.W.T.), 2 W. L. R. 20.

Motion to commit — Imperial Debtors Act, 1869, in force in Saskatchewan—Saskatchewan Act, 1905—British North America Act — Constitutional law—Jurisdiction of District Courts — Summons not in compliance with Rules—Appearance by counsel to take objection — Waiver — Subpœna — Tender of witness fees — Service — Costs. *Pearce* v. *Kerr*, 9 W. L. R. 504.

Motion to commit — Non-payment of judgment—Contempt of Court—Disobedience of order—Preliminary objections—Practice—Evidence of amount of judgment—Examination of debtor for discovery in aid of execution—Service of copy of depositions—Rule 380 (3) — Admissibility of depositions on motion to commit — Service of order — Exhibiting original. *Fraser* v. *Kirkpatrick* (N. W.T.), 4 W. L. R. 1.

Neglect or refusal to pay—Means to pay — Evidence — Examination of debtor — Committal. *Fraser* v. *Kirkpatrick* (N.W.T.), 4 W. L. R. 317.

Order and appointment for examination—Failure to attend—Motion to commit—Insufficient payment of conduct money. *Douglas* v. *Omand* (N.W.T.), 4 W. L. R. 331.

Order for committal — *Appeal from—Questions of fact — Affidavit — Oral evidence.*]—The Court will not set aside an order committing a judgment debtor to prison on the ground of his having made a fraudulent disposition of his property whereby the judgment creditor is materially prejudiced in obtaining satisfaction of his judgment, unless it appears that the Judge making the order has taken some manifestly mistaken view of the law or the facts. As such Judge has had the opportunity of hearing the witnesses give their testimony *viva voce*, and of observing their demeanour, his decision on questions of fact must be taken to have the same weight as the verdict of a jury. On an application for a rule *nisi* to rescind a Judge's order imprisoning a judgment debtor, the applicant

cannot shew by affidavit what took place before the Judge to whom the application was made; the stenographer's return of the evidence must be produced. *Ex p. Despres, In re O'Leary* v. *Despres*, 36 N. B. R. 13.

Order for committal—*Power of Judge to rescind—Re-trial — Mandamus.*]—A mandamus to a Division Court Judge to hear and consider an application made to rescind an order made under s. 247 of Division Courts Act, committing judgment debtor, refused, the Division Court Judge having no jurisdiction to hear or rescind such an order. *Re Wilson* v. *Dunham*, 13 O. W. R. 762.

Order for commitment — Arrest — —*Habeas corpus* — Practice — Finding of Judge after examination of debtor on judgment summons—Warrant of commitment — Irregularity—Affidavit. *Moore* v. *Shackleford*, 7 W. L. R. 930.

Order requiring a judgment debtor to account for any property in his possession held for him by third party. *Dearin* v. *Harvey* (1823), Wakeham's Nfld. Ca. 406.

Physician and surgeon — *Examination of — Unsatisfactory answers — Refusal to disclose his assets — Income unknown — No book kept—Motion to commit debtor under Con. Rule 907—Order to attend for re-examination and answer at his own expense —Costs.*]—Plaintiff, a judgment creditor, had defendant, a physician, examined as to his ability to pay. Defendant made unsatisfactory answers, stated that he did not keep books and did not know what his income was, and otherwise refused to disclose his assets. Plaintiff moved under Con. Rule 907 to commit defendant.—Riddell, J., *held*, that no reasonable man could believe defendant, and that, under the circumstances, he should be committed, but he ordered defendant to attend before the examiner at his own expense upon proper notice and give full, and as far as possible, satisfactory disclosures. Defendant to inform himself as to his business transactions. Costs of motion to be added to plaintiff's claim, or ordered to be paid by defendant at option of plaintiff. *Stavert* v. *Holdcroft* (1910), 17 O. W. R. 148, 2 O. W. N. 153.

Transfer of shares in company—Injunction to restrain further transfer — Examination of transferee—Aid of execution—Affidavit. *Coleman* v. *Hood*, 4 O. W. R. 309, 433.

See COURTS—PARTIES.

JUDGMENT SUMMONS.

See JUDGMENT DEBTOR.

JUDGMENTS ACT.

See EQUITABLE EXECUTION.

JUDICIAL COMMITTEE OF PRIVY COUNCIL.

See APPEAL.

JUDICIAL DEMAND.

See PRESCRIPTION.

JUDICIAL NOTICE.

See ASSESSMENT AND TAXES—CONTRACT — —CRIMINAL LAW — EVIDENCE — GIFT —MUNICIPAL CORPORATIONS —RAILWAY.

JUDICIAL PROCEEDINGS.

See LUNATIC—RAILWAY.

JUDICIAL SALE.

Agreement not to bid—*Consideration —Validity—Limitation to particular sale.*]—An agreement by which a person undertakes for a legal consideration not to bid at a judicial sale of immovables is lawful and valid. Such an agreement made on the day before the sale, with the condition that the person to whom the undertaking is given shall become the purchaser, is to be regarded as made in view of this particular sale only, and the condition not being realised, is extinguished. It is vain to attempt to revive the undertaking and exact the consideration several years later, under pretext that the condition has been realised at a subsequent judicial sale of the same property made in different circumstances. *Duhamel* v. *O'Sullivan*, 15 Que. K. B. 109.

Application to vacate sheriff's sale—*Should it be made by petition or by suit-at-law—Prejudice—C. P.* 787.]—It is not absolutely necessary that the application to vacate a sheriff's sale should be made by petition; it may form the subject of a direct suit-at-law. *Henry* v. *Mackay & Lemieux* (1910), 11 Que. P. R. 355.

Before an order for sale of an insolvent railway is made under Exchequer Court Act R. S. C. (1906), c. 140, s. 26, an enquiry before a referee into the validity and priority of the claims of the creditors may be ordered. *Royal Trust Co.* v. *Baie de Chaleurs Rw. Co.* (1907), 13 Ex. C. R. 1.

Decree authorising sale of defendant's interest — Sale of whole estate— Refusal to confirm. *Butler* v. *Forbes* (N.W. T.), 4 W. L. R. 579.

Effect of—*Extinction of title—Action to remove cloud on title.*]—After the sale under decree of an immovable of which he was the owner, the debtor has no longer any interest in the property, and therefore has no right of action to have removed from the property a hypothec which he alleges has been illegally registered. *Kauntz* v. *Léveillé*, 24 Que. S. C. 537.

Hour of sale — *Sale to one bidder—Covenant between seizing party and party upon whom seizure is made.*]—A sale of movables, under authority of justice, held at a quarter to 11, although advertised for 10 o'clock, and in the presence of only one bidder, is valid, even if there was an agreement between seizing party and party upon whom the seizure was made that it should be a purely formal proceeding and under condition that it would be discharged if judgment was satisfied within a fixed delay. These facts and the further one that the object sold was left in possession of party upon whom seizure was made, who agreed to reimburse purchase price with an additional sum as indemnity, cannot be set up by party upon whom seizure was made against party who purchased the object at the sale in a defence to a seizure in revendication, more especially when original seizing party is not in the case and makes no offer to reimburse amount received by him from the sale under authority of justice. *Frank* v. *Donohue* (1911), 38 Que. S. C. 253.

Notice — *Publication on non-juridical day.*]—If a newspaper is published on a non-juridical day, it may lawfully contain notices of judicial sales. *Wallace* v. *Honan*, 9 Que. P. R. 222.

Order setting aside—*Defective advertisement—Absence of notice to defendants—Requirements of order for sale not complied with — Sale by tender—Reserve bid — Sale to plaintiffs—Conduct of sale—Inadequacy of price—Irregularities—Judgment.*]—In an action by the vendors against the purchasers for specific performance of an agreement for the sale of land, judgment was given for the plaintiffs by the terms of which the defendants were to pay into Court the amount due for principal and interest when ascertained by the clerk of the Court at the time and place appointed by him, and, in default of payment, the lands were to be sold under the directions and with the approval of a Judge, and the purchase-money was to be paid into Court, and thereafter a sufficient sum paid out to satisfy the plaintiff's claim, and, if the purchase-money should not be sufficient, the defendants were to pay to the plaintiffs the amount of the deficiency. The account was taken, the amount due ascertained, and a day and place appointed for payment; the defendants failed to pay; and the plaintiffs proceeded to bring the lands to a sale. After some negotiations between the solicitors for the plaintiffs and defendants, an order was drawn up for sale of the land by sealed tenders. Conditions of sale were inserted in the order and the reserve bid was fixed therein at $10,500. The order was consented to by the solicitors for the plaintiffs and defendants, and was thereupon signed by a Judge. No copy was served upon the defendants or their solicitors. The land was advertised for sale by tender, but the advertisement was settled without notice to the defendants, and was not approved by a Judge. It contained no information as to the location and condition of the property, and did not state where further information might be obtained. The defendants had no notice of the sale, and did not hear of it till some months after it had taken place. There was only one tender, that of the plaintiffs, for the amount of the reserve bid, $10,500; the plaintiffs had obtained leave to tender. The tender was accepted by the clerk, and the plaintiffs declared the purchasers. Two months later the plaintiffs entered a part satisfaction of the judgment, acknowledging that $10,500 had been paid thereon, and signed judgment, without leave of a Judge, against the defendants, for the balance due to the plaintiffs over and above the $10,500. The order for sale provided that one-third of the accepted bid should be paid into Court, and the remainder paid from time to time. This term was absolutely disregarded, and, without any leave being obtained, the plaintiffs simply entered satisfaction for the amount of the bid. The bid was only two-thirds of the original price of sale to the defendants, and more than $2,000 less than the price at which the plaintiffs sold to another purchaser a few weeks later. No application was made to confirm the sale.—*Held*, that, if there is any case where a strict compliance with rules and orders should be insisted on, it is in such a case as this, where the plaintiffs attempt to purchase at a sale of which they have the conduct; and, as there had been neither a strict nor a substantial compliance with the ordinary requirements, and an injustice would be done the defendants if the sale should be confirmed, the order of Stuart, J., setting aside the sale and the judgment and other proceedings, should be affirmed. *Whitney* v. *Burn* (1910), 15 W. L. R. 392, Alta. L. R.

Party having conduct purchasing—*Invalidity — Objection — Person interested in proceeds.*]—In the absence of any order or direction, the plaintiff and not the clerk of the Court is to be considered to have the conduct of a judicial sale. Where the plaintiff, who had conduct of such a sale, purchased the land without leave, confirmation was refused. Such a sale is void, not merely voidable, and it is unnecessary for the person opposing to shew that the purchaser has perpetrated fraud, or acquired the property at less than its value, or obtained undue advantage, or that the lands should have realised sufficient to give him an interest in the proceeds. Any person having any interest in the proceeds of a sale, whether a party or not, has a right to object to confirmation. *Pruden* v. *Squarebriggs*, 2 Terr. L. R. 200.

Perishable things — *Sale—Execution—Discretion of the Judge — C. P. 3, 634.*]—As a rule, a Judge has the power to issue every conservatory order when the interest of the parties requires it. This principle of law is indeterminate and is only subject to the discretion of the Judge applying it. This power of the Judge should be exercised principally in matters of a preliminary nature and in which despatch is required; the sale of cattle which have been seized may, according to circumstances, be considered such an occasion. *Parizeau* v. *Meloche Heirs* (1910), 12 Que. P. R. 161.

Report on sale by Local Master—*Application to set aside — Irregularities — Inadequacy of price—Right of purchaser.*]—Where a judicial sale of lands was well advertised and the Local Master acted fairly and took every precaution to get the highest price

for the property, the sale will not be set aside because a responsible party says he is prepared to buy at a higher price than that which was obtained by the Local Master. *Cousins* v. *Cousins* (1910), 16 O. W. R. 576, 1 O. W. R. 995.

Seizure and sale of movables — *Adjudication—Hour of sale—Bidding—Auction — Nullity — Seizure in revendication.*]—*C. P. 668.*]—The fact that a sale under authority of justice, announced to take place at ten o'clock in the forenoon, only commenced at a quarter to eleven on the same day, and the further facts that the only bidder present was the plaintiff who made but one bid, are not sufficient reasons to disturb the sale from the moment it is established that there was no collusion between the plaintiff and the bailiff who made the sale. *Frank* v. *Donohue* (1910), 16 R. L. n. s. (Que.) 329.

Sheriff's sale — *Rights of purchaser—Transferor of purchase—Contestation of collocation.*]—A purchaser at a sheriff's auction sale, who has transferred his rights in the purchase, has no interest in the distribution of the moneys made at the sale by the sheriff, and has, therefore, the right to contest a collocation. *Eastern Townships Bank* v. *Arahill*, 8 Q. P. R. 109.

See CONTRACT—MORTGAGE—RAILWAY.

JUDICIAL SECURITY.

Authorised company — *Justification — requisition.*]—A company authorised to furnish security in the Courts may be required to justify as to solvency, but its security will not be rejected unless it appears that the party complaining of it has required the company to justify. *Ludlam* v. *Weiss*, 6 Que. P. R. 208.

See ARREST — BOND—COSTS—PRINCIPAL AND SURETY.

JUNCTION.

See RAILWAY.

JURA REGALIA.

See CONSTITUTIONAL LAW.

JURISDICTION.

Appeal to Privy Council—*Stay of proceedings.*]—When, as provided by s. 58 of Sup. Court Act, a judgment of that Court has been certified by the registrar to the proper officer of the Court of original jurisdiction, and the latter has made all proper entries thereof, the Supreme Court has no power to stay proceedings for purpose of an appeal from said judgment to the Privy Council. *Union Investment Co.* v. *Wells* (41 S. C. R. 244), overruled. *Peters* v. *Perras* (1909), 42 S. C. R. 361.

Application for shares in a company was signed at Granby, district of Bedford, where defendant had his domicil:—*Held*, that defendant could not be sued in district of St. Francis, because said application was accepted, by directors of plaintiff company, at Richmond, district of St. Francis. *Richmond & Drummond Fire Ins. Co.* v. *MacDonald* (1911), 12 Que. P. R. 274.

Arbitration in disputes between provinces exceeded their jurisdiction. *Quebec* v. *Ontario* (1909), 42 S. C. R. 161.

Assignation — *Defendant sued out of proper jurisdiction—Recourse—Exception to jurisdiction — Closing or setting aside the action with judgment for a part of the debt.*]—A defendant summoned before a Court not of his domicil, may insist on the cause being tried before it, or to set aside the action on acknowledging the amount of the debt, Art. 170, C. P. An exception to the jurisdiction which permits judgment for the plaintiff for only part of the debt, is irregular and must be set aside. *Belleau* v. *Dufault* (1909), 36 Que. S. C. 306.

By-law authorising the Mayor's Court to adjudicate upon fines imposed by the city is void.]—The Charlottetown Incorporation Act gave the corporation power to make by-laws for the good rule, government, etc., of the city, provided such by-laws were not repugnant to any public law. Section 47 vested all the executive powers of the corporation in the mayor and one councillor, who were to hold a police Court, and therein hear and determine every criminal offence cognizable before one or more justices of the peace. The city, under the Act, passed a by-law to regulate the sale of liquors by retail in Charlottetown, section 22 of which required the city marshal and police constables or either of them to summon any party guilty of a breach of the by-law before the police Court, at the suit of the city on the prosecution of the city marshal, D. had been prosecuted in the Police Court for a breach of the by-law, convicted and fined. On appeal he contended that the prosecution was improperly brought in the Police Court, which was really the Court of the mayor and councillors of the city, and as the city was the prosecuting party and was to receive the fine the prosecution ought not to have been brought in their own Court:—*Held*, (Palmer, C.J., Hensley, J., concurring), that the by-law so far as it authorised the city to prosecute in their own Court was void, and that the conviction must be quashed. *Downing* v. *Charlottetown* (1875), 2 P. E. I. R. 1.

"Carrying on business" — *Absent — Foreigners — Service of writ set aside.*]—"Carrying on business" means the possession within the jurisdiction of a place of business held in the name of the firm by a partner or by a person or persons in the pay of the firm. Assumption of jurisdiction over absent foreigners can only be supported on the grounds of constructive residence or attornment to the jurisdiction. Service of a writ would be valid only if at the time of service the defendants were carrying on business in the province. *Murphy* v. *Phœnix Bridge Co.* (1899), 18 P. R. 495, followed:—*Held*, on the evidence, that defendants were not carrying on business within the province at the

time of the service of the writ, and the service should therefore be set aside. *Ryckman* v. *Randolph* (1909), 14 O. W. R. 908, 1 O. W. N. 150; affirmed, 14 O. W. R. 1024, 1 O. W. N. 171. Leave to appeal to Divisional Court refused, 14 O. W. R. 1013, 1 O. W. N. 201, 20 O. L. R. 1.

Cause of action arising partly in one district and partly in another gives no jurisdiction under sub-sec. 3 of Art. 94 C. P. *Richmond & Drummond Fire Ins. Co.* v. *Macdonald* (1911), 12 Que. P. R. 274.

Choice of jurisdiction.]—When a declinatory exception is founded upon a denial of the allegations of the declaration, which tend to support a jurisdiction other than that of the domicil of the defendant, the burden of proof rests upon the plaintiff to justify his choice of jurisdiction. *Tanguay* v. *Dale* (1910), 12 Que. P. R. 245.

Circuit Court *of the county of Berthier —Defendant summoned in the district of Richelieu—C. P. 48, 55; R. S. Q. 3102.*]— The Court in the county of Berthier has exclusive jurisdiction over all cases in the Circuit Court in that county.—Defendant, described in the writ of summons as of the county of Berthier, cannot be sued for $100 in the Superior Court for district of Richelieu although he was served with the writ in that district. *Latour* v. *Guevremont* (1910), 12 Que. P. R. 38.

Circuit Court cases susceptible of appeal — *Ultra petita — Judgment for more than $200 — Costs—C. C. P. 55, 349.* (Varying judgment of Martineau, J.)]— When, for the purpose of giving jurisdiction to the Circuit Court in cases susceptible of appeal, the plaintiff has reduced his claim to $200, so that the Superior Court will not be able to hear and determine the case, the Court cannot deliver judgment for a larger sum; if it does, the judgment will be modified by the Court of Review, with costs against the plaintiff. *Meunier* v. *Forand*, 11 Que. P. R. 50.

Competent Court—*C. P. 48, 54, M. C. 807, 1042.*] — When they exceed $100 the taxed expenses of a special superintendent may be recovered by suit before the Superior Court. The jurisdiction in such matters given to the Circuit Court by Articles 807 and 1042 M. C. does not exclude the Superior Court. *St. Anne* v. *Lafleur* (1911), 12 Que. P. R. 376.

County Court—*Cause of action arising, and defendant residing, without the district— —Affidavit of merits—N. S. Order 34, Rule 1 (2).*]—Action to recover price of goods sold and delivered. Defendant pleaded that cause of action arose, and that he resided outside the jurisdiction of the Court. Order made changing venue. A plea to the jurisdiction of the Court is a good defence to the action on the merits. *Rea* v. *Lockett*, 7 E. L. R. 24.

County Court — *Excess — Damages arising out of transactions exceeding $150.*] —When transactions exceed $150 in amount and no balance has been struck and acknowledged the County Court of P. E. Island has no jurisdiction. *Dodd* v. *Gillis* (1875), 2 P. E. I. R. 31.

County Judge—Application to postpone the trial allowed on appeal—Power to grant postponement—Consent to allow Judge in Chambers to also dispose of question—Costs —Con. Rule 45.—*Wendover* v. *Nicholson*, 5 O. W. R. 645, distinguished. *Youldon* v. *London Guarantee Co.* (1911), 19 O. W. R. 291, 2 O. W. N. 1135.

Courts are not bound by agreements of counsel in a stated case as to effect upon rights of parties to the action by determination of certain questions submitted in certain specified ways. *Marsan* v. *G. T. P. Rw. Co.*, 2 Alta. L. R. 43, 10 W. L. R. 465, 9 Can. Rw. Cas. 341.

Court has no jurisdiction to enforce acceptance of offer of compensation in an action under Workmen's Compensation Act. *Krasno* v. *Loomis* (1910), 11 Que. P. R. 432.

Court of Appeal for B. C. has no jurisdiction to hear a motion for a writ of *habeas corpus* in the first instance. *R.* v. *Rahamat Ali* (1910), 14 W. L. R. 169.

Court of Appeal for Ontario has no jurisdiction to hear an appeal upon a case stated by a magistrate, from a summary conviction, under Ont. Summary Convictions Act, for an offence against a provincial statute. *R.* v. *Henry* (1910), 15 O. W. R. 621, 21 O. L. R. 494.

Decisions of co-ordinate tribunal.] —The Court is not bound to follow decisions of a co-ordinate tribunal on same question of law, except as a matter of judicial comity. Where a doubt exists the Court will prefer its own interpretation of law to that given by a co-ordinate Court.—The judgment of the Quebec Superior Court on the law of set-off in winding-up cases in *Exchange Bank* v. *Burland*, 7 Leg. N. 18, not followed. *Re Central Bank—Ex p. Harrison & Standing* (1888), 30 C. L. T. 271.

Declinatory exception—*Circuit Court for the county of Berthier—Exclusive jurisdiction up to $200—C. P. 55, 170; 61 V. ch. 20.*]—An action under $200, which originated in the county of Berthier where the defendant is domiciled, comes within the exclusive jurisdiction of the Circuit Court of the county of Berthier, if the defendant is served at Berthier. *Lemoine* v. *Bergeron* (1910), 11 Que. P. R. 387.

Declinatory exception — *Circuit Court for the county of Berthier—C. P. 48, 54, 55, 76, 94, 171—R. S. Q. 3102.*]—By virtue of s. 3102 R. S. Q., the Circuit Court for the county of Berthier has exclusive jurisdiction in a case for $100 in which the defendant is domiciled in the county of Berthier, and where the cause of action arose, although the writ was served in the district of Richelieu. *Latour* v. *Guevremont* (1910), 16 R. de J. 476.

Defendant served personally with the action—*Allegation of abuse of legal process — Declinatory exceptions—C. P. 94, par. 2, p. 170*]—*Held*, a defendant, having

his domicil in the district of Quebec, who is summoned to Montreal for examination by means of a subpœna from the Superior Court of the district of Montreal, can, then and there, be served personally with an action after his examination, and such service gives jurisdiction to the Montreal Courts. If said defendant complains of an abuse of legal process and fraudulent measures, it is incumbent on him to prove these allegations, and if such proof was not made, his declinatory exceptions will be dismissed. *Hyde* v. *Boswell* (1909), 10 Que. P. R. 388.

District Magistrate's Court is a Court of inferior jurisdiction, within the meaning of Art. 1003 C. P., and is subject to the control of the Superior Court. *Desormeaux* v. *St. Therese* (1909), 19 Que. K. B. 481.

Division Court Act — *Amendment 10 Edw. VII. c. 32, s. 62 (d)—Construction of —Established a new and independent test of jurisdiction—Costs of action in County Court —Scale — Ascertaining amount involved— Production of documents and proof of signature.*] — Divisional Court *held*, that 10 Edw. VII. c. 32, s. 62 (d), which reads "an amount shall not be deemed to be so ascertained where it is necessary for the plaintiff to give other and extrinsic evidence beyond the production of a document and proof of the signature to it," gave Division Courts a new and independent jurisdiction, therefore actions depending entirely upon documentary evidence are within the jurisdiction of Division Courts. That costs of such action brought in County Courts should be taxed upon Division Court scale.—*Slater* v. *Labree*, 9 O. L. R. 545, 5 O. W. R. 420, 539, specially referred to. *Mellhargey* v. *Queen* (1910), 17 O. W. R. 872, 2 O. W. N. 364.

Ex parte order allowing other pleas with general issue—*Setting aside.*]—An order allowing other pleas to be made with a plea of not guilty by statute should not be made *ex parte*. If such an order is made *ex parte*, even inadvertently, the Judge who made it has no jurisdiction to set it aside. Any application for that purpose must be made to the Court *en banc*. *Jackson* v. *Can. Pac. Ry.* (1907), 6 Terr. L. R. 423.

Exception to — *Cause of action—Property of defendants.*]—Where the cause of action arose out of the province of Quebec and the defendants had no residence or principal office in that province, but had certain goods therein in the hands of an agent for sale on commission:—*Held*, that such goods were property within the meaning of Art. 94 (4), C. P.; and an exception to the jurisdiction was dismissed. *Lumsden* v. *Cowan*, 3 Q. P. R. 155.

Exception to — *Time — Prejudice.*]— An *exception déclinatoire* filed within the time allowed by Art. 164, C. C. P., but of which notice has been given for a date beyond the three days after the entry of the cause, will be maintained, if it causes no prejudice to the other party. *Price* v. *Fournier*, 17 Que. S. C. 333, 3 Que. P. R. 73.

Foreign defendant illegally summoned before a judicial district may by declinatory exception ask that the record be referred to the Court of one of the places where the whole or part of his property is situated, and the plaintiff, having sued before a Court which was manifestly without jurisdiction, has lost his option between the districts which would otherwise have jurisdiction. *Germain* v. *Shiccs Lumber Co.* (1910), 12 Que. P. R. 252.

Foreign defendant having property in province of Quebec—*Declinatory exception—C. P. 94, par. 4, 170, 63 V. c. 44.*]— A foreign defendant can be sued in the province of Quebec, if he has property in said province which can be taken in execution for his debts. In the present case the action being for the cancellation of a sale, the price whereof has not been entirely paid, and the goods being at Montreal, in the province of Quebec, these goods, or the value thereof, are to be considered as defendant's property, and the latter who resides at Manchester, England, may be sued in the district of Montreal. *Porter* v. *Can. Rubber Co.* (1909), 10 Q. P. R. 442.

Hypothecary action—*Defendant's domicil—Action dismissed on Court's own initiative—Costs—C. P. 100, 549.*]—An hypothecary action, even when not contested, will be dismissed by the Superior Court in Montreal on its own initiative when the hypothecated property is situated in the district of Quebec, and when the defendant is domiciled and is served with the writ in that district. The action will be dismissed without costs in view of the fact that the defendant made default to appear. *La Foncière* v. *Bolduc* (1909), 11 Que. P. R. 309.

Judge in Chambers has no power to order *viva voce* examination of a witness *de bene esse*. *Hodgson* v. *Dawson* (1868), 1 P. E. I. R. 281.

Judge of Superior Court in the district of Quebec may hear, at Quebec, an application made under the Combines Investigation Act against a company having its principal place of business in the district of Montreal; said Judge being an officer acting under a Dominion statute, the order given to the company is not a judicial proceeding. A declinatory exception to have the case referred to the district of Montreal will be dismissed. *United Shoe Machinery Co.* v. *Drouin* (1911), 12 Que. P. R. 289.

Jurisdiction of a Court is determined by the conclusions of an action—*Summary matters—Action to recover a loan of money guaranteed by hypothec—C. P. 1159.*] —An action at law is decided according to the conclusions of the statement, and it is upon them that the jurisdiction of a Court must be determined.—An action to recover a loan of money founded upon promissory notes had in part guaranteed by a hypothec, is not an hypothecary action and is governed by the provisions of the law respecting "summary matters." *Mackay* v. *Aquin* (1910), 11 Que. P. R. 372.

Jurisdiction of the Court ought to appear either on the face of the record or by the allegations of the declaration; in the latter case the burden of proof is on the plaintiff to establish such ground of jurisdiction. *Richmond & Drummond Fire Ins. Co.* v. *Macdonald* (1911), 12 Que. P. R. 274.

Justice of Peace — *Value of land expropriated.*]—To be ascertained by justices of the peace and specially summoned jury. Jury not qualified to assess value of land expropriated without expert evidence. *Beaudry* v. *Montreal* (1858), C. R. 2 A. C. 342.

Local Judge — *New judicial district—Venue—Con. Rules, 55, 58, 767.*]—On 22nd January, 1909, plaintiffs issued writ at Kenora, the district town of the judicial district of Rainy River. On 20th March part of that district was formed into a new judicial district of Fort Frances. On 15th May plaintiffs filed their statement of claim at Kenora and laid venue at Fort Frances. On 13th December the Local Judge at Fort Frances made an order adding the municipality of McIrvine as a party defendant:—*Held*, that the action having been brought in the original district of Rainy River, the mere fact that venue was laid at Fort Frances did not give the Local Judge at Fort Frances jurisdiction to hear the motion nor to make the order. Order set aside with costs to plaintiffs in any event. *McKenzie-Mann Co.* v. *Scott* (1910), 15 O. W. R. 342.

Local Judge.]—Where the evidence did not shew that all parties had agreed to the motion being disposed of by the Local Judge—one of the solicitors not being a resident in the county—it was *held* that the appeal should be allowed. *Sproal* v. *Sproal* (1909), 14 O. W. R. 972, 1 O. W. N. 135.

Long vacation—*Motion to reject opposition.*]—A Judge has the right to entertain, during long vacation, the hearing on a motion to reject an opposition made under provisions of Art. 651, Code of Civil Procedure. *Noel* v. *Poulin & Houde* (1910), 12 Que. P. R. 18.

Merchant Seaman Act—*Jurisdiction of two justices respecting wages up to £50 — Enquiry into accounts exceeding £50 to ascertain balance.*]—The Merchant Seaman Act gives two justices of the peace jurisdiction in actions for wages up to £50. Plaintiff sued for a balance of £15 15s. To ascertain the balance really due the justices had to enquire into the amount of his wages during his whole services, which exceeded £70. An application was now made to set aside their judgment on the ground that they had exceeded their jurisdiction:—*Held*, Peters, J., that the judgment below must be sustained. *Bouche* v. *Aylward* (1869), 1 P. E. I. R. 295.

Municipal councils, in the decisions which they reach by virtue of the license law respecting the certificate for a hotel license (excepting the cases provided against in s. 22), exercise a purely discretionary power and, consequently, such decisions are not subjected to the reforming or controlling power of the Courts. *Desormeaux* v. *St. Therese* (1909), 19 Que. K. B. 481.

Objection to—*Right of Judge to raise.*]—Where a petition was presented for payment over of insurance moneys deposited by the insurers, whereas the claimant should have brought an action:—*Held*, that the Judge hearing the petition had a right to raise the objection to jurisdiction of his own motion. *Re Doran & A. O. U. W.*, 3 Que. P. R. 441.

Opposition for payment — *Rejection after motion—Vacation—Lessor and lessee—Insolvency—Distribution of moneys amongst creditors:* — 1. The Court has jurisdiction, during the long vacation, to dismiss, upon motion, an opposition for payment, in a case between landlord and tenant.—2. An opposition for payment alleging the defendant's insolvency, and praying that the bailiff charged with the writ make return of the moneys paid into Court, that the creditors be called in and that the moneys be distributed according to the claims filed, cannot be dismissed, upon motion, although it is alleged that the judgment of the seizing creditor is sufficient to offset all the moneys obtained by the sale, and that the opposant is without interest, but that, even in such a case, the moneys should be deposited in Court to be distributed according to the respective rights of the creditors.—C. P. 15, 670, 672, 675, 676, 703. *Hall* v. *McFadden & Hodgson Summer Co.*, 16 R. L. n.s. 7.

Personal hypothecary action — *Concurrent jurisdiction of the Superior Court and of the Circuit Court.*]—With the exception of the districts of Montreal and Quebec, in which its jurisdiction is exclusive, the Superior Court has concurrent jurisdiction with the Circuit Court, sitting elsewhere than at the chief place of the district, over a personal hypothecary action for the sum of $33.34. *Campeau* v. *Deschambault & Northern Colonization Rw. Co.* (1909), 37 Que. S. C. 542.

Provincial Court — *Foreign lands — Trusts.*]—An action will not lie in Ontario for a declaration that land outside the province is held by the defendant as mortgagee from the plaintiff and for redemption, even though both parties reside in the province. Judgment of Meredith, C.J., 30 O. R. 650, 19 C. L. T. 281, affirmed; Maclennan, J.A., dissenting. *Gunn* v. *Harper*, 21 C. L. T. 552, 2 O. L. R. 611.

Quashing municipal resolutions.] — District Magistrate's Court has a jurisdiction limited by Art. 100 M. C. to cases of illegality.—Hence, a petition to quash, presented to such Court, should state the reasons why the proceedings before the municipal council were illegal in order to give the Court the right to take cognizance of the case. *Desormeaux* v. *Therese* (1909), 19 Que. K. B. 481.

Ratione materiae and ratione personae — *Reference of case by incompetent Court to competent one—Reference when demanded by defendant — Reference by the Court itself.*]—It is only at defendant's request in every case, or by the Court itself in a case of want of jurisdiction *ratione materiæ* only, that the incompetent Court may refer a case to a competent one. It follows that, when, in an hypothecary action, the immovable being situated in the district of Quebec, instituted in the district of Montreal, the defendant, domiciled at Quebec, does not appear upon the action, the Superior Court at Montreal, incompetent *ratione personæ*, cannot refer the action to the district of Quebec and should dismiss it. *La Fonciere* v. *Bolduc* (1909), 38 Que. S. C. 128.

Recorder's Court cannot reserve plaintiff's rights for the future when in so doing

it would exceed its jurisdiction, the contract in dispute representing the sum of $800. *Ouimet* v. *Fleury* (1910), 12 Que. P. R. 98.

Recorder's Court, Montreal—*Recovery of fine under by-law.*]—The Recorder's Court for the city of Montreal has jurisdiction to try an action for the recovery of a fine imposed for a breach of the conditions in a by-law to grant a street railway company certain privileges. The fact that a contract is entered into by the city and the company, to carry out the by-law, does not alter the nature of the duties prescribed by the latter, so as to convert them into contractual obligations. *Que. Ry. Light & Power Co. & Recorder's Court of Que.*, 32 Que. S. C. 489 and 17 Que. K. B. 256, followed. *Montreal St. Ry. Co.* v. *Recorder's Court*, 37 Que. S. C. 311.

Recorder's Court (Montreal)—*Suit to recover commission on sale of real estate — Certiorari—62 Vict. (Que.), c. 58, s. 48.*]—The charter of the city of Montreal gives the recorders jurisdiction in cases to recover salaries or wages under contracts for the hiring of services. Actions to recover commissions due on sales of real estate are not included in this category. *Montreal East Real Estate Co.* v. *O'Connor* (1910), 17 R. de J. 93.

Release of party confined under decree of interdiction—*Interdiction made in one district with order to confine in another —District in which application should be made.*]—The Superior Court at Quebec has no jurisdiction to try a petition for release from confinement in a sanatorium in the district, ordered by a decree of interdiction for habitual drunkenness, made in another district. The petition, under Art. 170 C. P., must be referred to the Court of the district where the interdiction took place. *Audet* v. *Audet*, 37 Que. S. C. 322.

Removal of action to County Court—*County Courts Act, 1905, ss. 40, 73, 74.*]—Upon an application by the defendant P. to transfer an action begun in the Supreme Court of British Columbia to a County Court for trial:—*Held*, that it was immaterial whether the action fell within s.-s. 2 or s.-s. 3 of s. 40 of the County Courts Act, 1905, as both made provisions only that the action might be originally launched in a County Court; when launched in the Supreme Court, ss. 73 and 74 are applicable; the former is applicable only in cases of contract, and, while the plaintiff here founded his action upon a contract, it was not a contract to which the defendant P. was a party; and s. 74 applied only to an action for tort, which this was not: the application was, therefore, refused. *Soper* v. *Pemberton* (1910), 14 W. L. R. 200.

Right of appeal doubtful.] — Where the right of appeal was doubtful, and plaintiff had given notice of appeal, and at same time brought an action for injunction, in which action the validity of the order appealed from, would have to be enquired into, the matter was held to be properly before the Court. *Marsan* v. *G. T. P. Ry. Co.* (1909), 10 W. L. R. 465, 9 Can. Ry. Cas. 341, 2 Alta. L. R. 43.

Summary action — *Part payment — If balance under £20, summary action lies.*]—The P. E. Island Statute 26 Geo. III., c. 13, s. 1, provides that in actions where the debt or damages demanded does not exceed £20, the plaintiff may proceed in a summary way. The plaintiff stated that defendant had agreed to pay £30 for rent, of which £15 had been paid, and the plaintiff now sues for the balance in a summary way. The defendant pleaded to the jurisdiction, alleging that as the plaintiff had to shew an original demand exceeding £20 a summary action would not lie:—*Held*, Peters, J., that as the original debt was reduced by payment, the plaintiff might give credit for such payment and sue in a summary way for the balance. *Pidwell* v. *McDonald* (1851), 1 P. E. I. R. 46.

Superior Court—*Dominion controverted elections — Disavowal — Declinatory exception—C. P. 48, 170; R. S. C. (1906), c. 7, s. 2.*]—Superior Court sitting in and for province of Quebec, under provisions of Code of Civil Procedure, is without right, by means of proceedings in disavowal, to declare null and void proceedings had before a Judge of the province sitting under authority of Dom. Controverted Elections Act and to set aside a judgment rendered by latter in such capacity. *Quesnel* v. *Methot* (1909), 12 Que. P. R. 15. Confirmed on appeal, 20 Que. K. B. 57.

Superior Court has jurisdiction in actions for cancellation of lease for breach of covenants, when involving over $100 rent, even if plaintiff does not ask damages, and such action brought in the Circuit Court may be moved into the Superior Court, even if plaintiff does not sue for $100. Provisions of Act 1152 C. P. do not apply, subject to rules laid down in Art. 49 C. P. *Poirc* v. *Lavigne* (1909), 38 Que. S. C. 19.

Superior Court, sitting as an Election Court, has power to declare an order, made by one of its Judges, null and void. *Robinson* v. *Fisher; Brome Election Case* (1909), 37 Que. S. C. 19.

JURY.

See TRIAL.

JUSTICES OF THE PEACE AND MAGISTRATES.

1. APPOINTMENT AND QUALIFICATION.

Stipendiary magistrate.] — Appointment of town clerk as magistrate — Incompatible offices — Automatic vacation of one —Canada Temperance Act — Prosecutor related to magistrate — Constitutionality of

Nova Scotia Act preventing disqualification on this ground — Keeping liquor for sale—Previous conviction for same offence on previous day — Continuing offence — Evidence of liquor being the same — Magistrate's refusal to give evidence. *R.* v. *Murray*, 2 E. L. R. 80.

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2. DISQUALIFICATION.

Bias—*Litigation.*] — A magistrate is not disqualified from trying the accused upon a charge under the Canada Temperance Act by reason of an action having been begun by the accused against the magistrate for alleged misconduct as a judicial officer, and the writ of summons therein being in the hands of the sheriff for service, it not having been actually served before the conviction was made. *R.* v. *Byron, Ex. p. Batson*, 37 N. B. R. 383, 1 E. L. R. 364.

Interest.]—Justices of the peace, who belong to an association (a temperance alliance) of which the president is the party prosecuting, and the fine to be imposed upon the accused will ultimately be paid over to said association, have no jurisdiction, and are prevented from acting on account of interest sufficient to disqualify them. *Daigneault* v. *Emerson*, 20 Que. S. C. 310.

Relationship to accused.]—A conviction under the Canada Temperance Act made by two justices of the peace will not be quashed on the ground that one of them is related to the accused, within the ninth degree of consanguinity, if the justice was not aware of the relationship, and no objection was taken at the trial. *R.* v. *Biggar, Ex. p. McEwen*, 37 N. B. R. 372, 1 E. L. R. 352.

Recusation — *Proof of facts alleged — Appeal — Prohibition — Prosecution—Complainant.*]—Where, in a complaint brought before a justice of the peace, by virtue of Art. 5551 *et seq.*, concerning damages to property, the justice has been challenged by the defendants, it is for them to prove the facts alleged in their recusation, and that even before the justice challenged, preserving the right to appeal or to move for prohibition, if the justice persists in sitting, the provisions of the Code of Civil Procedure not applying in such a case. 2. It is not necessary that such a prosecution should be brought in the name of the complainant as well as of the municipal corporation. *Re Guertin & Beauchemin*, 18 Que. S. C. 316.

Stipendiary magistrate — Prosecutor related to magistrate — No disqualification. *R.* v. *Murray*, (N.S.) 2 E. L. R. 80.

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3. JURISDICTION.

Adjournment—*Commencement of "hearing" — Waiver — Irregularity — Habeas corpus — R. S. O. 1897, c. 90 — Criminal Code, ss. 708, 722.*]—A Judge in Chambers had refused a motion for discharge of defendant from custody. An appeal therefrom was made to a Divisional Court. Without deciding if appeal lay or if a new writ of *habeas corpus* might issue application dismissed with costs, any irregularities having been waived by defendant. *R.* v. *Miller*, No. 1 (1909), 14 O. W. R. 149, 19 O. L. R. 125.

Conviction — *Certiorari—Costs of conveying to gaol.*]—The Superior Court has jurisdiction to take cognizance, upon *certiorari*, of every decision rendered by a justice of the peace, even in criminal matters. 2. A recorder has no right, in imposing a fine and the costs of a prosecution, and imprisonment in case of non-payment, to require as a condition precedent to the liberation of the defendant, the payment of the costs of prosecution and conveying to gaol; and a conviction containing that provision will be quashed upon *certiorari*. *Leonard* v. *Pelletier*, 24 Que. S. C. 331, 6 Que. P. R. 54.

Conviction — *Certiorari — Selling unwholesome meat — Public Health Act — Criminal Code.*]—A charge was laid against the defendant of exposing and offering for sale on a public market meat unfit for food for man. The charge was so worded as to leave it doubtful whether it was intended for one under s. 122 of the Public Health Act or under s. 194 of the Criminal Code. The magistrates treated the charge at first as one of an offence against the Code, and, the defendant electing against a summary trial, took evidence, and adjourned for a week. They then announced that a case had been made out under the provisions of the Public Health Act, but not such as to warrant sending for trial under the Code, and adjourned for some days to enable the accused to put in a defence under the new conditions, if he so desired. The defendant objected to the case being proceeded with under the Public Health Act, and offered no defence, and the magistrates then convicted him:—*Held*, that the conviction must be quashed. It is not competent for magistrates, where the information charges an offence which they have no jurisdiction to try summarily, to convert the charge into one which they have jurisdiction to try summarily, and to so try it, on the original information. *R.* v. *Dungey*, 21 C. L. T. 435, 2 O. L. R. 223.

Conviction — Indian Act — Supplying Treaty Indians with intoxicating liquor. *R.* v. *Gray* (N.W.T.), 3 W. L. R. 564.

Conviction — Information charging more than one offence — Trial — Jurisdiction—Amendment — Appeal. *R.* v. *Austin* (N. W.T.), 1 W. L. R. 571.

Conviction — Jurisdiction not appearing — Certiorari—Right of appeal—Quashing conviction—Costs. *Johnston* v. *O'Reilly* (Man.), 4 W. L. R. 569.

Conviction for trespass — *Warrant of commitment — Necessity for two justices—Habeas corpus — Certiorari.*]—The prosecutor charged the petitioner before a justice of the peace with having cut wood upon his property. The petitioner took no notice of the summons served upon him, and the justice convicted him and ordered him to pay a fine of $5 and costs and upon default to be imprisoned for 15 days at hard labour. A warrant of commitment was issued by the justice under s. 783 of the Criminal Code, and the petitioner was imprisoned. He ob-

tained a *habeas corpus* and *certiorari* in aid, alleging that a single justice of the peace cannot issue a warrant of imprisonment, and that the conviction was illegal:—*Held*, that a single justice has no jurisdiction to issue a commitment under s. 783. 2. When it appears on the face of the conviction that the justice has exceeded his jurisdiction a *certiorari* in aid is not necessary. 3. In such a case the writ of *habeas corpus* was maintained and the conviction and commitment were quashed. *Cot* v. *Durand*, 25 Que. S. C. 33.

Conviction not conformable to municipal by-law — *Payment of fine—Acquiescence.*]—A by-law of the town of Levis enacted that all umbrella-menders, whether residing in the town of Levis or not, but carrying on that trade or business there, before carrying on such trade or business should take out a license, and that on failure to do so they should be liable to a fine of $50 or to imprisonment for one month. The applicant was convicted and ordered to pay a fine and in default of immediate payment to be imprisoned for 15 days, because he "was arrested by Constable Odillon Houde at night within the limits of the town of Levis, whilst, in contravention of the town by-law, soliciting orders as an umbrella-mender without having taken out the license required by the said by-law and the law." The applicant thereupon paid the fine:—*Held*, that the conviction was not conformable to the by-law, which did not require that those who solicited orders as umbrella-menders should take out licenses; that the conviction was therefore entirely beyond the jurisdiction of the justice of the peace. (2) The applicant must be presumed to have paid his fine to obtain his liberty, and such payment did not therefore constitute acquiescence. *Cardoni* v. *Robitaille*, 25 Que. S. C. 444.

Departure from port without a clearance — *Customs' Management Act, ss. 98 and 230.*] — A complaint was preferred against the respondent, who is master of the "Southern Cross," charging that the said steamer departed from the port of Bell Island without a clearance. Upon the hearing the justice dismissed the complaint on the ground that he had no jurisdiction to hear and determine it, and thereupon at the request of the appellant stated a case for the opinion of the Court:—*Held*, that section 98 of the Customs' Management Act which created the offence and provided the penalty of $400 for an infringement of the section, did not include the jurisdiction of the justice of the peace; and that in the event of proceedings being taken before a justice under s. 230 of the Act, he could not impose a fine exceeding $200, and that the matter be remitted to the justice for hearing and determination. *Cashin* v. *Bartlett, Royal Gazette, Nfld.*, 22nd Feb., 1910.

Hearing in absence of accused — *Appearance for sentence — Right to adduce evidence.*]—A justice of the peace has no right, after having heard the case in the absence of the accused, and issued a new warrant, to compel the accused to appear before him to receive sentence, to prevent the accused from adducing evidence when he appears in answer to that warrant. *Levesque* v. *Asselin*, 6 Que. P. R. 64.

Husband and wife — *Proceeding under s. 244 of Criminal Code — Order under Deserted Wives' Maintenance Act — Invalidity.*]—An order was made by two justices of the peace, purporting to act under the Deserted Wives' Maintenance Act, R. S. O. 1897 c. 167, whereby the defendant, described as an Indian of the Six Nations, was directed to pay $1 a week for his wife's maintenance; but, it appearing that the information was laid under s. 242 of the Criminal Code, under which all proceedings were had, and that it was only at the last moment, when the justices were drawing up their minutes of the order, that they decided to proceed under the first named Act, without any notice thereof to the defendant, the order was quashed. *Re Woodruff*, 16 O. L. R. 348, 11 O. W. R. 430.

Information — *Date of offence — Liquor License Act — Prohibition.*]—An information was laid at Halifax on the 25th April, 1904, by the chief inspector of licenses for the municipality of Halifax county, who resided 35 miles from the city of Halifax, before the stipendiary magistrate for the county of Halifax, against the defendant, charging him "for that he within the space of six months last past previous to this information at . . unlawfully, . . (a) did sell, . . . and (b) did keep for sale . . . intoxicating liquor contrary to the provisions of the Liquor License Act." The only evidence offered by the prosecution was that of the chief constable for the county of Halifax, who swore that in company with the inspector on the 23rd April, 1904, he visited the defendant's house within the county of Halifax, and found a gallon of liquor in his bedroom, but there was no bar or other appliances generally found in a place where liquor is sold, and that he had on former occasions served the accused with papers under the Liquor License Act. The defendant gave no evidence nor called any witnesses, but asked for a dismissal of the complaint on several grounds. The justice adjourned to consider the application of the defendant who in the meantime applied *ex parte* for a writ of prohibition under Crown Rule 72.—*Held*, following *Rex* v. *Boutillier*, 24 C. L. T. 240, that, as it did not appear by the information that it was laid within six months after the commission of the offence, or that the defendant had committed the offence within six months previous to its being laid, and as the evidence given on the trial in the presence of the defendant did not amount to a charge for violation of the law so as to dispense with the formality of an information, the magistrate was acting without jurisdiction, and should be prohibited from further proceeding in the matter. *Regina* v. *Bennett*, 1 O. R. 445, referred to. *R.* v. *Breen*, 24 C. L. T. 325.

Information — *Warrant for arrest — Canada Temperance Act — Suspicion.*] — A sworn information stating that the complainant had just cause to suspect, and did suspect and believe, that the party charged had committed an offence against the Canada Temperance Act triable under ss. 558, 559, and 843 of the Criminal Code, 1902, and will not authorise a justice to issue a warrant to arrest in the first instance. It is the duty of the justice before issuing a warrant to examine upon oath the complainant or his witnesses as to the facts upon

which such suspicion and belief are founded, and to exercise his own judgment thereon. *Ex. p. Boyce*, 24 N. B. R. 347, followed. *R.* v. *Mills, Ex p. Coffon*, 37 N. B. R. 122.

Information — *Warrant for arrest — Summary Convictions Act — Suspicion.*]— A magistrate has no jurisdiction to issue a warrant on an information under the Dominion Summary Convictions Act without examining upon oath the complainant or his witnesses as to the facts upon which the information is based.—*Ex p. Boyce*, 24 N. B. R. 347, and *R.* v. *Mills, Ex p. Coffon*, 37 N. B. R. 122, followed. *R.* v. *Carleton, Ex p. Gundy*, 37 N. B. R. 389; *R.* v. *Lizotte*, 1 E. L. R. 355.

Justice's Civil Court—*Omission to give security for costs — Foreign corporation — Goods sold and delivered.*]—The plaintiffs, who were a company incorporated abroad, but having a place of business in the province, brought an action against the defendant in a justice's court for goods sold and delivered. To prove their case they put in evidence a paper in the form of a promissory note, whereby the defendant promised to pay the plaintiffs a sum certain with interest. There were certain conditions as to the possession of the goods and the title thereto incorporated in the note or paper. Security for costs was not demanded at the trial, and none was given:—*Held*, that *indebitatus assumpsit* would lie, and that the omission to give security for costs did not deprive the magistrate of jurisdiction to try the case. *Per* Tuck, C.J., that 49 V. c. 53, s. 1, does not apply to companies incorporated abroad, but having a place of business within the province. *Per Barker*, J., that the defendant by not demanding the security at the trial waived the benefit of 49 V. c. 53. *Massey-Harris Co.* v. *Stairs*, 34 N. B. R. 591.

Keeping common gaming house.]—(1) Code s. 738 (f) which confers the power of summary trial for the offence of keeping "any disorderly house, house of ill-fame or bawdy house," includes as a "disorderly house" a common gaming house. (2) The definition of the term "disorderly house" contained in Code s. 198 (Part XIV. "Nuisances") applies to the same term in Code s. 783 (Part LV. "Summary Trials") and the Rule "*nosciter a sociis*" does not apply to the interpretation of subsection (f) of section 783. *R.* v. *Flynn* (Yuk.), 1 W. L. R. 388, 2 W. L. R. 468, 9 Can. Cr. Cas. 550.

Master and servant — *Complaint for non-payment of wages — Damages for disobedience of orders — Set-off.*]—B., a servant, under the provisions of s. 3 of Consolidated Ordinances c. 50, the Masters and Servants' Ordinance, lodged with a justice of the peace a complaint against C., his master, for non-payment of wages, and on the hearing, besides that bearing on the question of wages, some evidence was introduced tending to shew that, by reason of B.'s neglect to obey C.'s direction in regard to some oats, the oats became entirely lost and destroyed, and, notwithstanding the objection of B.'s counsel, the justice expressed his determination to allow the claim for damages as a set-off to the wages:—*Held*, that the justice exceeded the power conferred on justices by the Ordinance in holding that, upon hearing of an information laid under s. 3, damages claimed for any of the causes set out in s. 2 can be adjudicated upon, and if found set off against wages proved under s. 3. *Re Brown & Craft*, 21 C. L. T. 103.

Offence committed in a harbour — *Jurisdiction — Adjacent county.*] — Upon the shores of the high sea it is only land not covered by the sea which forms part of the adjacent counties, and, therefore, the jurisdiction of the Courts of these counties does not extend beyond the line of low tide. 2. Bays, gulfs, mouths of rivers, harbours, ports, roadsteads, or waters situated between the necks of land, where one can see from one bank to the other, form part of neighbouring or adjacent counties, and consequently an offence committed upon such waters is within the territorial jurisdiction, and not the Admiralty. 3. The port of Percé, in which an offence was committed, is part of the adjacent county of Gaspé, having regard to the facts (a) that it is an inland water almost entirely surrounded by land, and lying between necks of land, and (b) that the statute, in making the river the border of this county and including in it the nearest islands, includes also the waters of the ports and the roadsteads which lie between these islands and the mainland because they are between necks of land. 4. Consequently, a magistrate of the district of the county of Gaspé has jurisdiction over an offence or a tort or a quasi-tort committed at this place; and a writ of prohibition against the enforcement of a decision of such a magistrate will not be maintained. *Duguay* v. *North American Transportation Co.*, 22 Que. S. C. 517.

Preliminary hearing — *Exclusion of evidence — Application for mandamus — Duty of Court — Relevancy of evidence.*]—Upon the preliminary hearing by a Justice of the Peace of a charge against the defendant of making a false affidavit, a witness called by the private prosecutor, upon cross-examination by counsel for the defendant, was asked a question to which objection was taken by counsel for the private prosecutor, and the Justice ruled that the witness need not answer:—*Held*, refusing a motion by the defendant for a *mandamus* to the Justice to compel him to receive the evidence, that the Court will not, except perhaps in extraordinary circumstances, dictate to a Justice what evidence he shall receive or reject; and in this case it was not shewn whether the evidence was or was not relevant. *Regina* v. *Carden*, 5 Que. B. D. 1, 5, followed. *Re Rex* v. *Martin* (1910), 16 W. L. R. 166, Sask. L. R.

Summary conviction — *Jurisdiction — Merits — Certiorari.*]—Where a summary conviction is not on its face defective, and the justice had general jurisdiction over the subject matter, the adjudication involved in the merits of the case on the facts, as distinguished from collateral facts upon which the justice's jurisdiction depends, is not reviewable upon *certiorari*. *R.* v. *Beagan* (No. 1), 36 N. S. R. 206.

Summary trial—Charge of keeping common gaming house — Interpretation of Criminal Code. *Re R.* v. *Flynn* (Y.T.), 1 W. L. R. 388, 2 W. L. R. 468.

Territorial jurisdiction—*Act for protection of sheep — Offence against—Locality of — Owning vicious dogs — Order for destruction — Order for damages — Information — Quashing orders — Costs.*]—Upon a motion to quash an order of a justice of the peace for the county of Waterloo under ss. 11-13 of R. S. O. 1897 c. 271, an Act for the Protection of Sheep and to impose a tax on dogs, finding that the defendant, at the town of Waterloo, did unlawfully have in his possession two dogs, which dogs worried and injured two sheep, the property of the complainant, at the township of Wellesley, and ordering the defendant to kill the dogs: *Held*, that the offence under s. 11 was the having in possession a dog which, wherever the act was done, had worried, injured, or destroyed sheep, and therefore the offence was committed at the town of Waterloo, where the defendant lived, and a magistrate for the county had no jurisdiction, there being a police magistrate for the town, and it not appearing that the convicting magistrate was acting for or at the request of such police magistrate. Upon the same information the same magistrate also made an order, under s. 15 of the Act, for payment by the defendant to the complainant of $10 (said to be the value of the sheep) and costs:—*Held*, that a proceeding under s. 15 is independent of one under ss. 11-13, and the magistrate had no power to award damages for the injury to the sheep, without a separate complaint. The first order was quashed without costs, because the question of the magistrate's jurisdiction was not raised before him, and the assuming jurisdiction was his mistake. The second order was quashed with costs to be paid by the complainant, because he insisted on going on with the claim for damages before the magistrate. *R.* v. *Duering*, 21 C. L. T. 588, 2 O. L. R. 593.

Territorial jurisdiction — *Conviction — Presumption — Evidence — Judicial notice of local geography.*]—A conviction by a justice of the peace shewed on its face that the offence was committed "at Pincher Creek, in the said province," following the words of the information. The caption in the information and in the conviction mentioned the province of Alberta. Pincher Creek is in the province of Alberta, but this was not disclosed in the evidence:—*Held*, that judicial notice can be taken of such a fact of local geography, and that the conviction was not invalid for want of jurisdiction. *R.* v. *Can. Pac. Rw. Co.*, 8 W. L. R. 825, 1 Alta. L. R. 341.

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4. Liability to Action.

Action against — Canada Temperance Act — Setting aside defence. *Townshend* v. *Beckwith*, 3 E. L. R. 501.

Action against — *False imprisonment—Evidence — Innocence of plaintiff.*] — By C. S. N. B. c. 90, s. 11, it is enacted that, "where the plaintiff shall be entitled to recover in any action against a justice, he shall not have a verdict for any damages beyond two cents, or any costs of suit, if it shall be proved that he was guilty of the offence of which he was convicted," etc. In an action for false imprisonment brought against a magistrate, who without jurisdiction had committed to prison the plaintiff for making default in payment of a fine imposed upon him for selling liquor without a license, evidence was offered and admitted in proof of the plaintiff's innocence of the charge:—*Held*, that the evidence was properly received, and that the plaintiff, in order to prove his innocence, was not confined to such evidence as had been given before the magistrate on the trial of the information. *Labelle* v. *McMillan*, 34 N. B. R. 488.

Certiorari — *Return of money collected.*]—A justice of the peace whose judgment is removed upon a writ of *certiorari*, must, in presenting to the Court the documents relating to the matter, deposit all sums of money collected by him under his judgment. 2. If he does not do so a rule *nisi* may be issued against him obliging him to make such deposit. *Mercier* v. *Plamondon*, 21 Que. S. C. 335.

Charged with two offences before another J. P.]—No action taken on information by latter J. P., as required by Criminal Code, s. 665, as amended by 9 Edw. VII. c. 9, s. 2—Motion for order *nisi* under R. S. O. (1897), c. 88, s. 6—Order granted—Magistrate shewed cause—Riddell, J., thereupon retained the motion to enable the prosecutor to furnish witnesses, and the J. P. to pass upon the matter in the Light of evidence. *Re R.* v. *Graham* (1910), 17 O. W. R. 1058, 2 O. W. N. 463.

Collection of fine and costs — *Presumption of proper disposition — Duty, where conviction quashed.*]—*Held*, in an action against a justice of the peace to recover the sum of $15 paid to him as a fine and costs, upon a conviction under a Territorial Ordinance, which was afterwards quashed, that it must be presumed, in the absence of evidence, that the moneys were properly applied, i.e., the fine transmitted to the Attorney-General, and the costs paid over to the complainant, for whom they were received by the justice as agent. There is no duty imposed on the justice in such case to obtain a refund. The justice's personal fees when retained by him are in effect paid to him by the complainant, against whom he had the right to retain them. *Kauditzki* v. *Telford*, 5 Terr. L. R. 488.

Illegal arrest — *Action against magistrate — Warrant of commitment — Ministerial Act — Excessive punishment.*]—The defendant, a stipendiary magistrate, made a conviction against the plaintiff under the Canada Temperance Act, which was admittedly good. When he issued the warrant, he departed from the conviction and directed imprisonment with hard labour. The plaintiff was discharged on *habeas corpus* proceedings, and brought this action for damages for illegal arrest:—*Held*, that the magistrate was liable. If the issue of the warrant were a judicial act, the plaintiff would fail, as no malice was proved. The issuing of the warrant was, however, a ministerial act. *Banister* v. *Wakeman*, 15 L. R. A. 291, *Briggs* v. *Wardell*, 10 Mass. 356, *Noxon* v. *Hill*, 2 Allen 215, referred to. The case was distinguishable from *Mott* v. *Milne*, 31 N. S. R. 372, because the latter case proceeded on the assumption that the issuing

of a warrant to arrest for an indictable offence by a magistrate upon an information had before him was a judicial act. The defendant was not entitled to the protection of R. S. N. S. 1900 c. 40, s. 16, because the plaintiff was undergoing a greater punishment than the law assigned for the offence. *McIver* v. *MacGilliveray*, 24 C. L. T. 142, 237.

Order for imprisonment for non-payment of costs—*No conviction — Absence of accused — Order quashing—Condition.*]—After a magistrate had entered upon the hearing of a complaint of having used insulting and abusive language, the charge, at the complainant's instance, actuated apparently by compassion, was withdrawn, the accused to pay the costs. Subsequently, such costs not having been paid, the magistrate, in the absence of and without convicting the accused of any offence, made an order directing the payment by her of the costs; and, in default of payment, directing that the same should be levied by distress, and, in default of sufficient distress, directing imprisonment. The costs were then paid by the accused, but before the launching of this application they were tendered back to the accused and refused:—*Held*, that the order was invalid and should be quashed without costs, but on condition under ss. 889 to 896 of the Criminal Code—made applicable by 1 Edw. VII. c. 13, s. 1 (O.)—that no action should be brought against the magistrate, etc.; otherwise the motion was to be dismissed with costs. *R.* v. *Morningstar*, 11 O. L. R. 318, 7 O. W. R. 167.

Penalty — *Excessive fee — Information for indictable offence — Pleading—Amendment.*]—An information having been laid by the plaintiffs before the defendant, a justice of the peace, for an indictable offence under ss. 210 (2) and 215 of the Criminal Code, over which the defendant had no summary jurisdiction as a justice:—*Held*, that he was not entitled to any fee whatever, and that the plaintiffs, while they were entitled to recover by action the amount of the fee which they paid, could not maintain an action under s. 3 of R. S. O. 1897 c. 95, or under s. 902, s.-s. 6, of the Criminal Code, to recover a penalty from the defendant for receiving a larger amount of fees as a justice of the peace than he was entitled to. *Bowman* v. *Blyth*, 7 E. & B. 26, applied and followed. It was alleged by the statement of claim that the defendant wrongfully, illegally, and maliciously, and without reasonable or probable cause, demanded from the plaintiffs the sum of, etc., contrary to the Ontario Act. At the trial the plaintiffs were allowed to amend by substituting "wilfully" for "maliciously and without reasonable or probable cause," and by making an alternative claim under s. 902, s.-s. 6, of the Criminal Code. — *Held*, that the amendments were properly made. *McGilliveray* v. *Muir*, 23 C. L. T. 282, 6 O. L. R. 154, 2 O. W. R. 663.

Summary conviction quashed — *Action to recover fine and costs.*]—In an action for the recovery from the defendant, a justice of the peace, of the fine and costs paid to the defendant by the plaintiff upon a summary conviction made by the defendant under an Ordinance of the North-West Territories, which conviction had been quashed, it was held that the action did not lie against the magistrate, since, under s. 11 of the Ordinance respecting justices of the peace, Con. Ord. (1898), c. 32, he was bound to transmit the fine to the Attorney-General forthwith upon its receipt by him, and, in the absence of evidence that he had not remitted, must be presumed to have done so, and the costs were, by the conviction, directed to be paid to the complainant, whose agent to receive them the plaintiff must have known the defendant to be. *Kaulitski* v. *Telford*, 24 C. L. T. 108.

Trespass — *Issue of search warrant — Want of jurisdiction — Proof of malice — Arrest — Complaint — Damages.*] — In an action for false imprisonment, where the justice who issued the warrant acted wholly without jurisdiction, proof of malice or want of probable cause is unnecessary.—A complaint in writing under oath for a search warrant under which a warrant was issued, and goods named therein were found in possession of the accused, will not justify arrest without further or other complaint.—The expense to which a party complaining may have been put by an illegal arrest is a proper element of damages. *Melanson* v. *Lavigne*, 1 E. L. R. 520, 37 N. B. R. 539.

Unlawful distress — *Conviction—Certiorari — Costs — Jurisdiction — Res adjudicata — Pleading — Admissions—Adopting unlawful act — Damages.*] — Plaintiff had been convicted by defendant, a Justice of the Peace, and adjudged to pay a fine of $10.00 and $8.15 costs. To satisfy the fine, two cows were seized and sold under distress warrant by one Stoddart, a constable, for $61.00. The sale of the first cow realised more than sufficient to pay the fine and all costs, but nevertheless the constable sold the second cow. Subsequently the conviction was brought up by *certiorari* and quashed by Wetmore, J., who held that he had no jurisdiction to make an order as to costs on such proceedings, but left the plaintiff to recover at law as damages such costs as he might be entitled to, if any. The plaintiff brought action claiming damages accordingly:—*Held*, (1) that the constable was not the servant or agent of the Justice in making the seizure or sale, but inasmuch as the Justice had received from the constable the full proceeds of the sale, he had thereby adopted the constable's unlawful acts. (2) That the measure of damages for the unlawful sale was the market value of the cows sold. (3) That the plaintiff was entitled to recover from the Justice as damages his taxed costs of *certiorari* proceedings inasmuch as the quashing of the conviction was a condition precedent to the plaintiff's right to sue under Imperial Statute 11 and 12 Vic. c. 44 s. 2, in force in the Territories. *Simpson* v. *Mann* (1898), 6 Terr. L. R. 445.

Warrant of arrest — *Grounds — Issue without enquiry — Liability.*]—A justice of the peace who issues a warrant of arrest without enquiring into the grounds which the complainant has for suspecting the accused, is responsible to the latter when the complaint is not justified by any serious, reasonable, or plausible ground. *Murfina* v. *Sauvé*, 19 Que. S. C. 51.

Warrant to arrest—*School taxes—Irregularity—Demand—Trespass to person.*]—In an action for wrongful arrest and imprisonment, it appeared that plaintiff was arrested and conveyed to gaol upon a warrant issued by defendant, a justice of the peace, for the collection of $4.20, being three years' poll tax at $1 for each year, and an amount due for costs incurred on a general distress warrant previously issued by the defendant for the collection of the taxes, to which a return had been made by the constable that he was unable to find any goods whereon to levy. Before he issued the warrant under which plaintiff was arrested, defendant had before him the affidavit of the secretary of school trustees for the district, shewing that he had not paid his tax for three years, and that the trustees had authorised the secretary to collect the amount. The jury found that defendant acted in good faith in all that he did, and in the belief that all he did was authorised by the statute, and that he was required by the statute to do what he did:—*Held*, that defendant, having jurisdiction over the subject-matter brought before him, and over the person of plaintiff in respect thereto, was not liable in trespass, either by reason of his having issued the warrant for arrest without proof of a previous demand made upon plaintiff for payment of his tax, or by reason of a departure from the prescribed form of warrant; that defendant did not do any act which he had not power and jurisdiction to do upon a proper case; the most that could be said being, that he proceeded in an irregular way; that excess of jurisdiction does not extend to a mere irregularity, or erroneous judgment, but to a case where the justice does an act which he has no jurisdiction to do; that defendant's entry upon the enquiry was clearly within his duty and his jurisdiction; that under the Nova Scotia statutes the duty of enquiring into the validity of the rate is not imposed upon the justice. *Parker* v. *Etter*, 33 N. S. R. 52.

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5. PRACTICE AND PROCEDURE.

Action of assumpsit—*Justice of Peace under R. S. O. c. 88—Against Commissioner of Police — Constitutional Law—R. S. C. c. 92 intra vires—Money taken colore officii —Notice of action — Jury — Nominal damages — Costs.*]—Divisional Court *held*, that in an action of *assumpsit* for money had and received against an officer within the category of persons to be protected by R. S. O. c. 88, where the ground of complaint is the taking of the money in the first instance, if when taken *colore officii*, notice of action is necessary. If there are circumstances pointing to *mala fides* the plaintiff is entitled to a jury. Appeal dismissed without costs. R. S. C. c. 92 is *intra vires*. *Geller* v. *Loughrin* (1911), 19 O. W. R. 318, 2 O. W. N. 1159.

Change of opinion—*Formal conviction —Certiorari.*]—Until a conviction is drawn up formally a justice has a *locus paenitentiæ* and may change his opinion of the case. *Re A. Bishop, Royal Gazette, Nfld.*, Feb. 15th.

Conviction—*Omission to take down evidence.*]—The omission of the magistrate upon the summary conviction of a prisoner to have the evidence taken in writing is fatal to the conviction. *R.* v. *McGregor*, 11 B. C. R. 359, 2 W. L. R. 378.

Conviction — *Separate offences — Disposition of both cases after hearing evidence in both.*]—Two informations were preferred before a justice of the peace against the accused for distinct offences of selling liquor to Indians. At the conclusion of the first case, the magistrate reserved his decision, and proceeded with the second case, in which he convicted, and then dismissed the first. On an application to quash the conviction, the magistrate stated on affidavit that in convicting he was governed only by the evidence in the case in which the conviction was made:—*Held*, that the postponement by the magistrate of his decision in the first case until he had concluded the second, did not, under the circumstances, render the conviction in the second case bad in law. *R.* v. *McBerny*, 3 Can. Crim. Cas. 339, distinguished. *R.* v. *Sing*, 22 C. L. T. 423, 9 B. C. R. 254.

Conviction for assault—*Summary trial — Consent — Amendment — Costs — Hard labour—"Forfeit and pay."*]—A conviction must shew the jurisdiction of the magistrate; but where a conviction for an aggravated assault did not recite the consent of the accused, which was actually given, to be tried summarily, the defect was held to be covered by s. 800 of the Code. In such a conviction the magistrate has authority to award costs under s. 788 of the Code, and to sentence to imprisonment with hard labour in default of payment of fine and costs. The conviction, however, was bad because it did not adjudge that the accused should forfeit as well as pay the fine imposed. *R.* v. *Cyr*, 12 P. R. 24, followed. *R.* v. *Burtress*, 20 C. L. T. 398.

Conviction for obstructing peace officer — *Summary trial.*]—When a person is charged before a magistrate or two justices of the peace with resisting and obstructing a peace officer in the lawful performance of his duty, the magistrate or justices should observe the directions of s. 786 of the Criminal Code, and obtain the consent of the accused before proceeding to try the case summarily, notwithstanding the provisions of s. 144. Such offence is practically the same as is referred to in s. 783 (e), and the charge can only be heard in a summary way subject to the provisions of s. 786. *R.* v. *Crossen*, 19 C. L. T. 347, 12 Man. L. R. 571.

Irregular adjournment — *Jurisdiction —Prohibition.*]—When an irregular adjournment of the hearing of a complaint under Part LVIII. of the Criminal Code is made, the jurisdiction of the magistrate is ousted, he becomes *functus officio*, and prohibition will lie to restrain him from dealing further with the case. *Paré* v. *Recorder's Court of Montreal*, 27 Que. S. C. 424.

Ministerial duties — *One justice sufficient.*]—In cases tried under the Summary Act, purely ministerial duties, such as re-

ceiving complaint, issuing warrant, etc., may be done by one justice of the peace, even where the statute under which the proceedings are had, says that the case can only be tried by two justices of the peace. *Bousquet* v. *Gagnon*, 23 Que. S. C. 35.

Preliminary enquiry—*Continuation before another magistrate—Jurisdiction—Commencement de novo.*] — A preliminary enquiry in a criminal matter commenced before a magistrate cannot be continued by another. —2. But if a magistrate who has commenced a preliminary enquiry, dies or is deposed from office or resigns, or if he discharges himself from the matter, another competent magistrate may take the matter in hand, but he must begin the enquiry *de novo*; he may not continue the proceedings already commenced. —3. A Judge of sessions of the peace who commenced a preliminary enquiry, having obtained leave of absence, and having, without finishing the enquiry, departed for a journey to Europe, was held to have discharged himself from the matter; and in this case, with the consent of the Crown, the prosecutor properly obtained from another magistrate, who replaced the former, an order to commence *de novo* the preliminary enquiry.—4. A writ of *certiorari* to prevent the second magistrate from seising himself of the matter and recommencing it was refused. *Bertrand* v. *Angers*, 21 Que. S. C. 213.

Proceedings as to maintenance of pauper — Jurisdiction—Notice of discontinuance of previous proceedings—Interest of justice in prosecution — Certiorari—Appeal.]—Proceedings were taken by the plaintiffs before a justice of the peace with a view to having a pauper made chargeable to poor district No. 5 in the county of Pictou. Subsequently, and without notice to district No. 5, proceedings against that district were discontinued, and proceedings were commenced before another justice with a view to having the pauper made chargeable to the defendants' district. On the depositions taken before the magistrate applied to in the second instance, the stipendiary magistrate for the county (who was also county treasurer) took further depositions, and made an adjudication that the pauper was legally chargeable to the defendants' district:—*Held*, that the adjudication so made was bad, both because of the failure to give notice of discontinuance of the original proceedings, and because the stipendiary magistrate, as county treasurer, was a party to the proceedings and should not have acted.—*Held*, that the order made under the circumstances mentioned was open to attack either by *certiorari* or by appeal. *Pictou Overseers of the Poor* v. *Pictou Overseers of the Poor for District No. 6*, 36 N. S. R. 326.

Trespass—Issue of search warrant—Subsequent issue of warrant to arrest without sworn information—Damages. *Melanson* v. *Lavigne*, 1 E. L. R. 520.

Void conviction—*Action en nullité.*]—A conviction made by a person illegally exercising the functions of a justice of the peace is void, and may be attacked by way of a direct action to declare it void. *Corporation of Ham Nord* v. *Juneau*, 21 Que. S. C. 530.

Warrant to arrest — *Discretion — Mandamus.*]—A magistrate has a discretion to exercise as to the issue of warrants of arrest, and if, after hearing and considering the allegations of the complainant and the evidence, he refuses to issue a warrant for the apprehension of the person accused, a writ of *mandamus* will not lie to compel him to do so. *Thompson* v. *Desnoyers*, 16 Que. S. C. 253.

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6. Miscellaneous Matters.

Conviction — Certiorari — No return of evidence—Absence of record of proceedings before justice—Invalidity of conviction. *R.* v. *McGregor* (B.C.), 2 W. L. R. 378.

Conviction—Liquor License Act—Weight of evidence—Review on motion to quash—Conduct of magistrates—Costs. *R.* v. *McArthur*, 8 O. W. R. 694.

Conviction — *Minute of — Absence of formal entry—Quashing—Costs.*] — Where a justice of the peace convicts or makes an order against a defendant, and a minute or memorandum of such is then made, the fact that no formal conviction has been drawn up is no reason why the conviction should not be quashed. The Court has jurisdiction by virtue of s. 119 of the Judicature Act to award the costs of a motion to quash a conviction under an Ontario statute against either the justice of the peace or informant. *R.* v. *Bennett*, 4 O. L. R. 205, 1 O. W. R. 360, distinguished. *R.* v. *Mancion*, 24 C. L. T. 288, 8 O. L. R. 24, 3 O. W. R. 756.

Conviction — *Municipal by-law — Publication — Appeal — Certiorari.*] — Inasmuch as, by Art. 4061, R. S. Q., an appeal lies to the Superior Court from any conviction or order made by justices of the peace in prosecutions under the provisions of by-laws of a town council, and inasmuch as, by Art. 4615, no judgment, decision, or conviction, so susceptible of appeal, can be removed by *certiorari* to the Superior or Circuit Court, the remedy by *certiorari* is not competent to a person who complains of a decision by a justice of the peace under a by-law enacted by a town council with reference to a matter within its jurisdiction.—2. Where a by-law of a council has never been set aside or attacked, the question of its valid publication cannot be raised on an application for a writ of *certiorari*. *Hart* v. *Dunlop*, 17 Que. S. C. 383.

Conviction—*Superior Court—Certiorari.*]—The Superior Court has power over a conviction by a justice of the peace in a penal matter. *Mercier* v. *Plamondon*, 20 Que. S. C. 288.

Conviction quashed—Costs. *R.* v. *Dungey*, 2 O. W. R. 620.

Issuing warrant on application of relative — Corrupt motives — Criminal information. *R.* v. *Currie*, 2 E. L. R. 147.

Mandamus to J. P.]—Mandamus to compel J. P. to call meeting of inhabitants of school district to grant tavern license, when boundaries of school are not defined.—J. P.

may take judicial notice of the unfitness of applicant for tavern license. *Re Phelan* v. *Ross* (1875), 2 P. E. I. R. 28.

Proceedings to recover debt—Defendant's travelling expenses — Certiorari. *McKeen* v. *Cameron*, 1 E. L. R. 315.

Quashing conviction.]—A magistrate's conviction may be quashed on the ground that there was no evidence submitted which would give him power to convict, but when such evidence is submitted his conviction cannot be quashed on the ground that he improperly weighed it. *R.* v. *Barber Asphalt Paving Co.* (1911), 18 O. W. R. 778, 2 O. W. N. 819, 23 O. L. R. 372.

See CRIMINAL LAW — INTOXICATING LIQUORS.

KEEPING.

Common Bawdy House. *See* CRIMINAL LAW.

Common Betting House. *See* CRIMINAL LAW.

Common Gaming House. *See* CRIMINAL LAW.

Disorderly House. *See* CRIMINAL LAW.

KIDNAPPING.

See CRIMINAL LAW—EXTRADITION.

LABOUR.

Alien Labour. *See* ALIENS.

See CONTRACT—WORK AND LABOUR.

LACOMBE ACT.

See ATTACHMENT OF DEBTS.

LAKE.

See WATER AND WATERCOURSES.

LAND.

See CROWN—RAILWAY.

LAND ACT, BRITISH COLUMBIA.

Pre-emption record — *Improvements—Non-occupation — Collusion — Cancellation of certificate—Jurisdiction of commissioner.*]—Butters obtained a pre-emption record of the land in dispute in 1901. Bessette applied for a record in respect of the same land in 1904. In the year 1893, one Kitchen had obtained a pre-emption record of this land and made certain improvements thereon to the value of about $1,000. In March, 1900, Kitchen applied for and obtained a pre-emption record of certain other lands, and in April one Boutilier obtained a pre-emption record of a certain portion of the lands in question. Boutilier abandoned his pre-emption right, and Kitchen and Butters entered into an agreement whereby Kitchen agreed that Butters pre-empt the land on his paying for the improvements $200 in cash and the balance when he should realize the same out of the land, and Kitchen, until so paid, should retain an interest in the land. Bessette's application, which set up non-occupation of the land by Butters, and collusion between Butters and Kitchen, was refused by the assistant commissioner, who found against the charge of collusion, and on that of non-occupation he came to the conclusion that there was no provision in the Land Act for cancelling a certificate of improvements when once issued:—*Held*, that the arrangement entered into between Butters and Kitchen was, in the circumstances, not such as to preclude Butters from making the statement set forth in form 2 of the Land Act, as the term "collusion" as used in the form means collusion with somebody to defeat the provisions of the Act.—The legislature has refrained expressly from conferring upon the commissioner any jurisdiction to cancel a record on the ground that the original application for the record contains false statements of fact. —*Semble*, it is a condition of the power conferred by s. 13 that the commissioner shall find a cessation of occupation in fact, and the section has no application to any question arising under s. 7 or s. 8. *Hereron* v. *Christian*, 4 B. C. R. 246, dissented from. *Re Bessette*, 12 B. C. R. 228.

LAND PURCHASE ACT, P. E. I.

See CROWN.

LAND REGISTRY ACT.

See REGISTRY LAWS.

LAND SUBSIDY.

See ASSESSMENT AND TAXES—RAILWAY.

LAND TITLES ACT.

Agreement to mortgage homestead before patent — *Invalidity — Dominion Act—Alberta Act—Legislative jurisdiction—Constitutional law—Caveat — Discharge—Summary application—Action.*] — Where a cavatee alleges, as a ground for discharging a caveat, that he signed the instrument under which the caveator claims under mistake

and by reason of misrepresentation, the Judge should not deal with such a matter summarily on originating summons under Land Titles Act, s. 91, but should direct further proceedings by action or otherwise under s. 92.—An agreement by a homesteader, prior to the issue of patent, to execute a mortgage on his homestead, is void, under the Dominion Lands Act, R. S. C. 1906 c. 55, s. 142, and the Land Titles Act, R. S. C. 1906 c. 110, ss. 18 and 96; as also under the Alberta Land Titles Act, 6 Edw. VII. c. 24, s. 60, s.-s. 3.—The last mentioned enactment is not *ultra vires* of the provincial legislature.—The question as to whether Dominion statutes, relating to subjects within the legislative jurisdiction of the province, were continued by the Alberta Act, 4 & 5 Edw. VII. c. 3 (D.), *proprio vigore*, or merely as a part of the general body of the law previously in force in the Territories, and its bearing on questions of *ultra vires*, mentioned. *Sawyer-Massey Co.* v. *Dennis*, 7 W. L. R. 272, 1 Alta. L. R. 125.

Application for registration as owner in fee simple—Continuous possession for 12 years—Statute of Limitations—Positive title acquired—Direction for registration and issue of certificate of title—Evidence of possession — Affidavits — Starting point for statute—Evidence as to state of title at commencement of possession—Necessity for. *Re Anderson* (Alta.), 8 W. L. R. 319.

Assignment for benefit of creditors—*Execution registered after assignment—Application to vacate—Evidence—Jurisdiction.*]—A Judge in Chambers, on an application for an order vacating the registration of an execution against lands issued and registered subsequent to an assignment for the benefit of creditors, in the absence of evidence that the particular parcel of land affected passed under the assignment and was not reserved as a legal exemption, has no jurisdiction to make such order. *Re Davis*, 1 Sask. L. R. 97.

Assurance fund—*Failure of registrar to register mortgage — Certificate of title not produced — Retention of mortgage — Duty of Registrar — Necessity for production of mortgage a second time — Second mortgage gaining priority — Abstract of title—Omission of Registrar — Liability — Damages.*]—The plaintiff sought to recover from the assurance fund under the Land Titles Act, in an action against a District Registrar, damages for having omitted to register a land mortgage, made by H. to the plaintiff, in priority to a mortgage upon the same land, made by H. to a machinery company, and also for having furnished the plaintiff with an abstract of title of the land covered by his mortgage, without shewing thereon the prior mortgage in favour of the machinery company. The mortgage to the plaintiff was executed on the 8th May 1905, and forwarded to the Registrar on the following day. At that date the patent for the land had not been issued to H.; it was issued on the 13th May, 1905; and a certificate of title was issued thereon on the 29th August, 1905, subject to two liens and a mortgage in favour of a loan company, which had been registered before the issue of the patent. On the 31st August, 1905, H. executed the mortgage in favour of the machinery company, and it was registered on the 30th October, 1905. Up to this time the plaintiff's mortgage had not been registered. On the 30th December, 1905, the plaintiff's solicitor wrote to the Registrar requesting him to register the mortgage. On the 17th January, 1906, it was registered (having been in the Registrar's possession ever since May), and returned to the plaintiff's solicitor, with an abstract of title, which did not shew the mortgage to the machinery company. That company sold the land under their mortgage, and, as it did not realise the amount of their claim, the plaintiff was deprived of his security to the extent of the amount due on his mortgage, $100.90. By the statute in force in 1905, the Registrar shall not receive or enter in the day-book any instrument until the duplicate certificate of title for the lands affected is produced to him:—*Held*, that this was a clear statutory prohibition against the receipt by the Registrar of the plaintiff's mortgage unaccompanied by the duplicate certificate of title. When the Registrar received the mortgage, he was prohibited by statute from receiving it for registration; and, therefore, while he retained it in his possession, it was not in his possession as Registrar; and when the patent came to his office, and the certificate of title was issued thereon, the mortgage not being in the office for registration, there was no obligation on the Registrar to register it; and as Registrar he could not deal with it until it was again produced to him by himself or some one else, accompanied by the duplicate certificate of title. The plaintiff's mortgage was not again produced to the Registrar until January, 1906, when, on receiving the letter of the 30th December, he brought the mortgage into his office and registered it. Therefore, the Registrar registered it as soon as he was under any obligation to do so, and the plaintiff was not entitled to recover for the failure of the Registrar to register it sooner. *Re Greenshields Co.*, 2 W. L. R. 421, and *Re American-Abell Engine and Thresher Co. and Noble*, 3 W. L. R. 324, followed.—*Held*, as to the omission in the abstract, that under sec. 30 of the Dominion Land Titles Act, 1894, and by sec. 151 of the present Land Titles Act, which came into force on the 8th September, 1906, the Registrar would, as nominal defendant, be liable for the damage resulting from the omission; but the plaintiff had failed to shew any damage except an item of $7, money paid to H. which the plaintiff would not have paid had he known that the machinery company's mortgage was registered in priority to his own. *Hall* v. *Registrar of the Yorkton Dist.* (1911), 16 W. L. R. 568, Sask.

Bringing an action is enough upon which to found a caution. *Skill* v. *Thompson*, 11 O. W. R. 119, 339, 12 O. W. R. 361, 17 O. L. R. 186, followed. *Brown* v. *Clendennan* (1911), 19 O. W. R. 19, 2 O. W. N. 1013.

Caution — *Vacating — Pending action for specific performance — Jurisdiction of local Master of Titles—Security.*]—A caution was registered under the Land Titles Act, R. S. O. 1897, s. 138, by a person claiming

under an agreement to purchase from the registered owner's vendor, of which agreement he alleged the former had notice. The registered owner moved before the local Master of Titles, under s. 76, for cesser of the caution, though the cautioner had meanwhile commenced an action for specific performance of his agreement. The local Master refused to vacate the caution:—*Held*, that he had jurisdiction so to refuse under 7 Edw. VII. c. 30, s. 12 (O.), and that it was proper for the caution to be allowed to stand pending diligent prosecution of the action, and without requiring security under s. 78 of the Act; nor did either s. 45 or s. 84 protect the registered owner. *Re Skill & Thompson*, 11 O. W. R. 191, 329, 12 O. W. R. 361, 17 O. L. R. 186.

Caution—Vacating—Proof of action begun insufficient—Leave to adduce evidence—Terms. *Re Hebert & O'Brien*, 9 O. W. R. 172.

Caveat — Continuance — Consent—Failure to obtain leave of Judge—Lapse—Dominion Act — Saskatchewan Act—Estoppel. *Re Tudge Pork Packing Co.*, 7 W. L. R. 507.

Caveat—Motion to set aside—Questions of law—Discharge of caveat—Action to be brought — Dominion Lands Act—Agreement for sale of land by homesteader before recommendation for patent — Railway Act—Lands taken for railway—Ascertainment — Purchaser for value without notice. *Re Webster & Can. Pac. Rw. Co.* (N.W.T.), 6 W. L. R. 384.

Caveat — Summary application to set aside—Practice and procedure—Trial of issue —Vendor and purchaser—Default in payment of instalment under contract for sale of land — Rescission of contract. *Re Riddock & Chadwick's Contract* (N.W.T.), 6 W. L. R. 360.

Caveats.]—G. had a homestead for which he had not received the patent. He gave a mortgage thereon to S., who filed a caveat:—*Held*, that a Judge had a right to summarily order its discharge. S. having obtained judgment against G., issued execution and registered a caveat. The land was registered in the name of Prudent Giguere. The execution was against James Gear by which name Giguere was also known.—*Held*, that the Judge should not have summarily discharged the latter caveat, which should be continued to allow amendment of proceedings. *Re Gear Scott Co. & Giguere* (1909), 12 W. L. R. 245.

Certificate.]—B. made an assignment to C. for benefit of his creditors. Various executions were issued against B.'s lands and notice thereof filed with the Registrar of Titles. C. applied for a certificate of title to B.'s lands:—*Held*, that Registrar must issue the certificate without endorsing thereon the executions of which he has received notice. *Re Brooks* (1900), 12 W. L. R. 303.

Certificate of title — *Mistake* — *Correction* — *Summary application* — *Jurisdiction.*]—A Judge has no power under Land Titles Act to make an order for the correction or cancellation of any instrument, unless upon application made in any proceeding in Court or upon a reference by the registrar. *Re Smith*, 8 W. L. R. 131, 1 Sask. L. R. 126.

Claim on assurance fund — *Transfer*—*Fraud*—*Forgery* — *Bona fide purchaser for value without notice.*]—The plaintiff, being the owner of land registered under the Land Titles Act, R. S. O. 1897, c. 138, was, by the fraud of two persons, G. and H., induced to transfer her land to one D. Subsequently a transfer to McD., purporting to be signed by D., was registered, but D.'s signature was forged. McD. then transferred to O'M., and O'M. to B., both being parties to the fraud with G. and H. B. transferred to C., an innocent purchaser for value without notice. All the transfers were duly registered. None of the parties to the fraud being financially responsible, an action was brought for compensation for the loss of the land out of the assurance fund, under ss. 130 and 132 of the Act: — *Held*, that the plaintiff was not "wrongfully deprived" under s. 132, and that she could not recover. *Fawkes* v. *Atty.-Gen. for Ont.*, 23 C. L. T. 328, 6 O. L. R. 490, 2 O. W. R. 149.

Ejectment — *Title* — *Land titles certificate.*]—Action of ejectment by holder of land titles certificate. Ordered, that defendant amend, as no judgment could give relief claimed, defendant having no title to counterclaim for cancellation. *Selchfield* v. *Paterson*, 12 O. W. R. 1070.

Execution — Registration — Mortgage—Priorities—Certificate of title — Ownership. *Re Seahorn & Hansberger* (Sask.), 8 W. L. R. 71.

Execution—*Renewal*—*Refiling*—*Notice to execution creditor*—*Confirmation of tax sale*—*Statute*—*Retroactivity.*] — The Land Titles Act, 1894, s. 92, s.-s. 1, is amended by 63 & 64 V. c. 21, s. 2 (assented to 7th July, 1900), by the addition of a proviso "that every writ shall cease to bind or affect land at the expiration of two years from the date of the receipt thereof by the registrar, unless before the expiration of such period of two years a renewal of such writ is filed with the registrar in the same manner as the original is required to be filed with him." This proviso is not retroactive so as to apply to a writ of execution which would have expired but was renewed before the 7th July, 1900; such a writ, therefore, remains in full force though a renewal thereof has not been filed with the registrar either before or after that date. The execution creditor in such a writ should consequently be notified of an application for the confirmation of a tax sale of land of the execution debtor. *Re Town of Prince Albert*, 4 Terr. L. R. 510.

Execution against lands—*Renewal*—*Expiry*—*Memorandum on certificate of title*—*Sheriff*—*Judge's order*—*Seizure*—*Statute*—*Amendments.*]—The Land Titles Act, 1894, s. 92, provides for the delivery by the sheriff of a copy of a writ of execution against lands

to the registrar, until the receipt by whom no land shall be bound by the writ. It also provides that "no certificate of title shall be granted except subject to the rights of the execution creditors under the writ while the same is legally in force," and also that the registrar on granting a certificate of title shall by memorandum hereon express that it is subject to such rights. This section was amended by 63 & 64 V. c. 21, s. 52 (which came into effect on being assented to the 7th July, 1900), by adding a proviso to the effect that every writ shall cease to bind or affect land at the expiration of two years from the date of the receipt thereof by the registrar, unless before the expiration of such period of two years a renewal of such writ is filed with the registrar in the same manner as the original is required to be filed with him:—*Held*, that this proviso applies only to writs of execution filed with the registrar after the passing of the amending Act, and, therefore, among other consequences, a writ of execution filed with the registrar before the passing of the amending Act, and regularly renewed, does not require to be re-filed with the registrar. The Land Titles Act, 1894, s. 93, provides that upon the delivery to the registrar of a certificate by the sheriff or a Judge's order shewing the expiration or satisfaction or withdrawal of the writ, the registrar shall make a memorandum on the certificate of title to that effect; 63 & 64 V. c. 21, s. 3, substituted for the above section a provision that upon the satisfaction or withdrawal from his hands of any writ the sheriff should transmit a certificate to that effect to the registrar, and that the registrar on its receipt or on receipt of a Judge's order shewing the expiration, satisfaction, or withdrawal of the writ, should make a memorandum on the certificate of title to that effect:—*Held*, that now a sheriff cannot give a certificate of the expiry of a writ of execution; that unless the proviso added to s. 92 applies, and the writ appears by force of that proviso to have expired, the registrar can make a memorandum of its expiry only upon a Judge's order. If the sheriff has begun to execute a writ, *e.g.*, by seizure, it does not require a renewal. The delivery by a sheriff to the registrar of a copy-writ pursuant to s. 92 is not a seizure or other inception of execution which will prevent the expiry of the writ. *Re Blanchard Estate*, 5 Terr. L. R. 240.

Executors and administrators — *Death of one—Survivorship—Estate of trustees—Certificate of ownership—Will—Joint tenants—Provisions of statute.*]—Apart from the provisions of the Land Titles Act, an estate vested in two or more executors vests, on the death of one, in the surviving executors.—The effect of ss. 47 and 137 of the Land Titles Act is to displace the above rule only in case an entry of "no survivorship" has been marked by the registrar upon the certificate of ownership, issued to the executors.—Section 47 of the Act does not make it improper to issue a certificate of title designating the transferees generically "trustees," or specifically "executors," or otherwise as trustees, by reason of a particular office or capacity.—The estate of the testator vests in the executors by virtue of s. 74 of the Land Titles Act, and the terms of the will are not material as to whether they take as joint tenants or tenants in common.—Discussion of meaning and effect of Land Titles Act, ss. 47, 74, 135, 137. *Re Roueche Estate*, 1 Alta. L. R. 235.

Instrument not registrable—*Mortgage or incumbrance—Specific description of land—Inclusion of other lands not described — Non-compliance with s. 98.*] — *Held*, that a mortgage, a clause in which referred to a mortgage trust deed wherein all the lands now owned or afterwards to be acquired where mortgage is not registrable under above section as not specifically identifying the loans mortgaged. *Re North-West Telephone Co.* (1909), 12 W. L. R. 300.

Land vested in two executors—Death of one—Power of survivor to make transfer under the Act—Construction of Act—Trustees—Joint tenants. *Re Roueche* (Alta.), 7 W. L. R. 278.

Mortgage—*Application by mortgagees for registration of caveat—Crown patent not recorded—Judicial discretion.*]—A registrar of land titles is not bound to register a caveat in connection with a mortgage where the patent is not of record in his office. The registrar's duties are not merely ministerial, but within certain limits, judicial. *Re International Harvester Co. & Ebbing*, 11 W. L. R. 29, 2 Sask. L. R. 167.

Mortgage — *Caveat—Refusal to register—Patent not issued — Saskatchewan Land Titles Act—Dominion Lands Act, 1908, and Amending Acts.*]—Petition for an order directing a registrar to register a caveat against certain lands for which the patent from the Crown has not yet issued:—*Held*, that the registrar was right in refusing to receive the caveat. *Re International Harvester Co.*, 9 W. L. R. 680.

Mortgage — *Form of — Registration — Charge—S. 61 and Form N.*]—An instrument presented to a Registrar for registration as a mortgage, under the Land Titles Act, was not in the form prescribed in the schedule to the Act, but contained a clause by which the mortgagor purported to convey his estate in the land to the mortgagee, and also an *habendum* clause:—*Held*, having regard to the wording of s. 61 of the Act and the form N. in the schedule, that it is contrary to the intention of the Act that a mortgage shall operate as a conveyance of any estate in the land; it is to operate simply as a charge thereon. The Registrar was directed to refuse registration of the instrument. *Re Spokane & Eastern Trust Co.* (1910), 15 W. L. R. 637, Alta. L. R.

Mortgages — *Registration — Priorities —Production of duplicate certificate of title.*]—Where a document is produced to a registrar of land titles for registration, he has neither any power nor any duty in regard to it until the duplicate certificate of title has been produced; and of two incumbrances upon the same land, that one for the registration of which the duplicate certificate is first produced, is entitled to priority of registration, irrespective of its date. *Re Greenshields Co.*,

2 W. L. R. 421, approved and followed. *Re American-Abell Engine & Thresher Co. & Noble*, 3 W. L. R. 324, 6 Terr. L. R. 359.

Motion under s. 104 — *To discharge building condition — Evidence of common building schemes — Notice to interested parties.*]—Middleton, J., refused land owner an order under s. 104 of the Land Titles Act discharging a building condition, without notice to his grantor and others claiming under said grantor, as it appeared that applicant's property was a portion of a parcel of land which had been sub-divided and all the deeds from the common grantor contained similar conditions, which was evidence of a common building scheme. *Re Baillie* (1911), 18 O. W. R. 642 2 O. W. N. 816.

Priorities of encumbrances — *Production of duplicate certificate of title — What constitutes "receiving" for registration.*]— Where a document is produced to a registrar of land titles for registration, he has neither any power nor any duty in regard to it until the duplicate certificate of title has been produced; and of two encumbrances upon the same land, that one for the registration of which the duplicate certificate is first produced, is entitled to priority of registration, irrespective of its date. *Greenshields & Ritchie* (1905), 2 W. L. R. 421, approved and followed. *Re American-Abell Engine & Thresher Co. & Noble* (1906), 6 Terr. L. R. 359, 3 W. L. R. 324.

Production of duplicate certificate of title—*Priority of registration.*]—Where a mortgage had been registered as to some of the lands comprised therein, but remained unregistered as to one parcel owing to the non-production of the certificate of title:—*Held*, that a subsequent mortgage of the remaining parcel was entitled to priority of registration when the duplicate certificate was sent to the registrar at the instance of the subsequent mortgagee, and he made the first request for registration after its receipt by the registrar. *Re Greenshields & Ritchie* (1905), 6 Terr. L. R. 208.

Purchaser at tax sale — Motion for order directing issue of certificate of title—Subject to mechanics' lien—Power of Master of Titles under s. 66 of the Act—Riddell, J., granted order—Owner of land to pay costs of application. *Re Clendenan* (1911), 18 O. W. R. 666, 2 O. W. N. 750.

Registration — Construction of deed — Division line—Intention of parties. *Casci & Hill, Re* (1910), 1 O. W. N. 1083.

Registration of cautions — Claims for compensation — Bona fides — Terminating cautions. *Re Kay & White Silver Co.*, 9 O. W. R. 712, 10 O. W. R. 10.

Registration of certificate of lis pendens—*Application by registered owner to discharge — Judge of Supreme Court — Persona designata — Authority to entertain application.*]—McD., the registered owner of a quarter-section of land, applied to a Judge of the Supreme Court, by summons, to cancel the registration of a certificate of *lis pendens* registered against the quarter-section. McD. acquired his interest from the defendant:—*Held*, that the application could not be made under the Imperial Act 30 & 31 V. c. 47, s. 2, which has no application to a certificate registered under the Land Titles Act; and that there was no authority for the application under the Land Titles Act itself or otherwise. In dealing with any document registered in a land titles office, the Judge acts as *persona designata*; and, upon the facts of this case, even if the authority existed, it ought not to be exercised, as the plaintiff was entitled to proceed in his action for relief in respect of a charge upon the quarter-section in question. *Redditte* v. *Pellettier* (1910), 16 W. L. R. 42, Sask. L. R.

Registration of mortgage—*Production of duplicate certificate of title—Demand—Duty of registrar—Sections 41, 98, 160.*]—T. executed a mortgage (in duplicate) in favour of the company on certain lands, and the company presented the same to the registrar for registration. The registrar had previously sent by mail a duplicate certificate of title to the lands in question to T., the registered owner and mortgagor, and this certificate was presumably in T.'s possession at the time of the presentation of the mortgage. The company, having learned that the duplicate certificate of title had been sent to T., requested the registrar to serve upon T. a demand for its production, which the registrar refused to do. The company contended that, by virtue of the provisions of s. 98, s.-s. 4, read together with s. 160 of the Land Titles Act, the registrar was in duty bound to serve the demand as requested:—*Held*, having regard to other provisions of the Act, such as s. 41, that this contention could not prevail; the registrar was prohibited by s. 41 from receiving the mortgage until the duplicate certificate of title was produced.—*Re Greenshields Co.*, 6 Terr. L. R. 208, and *American-Abell Co.* v. *Noble*, 6 Terr. L. R. 359, followed. *Re Case Threshing Machine Co.* (1910), 14 W. L. R. 704, 3 Sask. L. R. 270.

Sale by order of Court in action for foreclosure — *Section 132 of Act — Confirmation of sale — Immediate operation — Issue of new certificate of title.*]—A sale of land in foreclosure proceedings is not a sale under process of law within the meaning of s. 132 of the Land Titles Act, and, the Court being satisfied that all preliminaries have been properly conducted, having confirmed the sale, and vested the land in the purchaser, such purchaser is entitled to be registered as owner forthwith.—2. The question of whether or not the preliminaries leading up to the sale have been properly conducted is a question for the Judge, and the decree of the Court ordering the transfer is sufficient evidence to warrant the registrar cancelling the existing certificate and issuing a new one to the purchaser. *Can. Pac. Ry. Co.* v. *Mang*, 8 W. L. R. 774, 1 Sask. L. R. 219.

T. R. P. Act — *Execution — Equitable mortgage—Unregistered charge—Priority.*]—Notwithstanding that by the Land Titles Act, 1894, differing in this respect from the Territories Real Property Act, an execution is declared to be an "instrument," the principle established in *Wilkie* v. *Jellett*, 2 Terr. L. R.

133, 26 S. C. R. 283 still applies; and therefore an unregistered equitable mortgage takes priority over a writ of execution against lands delivered to the registrar subsequently to the creation of the equitable mortgage. *Sawyer-Massey Co.* v. *Waddell* (1904), 6 Terr. L. R. 45.

Tax sale transfer—*Registration — Time — Appeal—Non-prosecution—Notice of appeal —Time for.*] — Rule 400 of the Judicature Ordinance, C. O. 1898 c. 21, providing for two clear days' notice of motion, except by special leave, applies to motions to the Court *en banc*. An order stopping the registration of a tax sale transfer and Judge's order confirming the sale, as provided for by s. 97 of the Land Titles Act, also acts as an order extending the time for registration of the transfer, as provided for by s. 95 of the Act. An appellant is excused for not having proceeded with the appeal by the fact that the original documents from which the appeal book is to be prepared have remained in the respondent's possession, he having neglected to file them in the land titles office, as directed by the order appealed from. *Re Donnelly*, 5 Terr. L. R. 270.

Transfer by executor — Powers of executor—Personal estate—Partnership lands—Judgment in partnership action. *Re Keating and Olsen* (Y.T.), 7 W. L. R. 316.

Transfer of land — *Certificate of title — Memorandum — Mortgage — Assignment to transferee — Extinguishment.*] — When a transferee of land under the Land Titles Act secures an assignment of a mortgage against such land, the mortgage is thereupon extinguished, and the registrar must remove the memorandum thereof from the title. *Re Riddell*, 7 W. L. R. 301, 1 Sask. L. R. 24.

Transfer of land — *Extinguishment of mortgage assigned to transferee — Priority—Subsequent encumbrancers.*]—*Held*, that upon transfer of land under the Land Titles Act to a mortgagee by the mortgagor, the interest of such mortgagee in the land as a mortgagee is extinguished; and such mortgagee is not entitled to a declaration that the interest of the mortgagee under the mortgage so extinguished is a charge upon the land in priority to subsequent encumbrances created by the mortgagor. *Reeves* v. *Konschur*, 8 W. L. R. 346, 1 Sask. L. R. 137.

Transfer of land — *Extinguishment of mortgage assigned to transferee — Priority — Subsequent encumbrancer — Res judicata.*]—Defendant owned certain land subject to first and second mortgages and to R.'s execution. The first mortgagee having commenced foreclosure proceedings, R. paid off this mortgage, and took an assignment thereof, which she registered. She then took a transfer from defendant, which she also registered. The registrar issued to her a certificate of title, shewing her to be the owner subject to said second mortgage, he thinking the first mortgage was extinguished by the transfer to her:—*Held*, that the expressed intention of the parties will control the implied covenants and that there has been no change made in the law by the Land Titles Act which would effect this case. Appeal allowed, and mortgage assigned to her to be the first charge on the land. The case is not *res judicata* through the matter being referred by registrar to a Judge. *Reeves* v. *Konschur*, 10 W. L. R. 680, 2 Sask. L. R. 125.

Transfer of land — *Mortgage — Subsequent mortgage — Production of duplicate certificate of title—Priority of registration.*] —Where a mortgage had been registered as to some of the lands comprised therein, but remained unregistered as to one parcel, owing to the non-production of the certificate of title:—*Held*, that a subsequent mortgage of the remaining parcel was entitled to priority of registration when the duplicate certificate was sent to the registrar at the instance of the subsequent mortgagee, and he made the first request for registration after its receipt by the registrar. *Re Greenshields Limited & Ritchie*, 6 Terr. L. R. 208; *Re Greenshields Co.*, 2 W. L. R. 421.

Transfer of land by power of attorney — *Pretended transfer — Order under s. 31 of Saskatchewan Land Titles Act — Suppression of facts — Fraud—Collusion.*]—Defendant C. gave his wife a power of attorney to sell certain land which she did, to plaintiff, retaining the proceeds; when plaintiff applied for registration of his transfer he could not produce the power of attorney, the wife having eloped, C. transferred the property to his co-defendant, who obtained a Judge's order directing registration without production of certificate. Transfer to defendant M. set aside, same having been obtained by collusion, the registration vacated, and plaintiff's transfer directed to be registered, to whom a certificate should issue. *Turner* v. *Clark*, 10 W. L. R. 25, 2 Sask. L. R. 200.

Unregistered assignment of lease—*Land Titles Act—Parties—Re-entry—Tender of rent due—Costs.*]—In an action against the landlord by the assignee of a lease under The Land Titles Act, 1894, duly registered, to recover possession of the premises upon which the landlord had re-entered for default in the payment of rent:—*Held* (1) that the fact that the assignment was not registered was no bar to the action.—(2) That the original lessee was not a necessary party.—(3) That the lessee was entitled to relief without the issue of a writ of ejectment upon payment of the rent due, but that the plaintiff, although he tendered all the rent due before action, should bear the costs of it, except in so far as these were increased by the defendant's resistance to the claim.—The plaintiff had sublet the lands, the sublease providing for re-entry in the event of the sublessee permitting an execution to be levied against his goods. This event had happened and the plaintiff had distrained through the sheriff, who was in possession under a writ of attachment and writs of execution when the defendant re-entered. — *Held*, that the plaintiff's distress and the bringing of this action shewed that the plaintiff intended to terminate the sublease. *Tucker* v. *Armour* (1906), 6 Terr. L. R. 388.

LANDLORD AND TENANT.

1. Agreements and Leases Generally.

Abandonment — *Re-letting — Cancellation—Deficiency in rent.*] — When a tenant abandons the demised premises and the landlord lets them to another, there is a tacit cancellation of the lease.—2. Nevertheless, such cancellation being due to the fault of the tenant, he must pay to the landlord the difference between the old and the new rent. *Jodoin* v. *Demers*, 24 Que. S. C. 189.

Acceleration clause — *Assignment for creditors — Forfeiture—Assignee's election—Payment of rent.*]—The effect of s. 34 of R. S. O. c. 170, the Landlord and Tenant Act, is to place the assignee who has elected by notice in writing under his hand to retain the premises occupied by the assignor at the time of the assignment, for the unexpired term of the lease, in the same position as respects the lease as the assignor would have been in had the assignment not been made; the landlord in such cases being entitled to the full amount of the rent reserved by the lease, but to nothing more. And where accelerated rent due for the unexpired term of a lease containing the usual forfeiture clause had been paid by the assignee, who had elected to retain the premises till the end of the term, he was held entitled to recover back a further sum for rent of the premises for a portion of the same period which he had paid, on demand of the landlord, under protest, to avoid distress. *Kennedy* v. *MacDonell*, 21 C. L. T. 233, 1 O. L. R. 250.

Action by tenant—*Pleading.*] — A tenant who sues by virtue of his lease is not obliged to allege that he has fulfilled all the conditions which it imposes upon him; that is implied by his setting up the lease. *Trempe* v. *Larivière*, 6 Que. P. R. 367.

After expiration of lease tenant estopped from disputing title of lessors.]—Defendant in December, 1863, took a lease for five years from Haviland and DeBlois, after expiration of lease Haviland and DeBlois conveyed the land to E. McK., to whom defendant paid rent. E. McK. in December, 1876, conveyed to plaintiff, who brought an action of ejectment. Defendant disputed title of Haviland and DeBlois, the original lessors. Verdict for plaintiff: — *Held* (Peters, J.), that defendant was estopped. *McKinnon* v. *McKinnon* (1878), 2 P. E. I. R. 279.

Agreement for — *Construction — Condition—Waiver.*]—The defendant contracted to let to the plaintiff a house, then under construction, for the term of one year from the 1st June, 1900, at the rental of $20 per month, payable monthly in advance. It was agreed that in the event of the house not being completed by the 1st June there should be a proportionate reduction in the rent. The house was not completed by the time agreed, but the plaintiff moved in on the 24th June, when the work was still unfinished. No rent was charged for the month of June, but the plaintiff paid rent in advance for the months of July, August, September, and October, and continued in occupation of the premises until the 1st May, 1901, when he moved out. In an action by the plaintiff for damages for goods distrained by the defendant for rent in arrear:—*Held*, that the trial Judge was right in construing the agreement as a letting for a year from the 1st June, 1900, with a condition that if the occupancy was prevented by reason of the house not being ready for occupation at that time, there should be a deduction from the rent in respect to the period of time during which the house was not occupied.—*Held*, also, that the payments made by the plaintiff shewed a waiver of the provision made in respect to the house being finished by a fixed date, or rather, in respect to the reduction which was to be made in consequence of its not being finished. *Acorn* v. *Hill*, 34 N. S. R. 508.

Agreement for — *Municipal corporation — Lease to railway company — Settling — Taxes—Rent—Covenants.*] — Property of a city municipality, when occupied by a tenant other than a servant or officer of the corporation occupying the premises for the purposes thereof, is subject to taxation (Assessment Act, R. S. O. 1897 c. 224, s. 7, ss-s. 7); and such tax is a tenant's tax payable by him, and not in any event payable by the landlord as between him and the tenant. Section 26 of the Act, as to tenants deducting taxes from their rent, has no application to such a case, as it applies only to taxes which can be legally recovered from the owner. The reason of the rule embodied in that section disappears when the property is in the hands of the landlord exempt, and becomes liable to be taxed only when in occupation of a tenant. *Semble*, also, that where the tenant, as in this case, holds in perpetuity under a renewable lease, he may be regarded as the "owner," within the meaning of the Assessment Act, and as such is liable to taxation without recourse to the owner in fee. Where the municipality had entered into an agreement to grant a lease for a rent specified, but no mention had been made of taxes:—*Held*, that the fixing of the rent payable to the city did not interfere with the right of the latter in its governmental capacity and exercising its sovereign power to lay taxes upon the property when no longer exempt, by reason of its being under lease. Taxes and rent are distinct things and collectible by the corporation in different capacities, and the imposition of the yearly taxes is not a derogation from

or inconsistent with the contract. A covenant by a tenant to pay taxes is a "usual" covenant, and it lay upon the tenant here objecting to give it, to shew by competent evidence that it was not so in such a case as that in question here or in this country, which the tenant had failed to do. No covenant to repair should be inserted in the lease, the jurisdiction to keep the railway in effective operation being in the Railway Committee of the Privy Council, and it not having been shewn that this was insufficient to protect the city. *Re Can. Pac. Ry. Co. & Toronto*, 22 C. L. T. 235, 4 O. L. R. 134, 1 O. W. R. 255, 2 O. W. R. 385, 5 O. L. R. 717.

Agreement for—*Specific performance.*]—Where the lessee refuses to sign a notarial lease in the terms of the agreement between him and the lessor in respect of the premises leased, the lessor has a right to bring suit, and have the lessee condemned to sign the lease, and, in default of his so doing, to have it ordered that the judgment of the Court shall serve as such lease. *Walsh* v. *Brooke*, 21 Que. S. C. 394.

Agreement for lease — Correspondence—Authority of agent—Incomplete contract—Specific performance — Damages. *Gibbins* v. *Smith*, 11 O. W. R. 563, 12 O. W. R. 7.

Agreement for lease—Incomplete contract—Nature of tenancy—Possession. *Grant* v. *McPherson*, 1 O. W. R. 240.

Agreement for lease—*Specific performance—Damages for breach — Measure and quantum — Loss of profits.*] — Action for specific performance of an agreement for lease, damages for wrongful exclusion and other relief. Under circumstances, discretionary remedy of specific performance refused. Damages allowed, the basis thereof being compensation for loss of lease and not punishment of landlord for his breach. Rental to new tenant indicates actual rental value when breach occurred. Tenant cannot recover for loss of prospective profits. *Jarvas* v. *Tormey*, 13 O. W. R. 432.

Agreement to lease timberland and woodland—*Portion of lands not in possession of plaintiff when agreement entered into — Subsequent grant by Crown — Effect of —Trust—Estoppel—Obligation to lease subsequently granted lands — "Belonging."*]—On appeal, *held*, that certain lands which plaintiff claimed "belonged" to him, and for which he subsequently obtained a Crown grant, were included in the agreement for a lease, and he is now estopped from saying that these lands were not intended to be in the agreement, as he had represented they were his and defendant had acted thereon. *Woodworth* v. *Lantz*, 8 E. L. R. 60.

Arbitration and award—*Valuation of buildings — Interest on amount fixed by award.*]—In a lease of twenty-one years it was provided that the buildings should be valued at the end of the term by three valuators or arbitrators, whose award should be made within the six months, next preceding the 1st November, 1900, and the value paid by the lessor within six months from that date, with interest from that date. Valuators or arbitrators were duly appointed, and possession given by the lessees on the 31st October, 1900, the last day of the term, but the award was not made until the 30th November, 1901: — *Held*, that the lessees were entitled to interest on the value of the buildings, as ascertained by the award, from the 1st November, 1900. *Toronto General Trusts Corporation* v. *White*, 22 C. L. T. 178, 3 O. L. R. 519, 1 O. W. R. 198, 760.

Assignment of lease—*Non-registration —Land Titles Act—Rent in arrear—Re-entry by landlord—Action by assignee of lease to recover possession — Parties — Original lessee — Subletting by assignee—Termination of sublease — Tender of rent—Costs.*] —In an action against the landlord by the assignee of a lease under the Land Titles Act, 1894, duly registered, to recover possession of the premises upon which the landlord had re-entered for default in the payment of rent:—*Held*, (1) that the fact that the assignment was not registered was no bar to the action.—(2) That the original lessee was not a necessary party.—(3) That the lessee was entitled to relief without the issue of a writ of ejectment upon payment of the rent due, but that the plaintiff, although he tendered all the rent due before action, should bear the costs of it, except in so far as these were increased by the defendant's resistance to the claim. — The plaintiff had sublet the lands, the sublease providing for re-entry in the event of the sublessee permitting an execution to be levied against his goods. This event had happened, and the plaintiff had distrained through the sheriff, who was in possession under a writ of attachment and writs of execution when the defendant re-entered.—*Held*, that the plaintiff's distress and the bringing of this action shewed that the plaintiff intended to terminate the sublease. *Tucker* v. *Armour*, 5 W. L. R. 35, 6 W. L. R. 93, 6 Terr. L. R. 388.

Assignment without leave — *Forfeiture — Election — New lease — Waiver—Distress — Acceleration — Assignment for benefit of creditors—Notice.*]—A lease of a store was made for five years, at a yearly rental, payable by even portions quarterly in advance, with the covenant that the lessee should not assign or sub-let without leave, and with a proviso that if the lessee should make an assignment for the benefit of creditors, the then current and the next quarter's rent and the taxes for the then current year should immediately become due and payable as rent in arrear and be recoverable by distress or otherwise. During the term, the lessee made an assignment for the benefit of his creditors to the plaintiff, who sold the stock of goods in the store to the defendant. By the terms of the sale the defendant was to assume the rent and taxes and to arrange with the landlord of the premises as to tenancy. The defendant's husband went into possession of the store and of the stock of goods, which had remained therein, and continued thereafter in possession of the store. On the 5th April, 1898, the lessors distrained the goods of the defendant in the store for $644, made up of $175 rent due on the 1st October, 1897, $175 rent due on the 1st January, 1898, $175 "the next quarter's rent," by virtue of the proviso in the lease, and $119

for the taxes for 1898, in respect of which sums they claimed to be preferred creditors on the estate of the lessee. The plaintiff paid the claim and costs under protest, and brought an action against the lessees to recover back $319.32 of it, which action was dismissed. On the 17th December, 1898, the lessors made a lease of the store to the defendant's husband to hold for three years from the 14th February, 1898. The lessors never consented in writing to the assignment of the demised premises to the plaintiff, and the plaintiff never assigned the premises to the defendant, and the lessors never recognized as rightful the occupation of the premises by the defendant. The plaintiff did not give notice to the lessors, under R. S. O. c. 170, s. 34, s.-s. 2, electing to retain the store for the unexpired term, or any portion of it:—*Held*, that the lessors, by granting the lease of the 17th December, 1898, elected to avoid their former lease, they having done nothing in the meantime to waive the forfeiture thereof incurred by the assignment to the plaintiff. The distress was no waiver of the forfeiture. The election to forfeit the original lease referred back to the time when the breach of the terms of that lease occasioning the forfeiture took place, that is, the date of the assignment. The forfeiture of the lease and the acceleration of the payment of the rent and taxes might have been avoided by giving, within one month from the execution of the assignment, a notice in writing to the lessors electing to retain the store for the unexpired term or a portion of it:—*Held*, also, that the condition that the defendant was to assume the rent and taxes and to arrange with the landlord as to tenancy, did not mean that the defendant was to assume any part of the rent and taxes which by virtue of the provision of the lease had become due on the previous 24th January, but rather that the defendant should arrange with the landlord as to tenancy and assume the rent and taxes payable in virtue of the tenancy so arranged. *Tew* v. *Routley*, 20 C. L. T. 36, 31 O. R. 358.

Attachment for rent in recaption—*Removal of movables—Notice of removal—Costs—C. P. 553, C. C. 1064, 1065, 1619, 1993, 1994, 2005.*]—The lessees who removed a considerable part of the effects garnishing the leased premises, which were locked up for several days, after having announced their decision to move, should be compelled to pay the costs of an attachment in recaption for rent for the reason that they put their lessors under the impression that they had entirely removed their movable effects. *Boucher* v. *Beauvais*, 16 R. de J. 211.

Attornment—Damage to tenant by act of third party — Negligence. *Slonemsky* v. *Faulkner*, 2 O. W. R. 551, 1099.

Breach of covenant—Quiet enjoyment—Eviction—Covenant not to sublet—Forfeiture—Waiver. *Armstrong* v. *Canada Co.*, 6 O. W. R. 888.

Breach of covenants — *Forfeiture — Possession — Pursuit — Ejectment.*]—Land leased by the plaintiff to the defendants the B. Co. for mining purposes, was worked by one or other of the several defendants up to the time this action was brought. Previous to action the plaintiff gave notice of cancellation of the lease, addressed to the defendants the K. Co., and served on the defendant T., who was apparently in actual possession. The claim in the action followed the notice, and claimed possession only on account of alleged breaches of covenants in the lease:—*Held*, on the evidence, that no breach of the covenants was proved as against the B. Co., who were the only necessary defendants, and the plaintiff could not be allowed to turn his action into one of ejectment against T. Judgment of Harvey, J., affirmed. *Humberstone* v. *Belmont Coal Co.* (1910), 13 W. L. R. 119.

Breach of covenants—*Sub-letting without leave — Alteration of premises without consent of lessor—Forfeiture—Relief against—Terms—Costs.*]—Action for possession of leasehold premises owing to breach of covenants:—*Held*, (1) that the assignment by the sub-tenant was no breach; (2) that the raising the rent of a sub-tenant was not a new sub-letting; (3) that sub-letting without lessor's consent was a breach, and the forfeiture was relieved against; (4) that the appointment of a manager of the dining room was not a leasing of that room, but an agreement between employer and employee; (5) that the plaintiffs are estopped from claiming that the alterations worked a forfeiture. *Royal* v. *Bell* (1909), 12 W. L. R. 546.

Building lease — Value of buildings erected by lessees — Ascertainment by arbitration — Evidence of rentals and expenditures — Admissibility — Relevancy — Weight — Question of law — Arbitration Act, s. 41 — Scope of — Stated case. *Re Rogers & London & Canadian Loan & Agency Co.*, 12 O. W. R. 1295.

Cancellation—*Use of premises changed.*]—There is a change in the use of the demised premises, affording ground for the cancellation of the lease, when the tenant of a bakery sub-lets it for a laundry. *Pearson* v. *Potvin*, 25 Que. S. C. 54.

Cancellation of lease—*Amount of damages to landlord—Costs—C. P. 549, 1152 C. C. 1637.*]—*Held* (confirming Davidson, J.):—If a lease is cancelled and the amount of rent for the whole year is asked for, the landlord will be entitled to six months' rent as damages for said cancellation. — (Reversing Davidson, J.)—If a sum of over $200 is asked as damages for the cancellation of a lease, and that a sum of $120 only is awarded, the plaintiff must be granted costs of a fourth class action and not those of a third one. *Theoret* v. *Trudeau* (1910), 12 Que. P. R. 92.

Cancellation of lease. — See CANCELLATION OF INSTRUMENTS.

Change in demised premises—*Necessary work — Sub-tenant — Warranty — Acts of tenant.*]—A clause in a lease forbidding the lessee to make changes in the demised premises, without the consent of the lessor, does not apply to works necessitated by a new use of the premises provided for in the lease itself.—A sub-tenant will not be held responsible to the lessee for claims made by the landlord for injury to the premises except to the extent of his (the sub-tenant's)

own acts, and cannot be called on to answer for the acts of the lessee. *Stevenson* v. *Macphail*. *Glickman* v. *Stevenson*, 17 Que. K. B. 119.

Charge on land—*Opposition to sale by sheriff.*]—A lease for one year, whether registered or not, does not constitute a charge upon the immovable leased, and gives no right to the tenant to make an opposition *afin de charge*, when the immovable is to be sold by the sheriff. *Lantaigne* v. *Skelling*, 22 Que. S. C. 304.

Chattel mortgage — *Piano under mortgage seized for rent—Bailiff removed piano and placed it in storage as security for payment of rent—Right of mortgagee to possession on removal from demised premises.*] —Landlady seized a piano for rent due; later she released possession of the piano, taking a bond providing that she might repossess if the amount claimed for rent, costs, etc., was not paid in a few days. The tenant could not meet the amount when due and arranged to have the bailiff take the piano in storage and hold it until he could pay it all up. The piano in question was subject to a chattel mortgage to plaintiff, who brought action to recover possession. Defendant contended that he was holding the piano under the distress warrant:— *Held*, that so soon as the piano, in accordance with the arrangement, was removed from the demised premises, the distress was abandoned and the landlady's lien ceased and the mortgagee was entitled to possession of the piano under his mortgage. *Gosnell* v. *McTamney* (1910), 16 O. W. R. 176.

Claim for cancellation of lease — *Questioning landlord's title.*]—A tenant who has had peaceable enjoyment of an immovable leased to him, cannot demand the cancellation of the lease and damages on the ground that a third person, who has not disturbed him in his enjoyment, is the owner of a part of such immovable. *Charpentier* v. *Quebec Bank*, 21 Que. S. C. 296.

Condition of lease—*Objections taken on appeal for first time.*] — Where the issues have been joined in a suit and judgment rendered upon pleadings admitting and relying upon a written instrument, an objection to the validity of the instrument taken for the first time on an appeal to the Supreme Court of Canada comes too late and cannot be entertained. Where a written lease of lands provides for the payment of indemnity to the lessees in case they shall be dispossessed by the lessor before the expiration of the term of the lease, the lessees are entitled to claim the indemnity upon being so dispossessed, although the eviction may be for cause, inasmuch as the lessor could not, under the lease, dispossess the lessee except for breach of the conditions therein mentioned. *Regina* v. *Poirier*, 19 C. L. T. 378, 30 S. C. R. 36.

Consent — *Distress* — *Exemptions* — *Under-tenant.*]—Where it is expressly stipulated in the lease between the lessor and the principal tenant that the latter shall not sublet the whole or any part of the premises leased without the lessor's consent in writing being first obtained, a sub-tenant under a lease made without such consent cannot invoke the benefit of Art. 1639, C. C., which declares that the sub-tenant is held towards the principal lessor for the amount only of the rent which he may owe at the time of seizure of effects on the leased premises.— 2. The right to select and withdraw from seizure the effects detailed in Art. 598, C. C. P., is established in favour of, and can only be invoked by, the debtor. An undertenant is not entitled to claim such exemption. *Hamilton* v. *Dwyer* 16 Que. S. C. 469.

Construction — Unincorporated society —Lease signed by officers—Action for expulsion from demised premises—Parties—Damages. *Tradeau* v. *Pepin*, 3 O. W. R. 779.

Construction of covenant — *Taxes* — *Partial exemption.*]—A society owned a building worth about $20,000, which, by statute, was exempt from municipal taxation so long as it was used exclusively for purposes of the society. A portion of the building having been used at intervals for other purposes, was assessed at a valuation of $1,000, and the society paid the taxes thereon for some years. Such portion was eventually leased for a term of years to be used for other purposes than those of the society, and the valuation for assessment was increased to $10,000. The lease contained this covenant: "The said lessees . . . shall and will well and truly pay or cause to be paid any and all license fees, taxes or other rates or assessments which may be payable to the city of Halifax, or chargeable against the said premises by reason of the manner in which the same are used or occupied by the lessees hereafter, or which are chargeable or levied against any property belonging to the said lessees (the said lessor, however, hereby agreeing to continue to pay as heretofore all the regular and ordinary taxes, water rates and assessments levied upon or with respect to said premises, and the personal property thereon belonging to the lessor)."—The society was obliged to pay the taxes on such increased valuation and brought action to recover amount so paid from lessees:—*Held*, Fitzpatrick, C.J., and Anglin, J., dissenting, that the taxes so paid were "regular and ordinary taxes" which lessors had agreed to pay as theretofore and lessees were not liable therefor on their covenant. *St. Mary's* v. *Albee*, 6 E. L. R. 582, affirmed; (1910), 30 C. L. T. 530, 7 E. L. R. 435, 43 S. C. R. 288.

Construction of lease — *Rent.*] — A clause in a lease providing for a renewal stated that the renewal lease was to be "at such increased rent as may be determined upon, as hereinafter mentioned, payable in like manner and under and subject to the like covenants, provisions, and agreements as are contained in these presents, including the covenant for renewal, such rent to be determined by three different disinterested persons as arbitrators." The lease further provided for payment of the yearly rent as follows: "For the first ten years of the said term eighty dollars per annum; for the remaining eleven years one hundred dollars per annum; all the said payments to be made half-yearly on the first day of January and July in each year:"—*Held*, that the proper manner by which the rent should be increased during the renewal term was by adding to each payment during the twenty-one years, that is to

say, adding to the rent of $80 per annum for the first ten years of the renewal term and to the rent of $100 per annum for the remaining ten years of the renewal term,—and not by adding together the annual payments for twenty-one years and making an addition to that, nor by adding to the sum payable during the last year before the renewal:—*Held*, also, that the condition as to the rent for the new term being an increased rent might be satisfied by making a merely nominal addition, whereas here there was no increase in the rentable value of the premises. *Re Geddes & Garde, Re Geddes & Cochrane*, 20 C. L. T. 455.

Contract—*To lease hotel and sell stock in trade—Action by plaintiff for specific performance and damages—Facts found against the defendant—Condition precedent.*]—Action for specific performance on an agreement to lease a hotel.—Falconbridge, C.J.K.B., *held* that a defendant should not be relieved from liability on an agreement when it is rendered impossible to be performed by his neglect or default.—Difficulties made a decree of specific performance impracticable, and judgment on the issues only granted. *Brown* v. *Brown* (1911), 19 O. W. R. 447, 2 O. W. N. 1242.

Contracts — *Interpretation of contracts —Offer to purchase and acceptance—Conditional contract.*]—The acceptance, purely and simply, by the proprietor of a factory of an offer of purchase made to him, in which it is stated, "but F. (the tenant), giving me a lease of five years after his present lease," does not obligate the party accepting the offer to obtain a lease for such period of time. It forms, with the offer, a conditional contract, *i.e.*, subject to the proprietor agreeing to the lease, and when such condition is absent the contract is rescinded and has no ulterior effects. *Delicato & Biondi* (1909), 19 Que. K. B. 425. (An appeal to the Supreme Court of Canada is now under advisement.)

Covenant—*Breach of—Assignment without leave—Re-entry — Formal execution of assignment after action.*]—The right of re-entry under the short form of lease applies to the breach of a negative as well as an affirmative covenant, so that there is a right of re-entry for breach of the covenant not to assign or sublet without leave. *Toronto General Hospital Trustees* v. *Denham*, 31 C. P. 203, followed. The making of an agreement for the assignment of a lease, the settlement of the terms thereof, and the taking of possession by the assignee, constitute sufficient evidence of the breach of such covenant, so that the fact of the document shewing the transfer not having been executed until after action brought, is immaterial. *McMahon* v. *Coyle*, 23 C. L. T. 225, 5 O. L. R. 618, 2 O. W. R. 265

Covenant—*Goods on premises to secure rent—Valuation.*] — Where, by a lease, the lessee undertook to furnish the leased premises with "a sufficient quantity of household furniture or goods to secure the payment of one year's rent," the effects upon the leased premises should be valued in accordance with their ordinary merchantable value, and not in accordance with what they might bring as a forced sale. *Rousseau* v. *Archibald*, 12 Que. K. B. 14.

Covenant—*Implied covenant to crop and cultivate—Damages for deterioration.*]—The plaintiff leased to the defendant's husband land for five years, yielding and paying therefor the clear yearly rent or sum of one-third of the crop. The lease contained covenants by the lessee that he would cultivate in a good husbandlike and proper manner so as not to impoverish or injure the soil, and plough and crop the same in a proper farmerlike manner. Afterwards a new lease was made substituting the defendant as lessee, instead of her husband. This did not contain any of the above-mentioned covenants, or anything specially applicable to leases of farms, but contained the following: "Yielding and paying therefor yearly and every year during the said term . . . the sum of one-third of the crop grown, to be payable, . . . the first of such payments to become due and to be made when threshed in the fall of each year," and a covenant to plough in each year of the term four inches deep, which was written into it. It did not contain express covenants to cultivate or crop:—*Held*, that there should be judgment for the plaintiff for deterioration in value of land from defendant's omitting to plough, cultivate, and crop in 1902, $300, and for loss of wheat, barley, and oats, $291.76, in all $591.76. Implied covenants to cultivate and crop in each year should be read into the second lease: *McIntyre* v. *Belcher*, 14 C. B. N. S. 654; *Hamlyn* v. *Wood*, [1891] 2 Q. B. 491. The defendant bound herself to plough four inches deep in each year. That must mean that she would plough for the purpose of cultivating and cropping. The wording of the provision as to the payment to the lessor of a third of the crop in each year, would imply that a crop was to be grown in each year of the term. *Dunsford* v. *Webster*, 23 C. L. T. 290.

Covenant — *Improvements — Renewal —Independent covenants—Option.*]—A lease contained a covenant to the effect that the lessee might make improvements upon the demised premises; that at the expiration of the lease or any renewal thereof the same should be valued and paid for by the lessor; and concluding as follows: "And upon such payment, upon such valuation not being duly made, the party of the first part, his heirs or assigns, shall, if so required, give or renew a lease including the covenants of the present lease to the parties of the second part for a further period of five years, with the like agreement of valuation and payment for improvements as in this lease expressed and at the same yearly rent." On the expiration of the term, a dispute having arisen between the lessor and lessee as to the effect of the covenant—the former claiming that it was optional with him either to renew the lease or pay for the improvements after valuation, the latter that he was entitled to have the improvements valued and paid for by the lessor—a special case was stated in equity for the opinion of the Court. Each party was ready and willing to perform the covenant as interpreted by him:—*Held*, that the covenant was single, and therefore that the lessor was discharged upon his shewing that he was ready and willing to renew the lease; (2) that, even if there were two separate and independent covenants, one to pay the appraised value of the improvements and the other to renew, only one was to be per-

formed, and the option lay with the lessor, he being the first person called upon to act. *Quare, per* Tuck, C.J., whether a special case stated under the provisions of 53 V. c. 4, s. 139, should not be first heard by the Judge in Equity. *Ward* v. *Hall*, 34 N. B. R. 600.

Covenant — *Lease by tenant for life — Straw and manure — Property in — Emblements.*]—During the lifetime of the widow and tenant for life, two of the farms belonging to the estate were leased for five years, dependent on her living so long, and the lessees covenanted to cultivate, till, manure . . . and to spend, use, and employ in a proper husbandlike manner all the straw and manure . . . and not to remove or permit to be removed from the premises any straw of any kind, manure, wood or stone, and to carefully stack the straw . . . and turn all the manure thereon into a pile (so it may heat and rot so as to kill and destroy foul seeds), and thereafter and not before to spread the same on the land:—*Held*, that the defendants were not entitled to the straw and manure as emblements, as the widow was not in actual occupation or cultivation of the lands on which it was produced.—*Held*, also, that the lessees would have been entitled to the straw and the manure, which had been piled into heaps, but for their covenants, which precluded them from making any claim; and that the covenants might be construed or held to operate as a reservation of the straw and manure to the lessor to be dealt with in the stipulated manner, and, as the lessees' right or power and obligation so to deal with it came to an end with the death of the lessor, it passed to her representatives unrestricted thereby. *Snetsinger* v. *Leitch*, 32 O. R. 440, referred to. *Gardner* v. *Perry*, 25 C. L. T. 295.

Covenant—*Not to cut timber—Statutory covenant — Common law rights.*]—Under a covenant in a lease made in pursuance of the Short Forms Act, the lessee was not to cut down timber for any purpose whatever, except for fire wood, but he was to have the privilege of using for any purpose all lying down hard wood timber, cedar only excepted:—*Held*, that the covenant was a restriction of the statutory covenant, under which the lessee could cut down timber or timber trees for necessary repairs or for fire wood, but was an extension of the common law right, which was limited to lying down dead timber, and that the covenant allowed the lessee to use all the lying down hard wood timber, sound or unsound, except in so far as restricted by the exception as to cedar. *Snellie* v. *Watson*, 7 O. L. R. 635, 2 O. W. R. 118, 3 O. W. R. 475.

Covenant — *Not to sublet—Lodgers.*]—A condition in a lease, prohibiting sub-letting of the premises in whole or in part is not violated by a tenant who lets furnished rooms to lodgers, the tenant retaining the entire care and control of such rooms, and the lodgers not even being in possession of keys thereto. *Collerette* v. *Bassinet*, 24 Que. S. C. 372.

Covenant — *Railway company — City lease—Usual covenants — Covenants to pay taxes and repair—Right of re-entry—Rent in arrear — Interest on.*] — An agreement made between the corporation of the city of Toronto and the Canadian Pacific Railway Company, provided, amongst other things, for a lease renewable in perpetuity, in successive terms of fifty years, at an agreed rent, payable on named days, nothing being said about covenants:—*Held*, that the lease should contain a covenant by the appellants to pay the same, partly because the effect of the Assessment Act in force at the date of the contract was to impose such liability on the lessees of municipal lands without recourse to the corporation, and partly because a covenant to that effect was shewn to be a usual covenant, in the sense that the corporation invariably insisted on it in their leases. Judgment in 23 C. L. T. 218, 5 O. L. R. 717, affirmed in the main, but varied as to interest. *Can. Pac. Rw. Co.* v. *Toronto*, [1905] A. C. 33.

Covenant—*Rent.*]—A lease of land, upon which there were no buildings except an old shed, contained a covenant by the lessor to grant, at the expiration of the term, if requested, "another lease" to the lessee "for the further term of twenty-one years," at such rent as might be agreed on or fixed by arbitration, "such renewed lease to contain a like covenant for renewal":—*Held*, that the rent for the renewal term should be based upon the value of the land at the time of the renewal, and not upon the value of the land and of buildings erected by the lessee during the term. *Van Brocklin* v. *Brantford*, 20 U. C. R. 327, affirmed in appeal, 26th June, 1862, followed. Judgment below, 31 O. R. 335, 20 C. L. T. 39, affirmed. *Re Allen & Nasmith*, 20 C. L. T. 425, 27 A. R. 536.

Covenant — *Taxes — Evidence — Discretion — Referee.*] — Upon a reference to settle the form of a lease, under a contract by a municipal corporation to demise land owned by it to a railway company for a long term of years with perpetual right of renewal, evidence of surrounding circumstances and the practice and usage of conveyancers is admissible to enable the referee to decide whether the lease should contain a covenant by the lessee to pay municipal taxes. Upon such a reference the referee is entitled to exercise a judicial discretion as to the evidence to be admitted, and he should not be ordered to admit, subject to objection, all evidence which may be tendered. *Re Can. Pac. Rw. Co. & Toronto*, 20 C. L. T. 58, 27 A. R. 54.

Covenant for renewal—*Construction.*]—A lease for 21 years, made in 1851, of mill-races and lands on the old Welland Canal contained the following covenant: "After the end of 21 years, as aforesaid, if the said (lessors) shall or do not continue the lease of the said water and works to the said parties of the second part or their assigns," they would pay for improvements. After the expiration of the lease, in 1872, the lessees remained in possession and in 1880 they asked for a new lease "with trifling alterations," but were informed that their application could not be considered until the nature of the alterations was submitted. Nothing further was done, and on the expiration of a second term of 21 years the lessors resumed possession of the premises. The lessees filed a petition of right claiming compensation for improvements:—*Held*, that the

lessees were entitled to a renewal of the original term but not to a renewal lease containing the above covenant; that they were entitled to renewal or compensation; that their occupancy during the second period constituted a renewal, having obtained which their right to compensation was gone. *Rex v. St. Catharines Hydraulic Co.* (1910), 30 C. L. T. 1098.

Covenant not to assign — *Assignment to co-partner—Right to renewal—Notice.*]— Where partners were lessees of a term for years, and have covenanted not to assign or sub-let without the consent in writing of the lessor, an assignment by one of his interests in the lease to his co-partner without such consent is a breach of such covenant. *Varley v. Coppard* (L. R. 7 C. P. 505), followed. The lease provided that, having performed all their covenants and agreements contained in the lease, the lessees on giving six months' notice in writing to the lessor before the expiration of the term that they required it, would be entitled to a renewal:—*Held*, that a breach (after the said notice was given) of their covenant in the lease not to assign without leave caused a forfeiture of the right to renewal. Judgment appealed from (17 O. L. R. 254), affirmed. *Loveless v. Fitzgerald*, 42 S. C. R. 254.

Crops — *Defence—Tilling and sowing—Harvesting.*] — In a defence claiming the value of crops the defendant is not entitled at the same time to the cost of tilling and sowing and the cost of harvesting, and a claim for the latter will be set aside upon inscription in law. *Désormeau v. Bastien*, 5 Que. P. R. 417.

Crops — *Provision as to — Execution against tenant—Rights of landlord—Bills of Sale Act—Seizure of equitable interest.*]— The claimant let to the execution debtor the farm on which the grain had been grown by an indenture reserving as rent "the share or portion of the whole crop which shall be grown upon the demised premises as hereinafter set forth," and the lease provided that the lessor might retain from the share of the crop that was to be delivered to the lessee a sufficient amount to cover taxes, and to repay advances and other indebtedness; that the lessee immediately after threshing, should deliver the whole crop, excepting hay, in the name of the lessor, at an elevator to be named by the lessor; that all crops of grain grown upon the said premises should be and remain the absolute property of the lessor until all covenants, conditions, provisoes, and agreements therein contained should have been fully kept, performed and satisfied; and that the lessor should deliver to the lessee two-thirds of the proceeds of the crop to be stored in the elevator, less any sum retained for taxes, advances, indebtedness or guaranties previously mentioned. The grain in question had, until its seizure under the plaintiff's execution, remained on the farm in the possession of the lessee. The claimant claimed it as owner under the terms of the lease and not for rent:—*Held*, that the lease did not operate to prevent the lessee from ever having any property in the grain to be grown.—2. That, even if the legal ownership of the grain was to be in the lessor, it was still, as to two-thirds, held for the benefit of the lessee subject to the lessor's charges for taxes and advances, etc., and the lessee had an equitable interest in it, and the lessor's lien or charge would be void under the Bills of Sale and Chattel Mortgage Act, R. S. M. 1902, c. 11, s. 39, as being a charge upon crops to be grown in the future.—3. That the interest of the lessee in the grain whether legal or only equitable, was subject, under s. 182 of the County Courts Act, R. S. M. 1902, c. 38, to seizure and sale under execution, and that the claimant's interest could not prevail over that of the plaintiff. *Campbell v. McKinnon*, 23 C. L. T. 234, 14 Man. L. R. 421.

Crops — *Rights of the lessee of a farm subject to usufruct—End of such usufruct—Ownership of the fruits and revenues—C. C. 447, 450, 451, 457.*]—On 16th June, 1898, plaintiff purchased from A. T. and wife, the property in question, vendors reserving for life for themselves or survivor of them, the usufruct of said property. A. T. died in 1904. On 13th October, 1908, the wife leased said property as her farm to defendant for 5 years from 1st November, 1908, at $250 yearly, payable $125 on 1st July, and $125 on 1st October of each year during said lease. The lessor died on the 22nd May, 1909. Defendant continued, as such tenant, the enjoyment of said lease for the current year up to 1st November, 1909, and he paid the two instalments of rent partly to the heirs of said lessor in proportion to the duration of the usufruct, and partly to plaintiff himself as owner of the farm for the remainder of the year.—Upon an action, with conservatory attachment, by plaintiff claiming, as proprietor of the farm, at the end of the usufruct, the ownership of the hay cut by defendant on said farm:—*Held*, that defendant, as lessee, was bound and entitled, at the expiration of the usufruct, to continue, as such, the enjoyment of said leased farm to the end of the year begun, by paying the rent to the proprietor for such continuation (C. C. 457).—That the hay which was attached by its roots to the soil when the usufruct ceased, could not belong to plaintiff, as owner of the farm, inasmuch as defendant, who was carrying on the farm at a fixed rental in money, had, by his lease, the right to enjoy all the natural and industrial fruits, and had by law the right to continue his lease for the balance of the year which had begun before the end of the usufruct by paying the rental to the proprietor.—That as defendant had duly paid all rent due to the parties entitled to receive the same, in proportion to their respective rights, plaintiff's action and seizure were unfounded and should be dismissed with costs. *Packham v. Pariseau* (1910), 17 R. de J. 79.

Damages for violation of lease.]—Actions for are summary. *Weinstein v. Millman* (1910), 11 Que. P. R. 294.

Default by tenant—*Action by landlord—Proof of damage.*]—A landlord, in order to obtain judgment against his tenant for breach of covenants in the lease, must prove that he has suffered damage from his inability to relet the premises, that he has paid the taxes, and that the repairs done are "*réparations locatives.*" *Lamarche v. Bessette*, 7 Que. P. R. 351.

Defect in premises — *Damages.*] — 1. A lessee is not entitled to ask for the

resiliation of a lease by reason of a defect in the leased premises, the existence of which defect was known to him when he entered into the lease and accepted the premises.—2. The position of the lessee, as to his right to demand resiliation of the lease, is not altered by the fact that he recovered a small amount from the lessor in another Court as damages alleged to have resulted from the defect referred to.—3. A lessee is not entitled to vacate the leased premises and to ask for the resiliation of the lease by reason of a defect which did not render them uninhabitable, without first putting the lessor in default to remedy such defect. *Beauchamp* v. *Brewster*, 16 Que. S. C. 268.

Defect in premises.]—Where tenements are co-structed in the manner adopted by a large number of architects and builders, the fact that noises incidental to the occupation of a lower tenement are heard by the occupant thereof coming from the upper tenement is not a ground for resiliating the lease, although possibly a more effectual means of preventing communication of sound from one tenement to the other might have been devised. *Benoit* v. *Smith*, 16 Que. S. C. 591.

"Disposing" of premises—*Sale—Misrepresentation — Covenant for quiet enjoyment.*]—A lease of premises used for a factory contained this provision: "Provided that in the event of the lessor disposing of the factory the lessees will vacate the premises if necessary on receiving six months' notice . . :"—*Held*, reversing the judgment of the Court of Appeal, 26 A. R. 78, 19 C. L. T. 62, and that of Rose, J., 29 O. R. 75, 18 C. L. T. 64, that a parol agreement for the sale of the premises, though not enforceable under the Statute of Frauds, was a "disposition" of the same under said provision entitling the lessor to give the notice to vacate.—*Held*, further, that the lessor having, in good faith, represented that he had sold the property, with reasonable grounds for believing so, there was no fraudulent misrepresentation entitling the lessee to damages, even if no sale within the meaning of the provision had actually been made, nor was there any eviction or disturbance constituting a breach of the covenant for quiet enjoyment. *Gold Medal Furniture Mfg. Co.* v. *Lumbers*, 19 C. L. T. 375, 30 S. C. R. 55.

Dispute as to provisions—*Expiry of terms — Notice to quit — Overholding tenant.*]—Action to recover possession:—*Held*, that notice insufficient either under lease; or if defendant is an overholding tenant. Action dismissed. *Van Ferber* v. *Enright* (1909), 12 W. L. R. 216.

Duration of tenancy — Agreement—Construction. *Methodist Church* v. *Roach*, 9 W. L. R. 23.

Dwelling house — *Parol agreement* — Tenancy from month to month—Damages to premises alleged to be owing to tenant's negligence—Permissive waste—Liability of tenant—Implied covenant—Evidence. *McDonald* v. *Hamilton* (1911), 9 E. L. R. 395, N. S. R.

Ejectment — *Pleading — Waiver.*] — Where in an action in ejectment, the lessee pleads that he has never received any notice that his lease was terminated, the plaintiff may answer such plea by stating that the notice that the premises were to let had been put up for three months before the termination of the lease, and that the defendant asked for a longer delay to move out. *Berthel* v. *Duceppe*, 3 Que. P. R. 229.

Emphyteusis — *Bail-à-rente — Petitory action—Transfer by lessee.*] — An instrument by which lands were leased for sixteen years at an annual rental, subject to a renewal for a further term of twelve years, provided for the construction of certain buildings and improvements by the lessee upon the leased premises, and hypothecated these contemplated ameliorations to secure payment of rent and performance of the obligations of the lessee. On disturbance, an action, with both petitory and possessory conclusions, was brought by a transferee of the lessee against an alleged trespasser, who pleaded title and possession in himself, without taking objection to its cumulative form:—*Held*, that, under the circumstances, the action should be treated as petitory only; that the contract under the instrument described was neither emphyteusis nor a bail-à-rente (lease in perpetuity), but merely an ordinary contract of lease which conveyed no title to land or real rights sufficient to confer upon the transferee the right to institute a petitory action:—*Held*, also, that a deed of sale from the lessee would not support the petitory action, as the lessee could not transfer proprietary rights which he did not himself possess. *Price* v. *LeBlond*, 20 C. L. T. 449, 30 S. C. R. 539.

Encroachment by tenant upon unenclosed lands of landlord adjoining demised premises — Compensation for use and occupation — Acquisition of title by possession — Statute of Limitations—Possession taken before lease but in contemplation of lease — Repudiation — Estoppel—Renewal lease — Right of tenant to have premises in dispute included — Equitable right—Improvements. *Toronto* v. *Ward*, 11 O. W. R. 653, 12 O. W. R. 426.

Erection of building by tenant—*Agreement to continue lease — Breach by landlord — Liability to pay for building — Evidence — Admissibility.*]—An agreement between a lessor and a lessee that the lease shall continue for a number of years, on condition that the lessee shall erect upon the demised premises, to the satisfaction of the lessor, an addition to the buildings thereon, creates reciprocal rights and obligations which are the consideration the one for the other. Therefore, the lessor refusing to continue the lease, upon the pretext that the addition has not been constructed by the owner to his satisfaction, cannot at the same time retain it without compensation. The agreement remaining unexecuted, the parties fall back under the common law, which does not permit the lessor to retain additions made by the lessee except upon payment of their value.—Where the addition, the subject of the agreement, is of greater value

than $50, oral evidence is inadmissible to establish that it has been constructed to the satisfaction of the lessor. *Lee Chu* v. *Deslauriers*, 30 Que. S. C. 494.

Estoppel — *Malicious civil proceedings—Pleading — Malice — Evidence — Onus.*]— Action for a balance of rent. The defendant relied upon a surrender by operation of law. In 1896 the defendant and his cotenant, with the plaintiff's consent, leased a part of the land to one S., who entered into possession and paid the rent direct to the plaintiff, at the request of the defendant. On the 17th April, 1897, according to the defendant's story, at a time when he owed $100 for rent, the plaintiff agreed, in consideration of getting this money, to cancel the lease. This the plaintiff positively denied. The receipt alleged to have been given was not produced, nor was its disappearance accounted for. The defendant's evidence was taken on commission, and he was not examined in open Court. No new lease was granted and the plaintiff had not resumed possession:—*Held*, that there can be no estoppel by mere verbal agreement; there must be, in addition to such agreement, some act which is inconsistent with the continuance of the lease. And in this case there was no surrender of the lease by operation of law. The defendant counterclaimed for damages against the plaintiff for (*a*) fraudulently and without any colour of right filing a plaint in the County Court claiming a lien; (*b*) causing a *lis pendens* to be issued against lands not included in the lease; (*c*) for registering such *lis pendens*. —*Held*, that to sustain such an action there must have been, by means of civil process, some unwarrantable interference with the person or property of the defendant in the original action.—*Held*, also, that the counterclaim did not disclose a good cause of action, because neither malice and want of reasonable and probable cause nor special damage were sufficiently alleged.—*Held*, also, that the onus of shewing malice or special damage was upon the defendant, and he had not succeeded in his proof. *Trim* v. *Baines*, 20 C. L. T. 145.

Evidence of — *Commencement in writing—Third party—Confession of judgment.*] —A lease for a year at more than $50 rent cannot be proved by verbal testimony, even as against a third party, without a commencement of proof by writing, and such commencement of proof by writing is not to be found in the allegation, by such third party, of a monthly lease. 2. A confession of judgment by the tenant in an action brought against him by the landlord is not proof of a verbal lease against a third person who has been made a party. *Laliberté* v. *Langelier*, 9 Que. Q. B. 398.

Evocation — *Suit between landlord and tenant — Future rights — C. P. 49, 1152 (reversing Fortin, J.).*]—Although an action whereby the cancellation of a lease and a claim in addition for rent in an amount under $100, is within the jurisdiction of the Circuit Court, evocation of the case to the Superior Court will be permitted if the future rights of the parties are affected to an extent exceeding $100. *Poiré* v. *Lavigne*, 11 Que. P. R. 187.

Execution of lease by party not understanding its effect—*Absence of fraud —Denial of lessor's title — Estoppel.*] — A lessee can not deny his lessor's title and set up title in himself in an equitable replication in an action brought by him against the lessor for an illegal distress for rent in arrear under the lease by alleging and proving (no issue of fraud being raised) that he did not understand the effect of the lease, and believed that in executing it he was completing an option of purchase of the demised premises given in a prior lease from the defendant's predecessor in title; *per* Hannington, McLeod, and Gregory, JJ.; Tuck, C.J., and Landry, J., dissenting. *Sivret* v. *Young*, 38 N. B. R. 571.

Expiry — *Continuance of possession by tenant — Special agreement — Tenancy at will.*]—The reservation or payment of rent in aliquot proportions of a year, is the leading circumstance which turns tenancies for uncertain terms into tenancies from year to year. But this payment does not create the tenancy. It is only evidence from which the Court or jury may find the fact. And the circumstances may be shewn to repel the implication:—*Held*, therefore, in this case, where the landlord, before he accepted any rent after expiry of the lease, expressly told the tenant that he would not consent to any tenancy from year to year, so as to require any notice of termination to be given, but that they should remain in the same position as they were on the expiry of the lease, to which the tenant assented—the rent, however, to be the same as that reserved in the lease, and to be paid in like manner—the tenant was not a tenant from year to year, but a tenant at will. *Idington* v. *Douglas*, 23 C. L. T. 286, 6 O. L. R. 266, 2 O. W. R. 754.

Farm — Crop-payments—Negligence and want of skill of tenants—Action for damages — Joinder of defendants — Farming operations — Conflicting evidence — Damages — Costs. *Graviston* v. *Johnston* (N.W.T.), 2 W. L. R. 81.

Forfeiture — *Assignment for creditors.*] —A lease is not terminated or dissolved by operation of law in consequence of an abandonment of his property by a trader for the benefit of his creditors. *Milot* v. *Hains*, 4 Que. P. R. 58.

Forfeiture—Breach of covenant not to sub-let without leave—Acquiescence—Waiver —Breach of covenant to repair. *Minuk* v. *White* (Man.), 1 W. L. R. 401.

Forfeiture—*Non-payment of rent—Damages—Declinatory exception.*] — A declinatory exception, which concludes simply for the dismissal of the action, where it is shewn that the Court is competent, must be dismissed. 2. A landlord who demands the cancellation of the lease for non-payment of rent, may allege, besides, that he incurred, on account of the loss of future rents, damages to

a certain amount, and is not obliged to limit his demand to three months' rent to fall due. *Belanger* v. *Dubois*, 5 Que. P. R. 342.

Forfeiture — *Waiver—Estoppel—Covenant — Sub-lease—Company — Assignment for creditors.*]—A lease to a joint stock company provided that, in case the lessee should assign for the benefit of creditors, six months' rent should immediately become due, and the lease should be forfeited and void. The two lessors were principal shareholders in the company, and while the lease was in force one of them, at the meeting of the directors, moved, and the other seconded, that a by-law be passed authorising the company to make an assignment, which was afterwards done, the lessors executing the assignment as creditors assenting:—*Held*, reversing the judgment of the Court of Appeal, 1 O. L. R. 172, 21 C. L. T. 111, that the lessors and the company were distinct legal persons, and the individual interests of the former were not affected by the above action. *Salamon* v. *Salamon*, [1897] A. C. 22, followed. The assignee of the company held possession of the leased premises for three months, and the lessee accepted rent from him for that time, and from sub-lessees for the month following.—*Held*, reversing the judgment, that, under the facts of the case, the lessors could not be said to have waived their right to claim a forfeiture of the lease. Mortgagees of the premises having notified the sub-tenants to pay rent to them, the assignee paid them a sum in satisfaction of their claim, with the assent of the lessors, against whose demand it was charged.—*Held*, that this, also, was no waiver of the lessors' right to claim a forfeiture.—*Quære*: Was a covenant by the company to supply steam and power to its sub-tenants anything more than a personal covenant by the company, or would it, on surrender of the original lease, have bound the lessor and a purchaser from him of the fee? *Littlejohn* v. *Soper*, 22 C. L. T. 45, 31 S. C. R. 572.

Formal denial — *Absence of — Recognition.*] — A lease under seal which is not denied in the manner provided by Art. 208, C. P., must be considered as recognized by the person against whom it is set up. *Thurston* v. *Hughes*, 16 Que. S. C. 472.

Hotel—*Proviso for reasonable rebate of rent in case of a prohibitive law being enacted—Prohibitive law passed — Reference to ascertain amount of rebate — Replevin—Excessive distress.*]—Plaintiff was a tenant of defendant's hotel, the Orillia House, under a lease with a proviso that in event of any law being enacted to prohibit the sale of intoxicating liquors upon the premises, a reasonable rebate in the amount of rent during such prohibition should be allowed. Plaintiff was prohibited from selling, demanded the rebate, refused to pay rent until it was fixed, and while rebate was unascertained, defendant distrained for rent. Plaintiff brought action, claiming that right of distress was suspended or non-existent until rebate ascertained, the amount for rent being no longer a fixed and ascertained sum. This action is in replevin and for damages for excessive distress:—*Held*, that the action should be dismissed, in so far as it is founded in replevin. On the claim for damages for excessive distress, $100 damages allowed plaintiff. On the counterclaim, judgment for defendants for (a) the rent due under the lease claimed for the period distrained for and up to and inclusive of the 1st October, 1909, subject to a rebate on the same being ascertained under the judgment of Riddell, J., 13 O. W. R. 907, in a former action; (b) the additional rent at $10 per month agreed to be paid for the hotel in consideration of putting in a heating plant and apparatus; (3) and for the rent due at and for the same period for the six rooms used in connection with the hotel. Defendant's claim for double value for holding over these six rooms dismissed. Plaintiff to have his costs of the action in so far as it is an action for excessive distress. No other costs to or in favour of either party as respects claim or counterclaim. Reference to the Master at Barrie to ascertain amount due for rent and allowance for rebate. The latter, with the $100 damages, to be set off against the former, defendant to have judgment for excess. Money paid into Court to be applied towards or in payment of what may be found due. *Hessey* v. *Quinn* (1910), 15 O. W. R. 505, 20 O. L. R. 442, 1 O. W. N. 515.

Divisional Court varied above judgment by reducing the damages allowed to $5.—(1910), 16 O. W. R. 628, 21 O. L. R. 519, 1 O. W. N. 1039.

Hotels — *Distress — Sale of furniture—Lessor's right to bid at auction.*]—*Held*, (1) that there had been an excessive distress so far as one month's rent was concerned, and one dollar damages allowed; (2) that a landlord may buy at an auction sale of goods sold under his distress warrant. *Kipen* v. *McKay*, 7 E. L. R. 503. Reversed 7 E. L. R. 529.

Hotel premises — *Requirements of by-law — Illegal lease.*]—Premises leased for use as an hotel did not fulfil the requirements of a by-law in regard to the number of bedrooms, and of this both the lessor and lessee were aware at the time the lease was entered into. The lessee was prevented by the municipal authorities from using the premises as an hotel:—*Held*, in an action by the lessor on covenants for rent and repair, that the lease was void *ab initio*, and the maxim, *In pari delicto potior est conditio defendentis*, applied. Even if the lease were not void *ab initio*, it became void by the action of the authorities in stopping the further use of the premises as an hotel. *Hickey* v. *Sciutto*, 24 C. L. T. 106, 10 B. C. R. 187.

House not completed — *Requirements as to heating.*]—Where in a lease of a house in the course of construction, it is provided that the lessee shall take the house in the condition in which it shall be at the time of delivery over, provided that the work is finished, and the arrangement of the house shews (the owner having placed in it pipes for a system of hot water heating) that the house is to be heated by hot water, the tenant, especially if the house, by reason of its construction, cannot easily be heated with stoves, may require that the owner shall place radiators in every room where the visible indications make it apparent that the intention was to so place them, and a fur-

nance of a capacity sufficient to heat the water for such system. *Bazinet* v. *Collerette*, 21 Que. S. C. 508.

Immoral purposes of lease — *Void lease — Action — Saisie-gagerie.*] — The lease of a house for purposes of prostitution, having an illicit origin, and being contrary to good morals and public policy, is void, and can give no cause of action to any of the parties to it.—The fact that the tenant is about to leave the demised premises and to remove his goods and chattels therefrom, does not give rise in favour of the lessor to a remedy by way of *saisie-gagerie*, especially when the lessee is leaving because he is forced by law to do so. *Lachance* v. *Roy*, 29 Que. S. C. 478.

Implied covenant to crop and cultivate—*Rent in kind—Damages for deterioration.*]—In April, 1898, the plaintiff leased by deed to the defendant's husband a half section of land for five years at a rental of one-third of the crop grown on the premises yearly. The lease was on a printed form of a farm lease, and contained covenants by the lessee that he would during the term cultivate such part of the land as was then or should thereafter be brought under cultivation, in a good, husbandlike, and proper manner, and would plough the land in each year four inches deep and crop the same during the term in a proper farmerlike manner. Afterwards a new lease of the same land was made by deed, ante-dated so as to bear the same date as the first one, substituting the defendant as lessee instead of her husband. It was intended that the new lease should be a duplicate of the other in all respects except as to the name of the lessee. The new lease, by mistake of the solicitor who prepared it, was written on a printed form of "statutory lease," not containing the special clauses applicable to farm land. It provided for the same rental as the other lease, payable in the same way and at the same times, and contained the same covenant to plough four inches deep in each year written into it, but no express covenants to cultivate or crop. By the end of 1901 the cultivated portion of the farm was 117 acres, but in 1902 the defendant only ploughed and cultivated four acres out of the 117, and weeds grew up all over the rest. The plaintiff's claim was for damages for breach of covenants to cultivate, crop, and plough in 1902, which he contended should be implied in the lease to defendant in the circumstances: — *Held*, following *McIntyre* v. *Belcher*, 14 C. B. N. S. 654, *The Moorcock*, 14 P. D. 68, and *Hamlyn* v. *Wood*, [1891] 2 Q. B. 491, that such covenants should, in the circumstances, be implied in the lease to the defendant, and that she was liable for the estimated value of one-third of the crop that would probably have been produced on the 117 acres if it had been cropped in that year, and for deterioration in value of the land on account of defendant having allowed it to grow up with weeds, *Dunsford* v. *Webster*, 23 C. L. T. 290, 14 Man. L. R. 529.

Implied obligation of tenant to use premises in tenant-like manner — Injury to heating plant in house — Evidence —Conduct of tenant. *Warren* v. *Winterburn* (B.C.), 6 W. L. R. 498.

Improvident contract — *Misrepresentation — Fraud — Fiduciary relationship.*] —R. was the owner of certain premises situated in Saint John, which she leased to E. and M., by a written indenture of lease made February 4th, 1908. The defendant M. offered to draw the lease for her, and did so, and it was executed by all the parties at the same time in the presence of the father of the defendant E. The lease was read over to R. by M. on two separate occasions, and was given to R. to read for herself. R. is a middle-aged woman of property. She has been accustomed to transact all her own business, and manage her own property without assistance from anyone, and it was not contended that she was not fully capable of making an agreement of this nature:—*Held*, that the lease would not be set aside as there was no fraud or misrepresentation; that the defendant M. did not stand in any fiduciary relationship to R. by reason of his having drawn the lease, and the rule as to independent advice in such cases was not applicable here. The lease contained the following provisions for renewal:—More and containing and subject to precisely the same covenants, provisions and agreements as are herein contained." The defendants consenting, the words "or more" in the renewal clause were expunged. *Robinson* v. *Estabrooks & McAlary* (1909), 4 N. B. Eq. 168, 7 E. L. R. 131.

Landlord undertaking to erect new warehouse.]—Agreement for a lease for five years, from the 1st of April, 1840, the landlord undertaking to erect by that time a new warehouse, on part of the ground to be demised, and to put the old warehouse in repair, the amount of rent to be determined with reference to the amount of the landlord's expenditure on the buildings. The new building was not erected, nor the old warehouse repaired, on the 1st of April, but no objection made by the intended lessees, who then occupied part of the premises under a former agreement, and shortly afterwards the whole premises were destroyed by fire. In such circumstances:—*Held*, upon a bill filed by the landlord, for specific performance of the agreement, and for the defendants to rebuild the premises, and to accept a lease; that it was a condition precedent that the premises should be put in repair before the lease was granted, and that, as the landlord had not performed his engagement within the time limited, the contract could not be enforced in equity, and the bill dismissed. *Counter* v. *MacPherson* (1845), C. R. 1 A. C. 230.

Lease—*Clause forbidding sub-letting without leave — Refusal of leave — Inquiry into grounds — Evidence — Commencement of proof in writing — Admission — Acceptance of sub-tenant.*]—The admissions of a party interrogated as a witness constitute a commencement of proof in writing only so far as they render probable the fact to be proved. The indorsement by a lessor of a cheque for rent, presented by a third party as sub-lessee, followed almost immediately by obliteration after consultation with an advocate, does not furnish a commencement of proof in writing of the acceptance of this third party as sub-lessee.—2. The forbidding of under-letting without the written consent

of the lessor is *de rigueur*, and the Courts can neither inquire into the motives of a refusal nor otherwise control the stipulations. *Brown* v. *Orkin & Gestrofsky*, 35 Que. S. C. 132.

Lease by municipal corporation—*Expiration of term — Buildings and permanent improvements — Payment for — Work done under prior leases and by sub-tenant — "Permanent improvements" — Evidence to explain — "Worth" — Costs —Arbitration.*]—Where, by the terms of a lease, the lessors, in case of their refusal to renew at the expiration of the term, were to pay to the lessee "such reasonable sum" as "the buildings and permanent improvements" on the demised premises might then be worth, evidence was held, in an arbitration to fix their value, to be admissible to explain the meaning of the words "permanent improvements," namely, improvements made and in a sense owned by the lessee:—*Held*, also, that the meaning of the word "worth" was the value of such buildings and permanent improvements to the lessee in case the lease was renewed; and the principle to be adopted was the fair and reasonable market value thereof, as would result if it were the case of the bringing together of a willing buyer and prudent seller.—Certain of the alleged improvements claimed for consisted of filling in portions of a water lot, which was done by or for lessees under prior leases in performance of agreements entered into therefor.—*Held*, that the claimant was not entitled to be paid for such filling in, for when done it at once became part of the freehold, and was not in any sense a permanent improvement under the claimant's lease. — Other alleged improvements, also consisting of filling in, were done by a sub-tenant, under a sub-lease from the claimant.—*Held*, that such improvements enured to the benefit of the lessee, and he was entitled to be paid for them.—Where a submission to arbitration under the Municipal Arbitration Act, R. S. O. 1897 c. 227, is silent as to costs, s.-s. 6 of s. 2 of the Act applies, and empowers the arbitrator to deal with them; and in this matter, he having awarded costs to the claimant, the Court, under the circumstances, refused to interfere. *Dalton* v. *Toronto*, 12 O. L. R. 582, 8 O. W. R. 154.

Lease by tenant for life—Covenant—Emblements. *Gardner* v. *Perry*, 1 O. W. R. 157, 2 O. W. R. 681.

Lease by usufructer—*Extinction of usufruct — Notice by reversioner of intention to take possession — Rights of lessee — Trespass — Damages.*]—The extinction of the right of usufruct of an immovable leased by the usufructer, and notice given by the reversioner of his intention to take possession, do not suffice as a cause, in favour of the lessee, for resort to the remedy in damages given by Art. 1618, C. C. To come within that article, he must have been actually disturbed in his possession, if not materially, at least by the institution by the reversioner of an action for eviction. *A fortiori*, there will not arise from agreements made with the reversioner for continuation of the lease, a recourse in damages against the lessor. *Baillargeon* v. *Robillard*, 17 Que. K. B. 334.

Lease executed as security for past indebtedness and future advances—Share of crop reserved as rent—Seizure under execution—Claim of landlord—Interpleader.] — S. was indebted to a bank, and, to secure the indebtedness, made a mortgage upon certain lands to the plaintiff, representing the bank; the mortgage was dated the 11th January, 1909; and the moneys secured thereby were made payable on the 15th February, 1909. The mortgage was subject to a prior mortgage to a loan company. On the 15th March, 1909, the bank demanded further security, and a lease of the mortgaged lands was made to S. by the plaintiff and executed by S. on that date, for 9 months, the *reddendum* being one-third of the crop which should be grown upon the demised premises. On the 1st March, 1910, S. was in arrears in respect to the first mortgage, and the bank advanced him $700 more to pay the arrears, S. then executing a lease to the plaintiff for two years, reserving a rental of two-thirds of the crop. On the 30th August, 1910, the sheriff seized the grain upon the land under the defendant's execution against the goods of S. The plaintiff claimed two-thirds of the grain seized:—*Held*, upon an interpleader issue directed to determine whether the plaintiff was entitled under his lease to a two-thirds share of the crop, that the crop reserved as rental was not in reality a rental, but a security for a past indebtedness, as well as for future advances; and, therefore, the issue should be determined in favour of the defendant. *Stikeman* v. *Fummerton* (1911), 16 W. L. R. 502, Man. L. R.

Lease for a year—*Overholding.*]—In a case of a lease for a year where the tenancy continues after the expiry of the year without any agreement, the rent being paid monthly, the tenancy may be terminated by a month's notice to quit.—2. Although the notice should be in writing, where the lease is in writing, a verbal notice is sufficient when the opposite party admits its receipt either in writing or under oath. *Marson* v. *Hughes*, 17 Que. S. C. 1.

Lease for one year—Notice to quit before expiry of year—Sub-tenant giving up possession — Disturbance of possession — Delivery of distress warrant to bailiff — Constructive eviction — Evidence — Damages — Costs. *Ball* v. *Carlin*, 11 O. W. R. 814.

Lease of farm for pasture—Hay raised by tenant — Injunction against selling — Declaration of landlord's property in hay—Damages — Injunction — Account—Breach of contract — Covenant — Title to severed hay — Manure. *Bradley* v. *McClure*, 12 O. W. R. 215, 695.

Lease of part of building—*Obligations of landlord — Enjoyment of premises — Leakage of water from floor above.*]—The lessor of the basement of a building is liable, having regard to his obligation to afford the tenant proper enjoyment of the demised premises, for damages caused to the tenant by a leakage of water due to the bad condition of the pipes in the floor above, which he himself occupies. *Beaudoin* v. *Dominion Clothing Co.*, 34 Que. S. C. 157.

Mining lease — Reservation of rents — Royalties — Implied condition—Commencement of operations — Costs. *Lafave* v. *Lake Superior Power Co.*, 2 O. W. R. 715.

Mortgage of lease—*Discharge.*]—J. demised lands for a term of years, with a provision against assignment by the lessor without his consent. The lessor assigned the lease by way of mortgage, and the consent of J. was indorsed thereon. The mortgagee, in an action by J., was adjudged liable as assignee for payment of rent and taxes, and, the lessor having died insolvent, was about to register a statutory discharge of the mortgage, when J. brought an action claiming a declaration that it could not be discharged without his consent and an injunction to restrain the mortgagee from doing so:—*Held*, affirming the judgment of the Court of Appeal, 26 A. R. 116, *ante* 132, that under the Judicature Act the Courts are bound to treat a mortgage, as Courts of equity have always done, as a mere accessory to the debt; that, the lessor having consented to the specific assignment, such consent included all such incidents as the law attaches to the covenants and agreements between the parties set forth in the deed, as well as the covenants and agreements themselves; one of such incidents being that, on repayment of the debt, the mortgagee would be obliged to re-assign the mortgaged lands; that the lessor could not prescribe the dealings between the parties as to the mortgage debt, and the mortgagee was free to release it if he chose; and that he did not require a further license from the lessor to do so. *Jamieson* v. *London & Canadian L. & A. Co.*, 19 C. L. T. 373, 30 S. C. R. 14.

Option — *Mortgage — Redemption.*] — Under a covenant in a lease that the lessors would, at the expiration of the term thereby granted, grant another lease, "provided the said lessee . . . should desire to take a further lease of said premises," no notice or demand by the lessee is necessary. The existence in fact of a desire for the further lease is all that is essential, and that desire may be indicated by conduct and circumstances. A lease of land, subject to two mortgages, contained a covenant by the lessor and the second mortgagee with the lessee, that the lessee might if he desired to do so redeem the first mortgage, and that in that case the sum paid for redemption should be a first charge on the land:—*Held*, that the second mortgagee's right to redeem the first mortgage, after its acquisition by the lessee, was not taken away. *Brewer* v. *Conger*, 20 C. L. T. 59, 27 A. R. 10.

Option for lease—*Absence of consideration—Acceptance too late.*]—An action for damages for alleged breach of agreement by defendants to lease to plaintiff certain premises in Ottawa for 2 years at $50 per month, clear of all taxes except business tax. The agreement was not under seal.—Divisional Court held that the agreement was without consideration, and the notice of acceptance of the option was not given until it was too late.—Action dismissed with costs. —*Davis* v. *Shaw*, 16 O. W. R. 273, 21 O. L. R. 474, 1 O. W. N. 991, followed. *Maltezos* v. *Brouse* (1911), 19 O. W. R. 6, 2 O. W. N. 990.

Option to purchase—*Revocation of by death — Specific performance — Consideration — Tender — Evidence — Declarations against interest.*]—A provision in a lease, whereby the lessor grants to the lessee an option to purchase the leased property within a limited time, is not a *nudum pactum*. Such an option is, within the time limited, binding on a deceased lessor's personal representatives, though not so expressed. Statements, whether written or orally made, by the lessor as to the terms of the lease are not, after the death of the lessor, admissible as evidence in favour of his successor in title as being declarations against the deceased's interest. *Per* McGuire C.J.—Such statements merely amount to statements of an agreement which must be supposed to be made on fair terms, and, consequently, as much in favour of the maker's interest as against it. Where a tender is made in current bank bills, and objection is made only to the amount tendered, the objection cannot subsequently be taken that the tender was not made in "legal tender." The questions of the necessity for a formal tender, a contract under seal importing a consideration, the inadequacy of the consideration in an action for specific performance, discussed. *Yuill* v. *White*, 22 C. L. T. 312, 5 Terr. L. R. 275.

Option to purchase — *Terms — Construction.*]—S. leased land from F. for a term of three years at a rent of $150, payable in advance, with a right to extend the term for a further period of six years—that is, two terms of three years each—on paying a further sum of $150, in advance, at the beginning of each term of three years. The lease also contained a purchase clause, whereby F. agreed to convey to S. the leased premises at any time within the nine years for the sum of $6000, and further agreed that any payment which might have been made on account of the lease rent in advance at the time at which such conveyance might occur should be allowed as part payment:—*Held*, that in case of a purchase all the advance rent should go on account of the purchase money. Judgment in 1 N. B. Eq. Reps. 365, 451, affirmed. *Freeman* v. *Stewart*, 36 N. B. R. 465.

Oral agreement—Tenant in possession—Disturbance of possession — Trespass—Lease to stranger — Notice — Registry laws — Damages—Injunction. *Hare* v. *Krick*, 9 O. W. R. 958.

Oral agreement for lease — Tenant in possession — Disturbance of possession — Trespass — Lease to stranger — Notice — Registry laws — Damages — Injunction. *Hare* v. *Krick*, 8 O. W. R. 620.

Oral demise to take effect at future date — *Statute of Frauds — Rent — Possession not taken.*]—A parol agreement for the lease of a house for the period of one year, to commence at a future day, is void as made in contravention of the Statute of Frauds, R. S. N. S. 1900, c. 141, and cannot be enforced. But an immediate letting for the same period is within the exception to s. 3 of the statute, and is good, notwithstanding that it is not to go into effect until a future day.—In an action for rent alleged

to be due under a contract of hiring, the defendant having refused to take possession, the Judge of a County Court was of the opinion that the plaintiff was entitled to recover only for one month's rent, and, the plaintiff not appealing, the Court (Townshend, J., *dubitante*), although of the opinion that the plaintiff was entitled to recover generally, dismissed the defendant's appeal, and ordered judgment for the plaintiff for the amount awarded in the Court below. *Smith* v. *Thomas*, 2 E. L. R. 394, 41 N. S. R. 216.

Oral lease — *Admission—Commencement of proof in writing — Special conditions.*]— The admissions, by a party, of a verbal lease of premises and of occupation thereof, are not a commencement of proof in writing of special conditions attached to it. Hence, they will not avail to allow proof by testimony that the tenant, by the terms of the lease, was to permit alterations, etc., without compensation. *Men's Wear Ltd.* v. *Arnold*, 34 Que. S. C. 224.

Payment of rent — Tenant disputing landlord's title — Estoppel — Covenant — Possession — Termination of landlord's title after demise — Liability to pay rent— Eviction by title paramount — Use and occupation — Crown — Correspondence with department — Cancellation of lease— Waiver — Continuance of interest. *Clary* v. *Lake Superior Corp.*, 11 O. W. R. 381, 12 O. W. R. 6.

Personal action — *Territorial jurisdiction — Superior Court.*] — An action for cancellation of a lease for a long term or a sale, on account of default in payment of the price by the purchaser, or for non-performance of the obligations arising from the lease or sale, is a personal action, and should be brought in the Court of the district in which the contract was made, although the domicil of the defendant and the demised premises are in another district. *Marsolais* v. *Grenier*, 3 Que. P. R. 39.

Possession—*Personal action—Territorial jurisdiction.*]—Where the lessor, in a lease for a long term, demands against the holder of the lease that it shall be cancelled because of failure by the holder to perform his covenants, and that the possession of the demised premises shall be given up to him, the action is a personal one which is within the jurisdiction of the Court of the place where the lease has been executed. *Marsolais* v. *Grenier*, 17 Que. S. C. 296.

Possession—*Subsequent agreement under seal—Operation of lease—Surrender of previous tenancy — Overholding tenant — Detention of premises.*]—An informal document entered into between the parties hereto held to be an agreement for a lease which became merged in a lease under seal. When the latter herein expired plaintiff gave up possession. Plaintiff held entitled to damages for conversion of some wheat, etc., and defendant's counterclaim for possession and damages for overholding dismissed. *Boyd* v. *Naismith* (1909), 12 W. L. R. 233.

Possession taken in expectation of lease — *Encroachment on adjacent land of lessor by tenant—Covenant for renewal — Use and occupation—Action for.*]—The defendant, in 1882, went into possession of certain lands situate on Toronto Island, under the expectation of obtaining a lease thereof for twenty-one years, which was shortly afterwards granted to him by the plaintiff, owners of the freehold, the lease containing a covenant for renewal. The lands leased were three lots, described in the lease by their numbers on a plan. The defendant, in the belief that a piece of land, not so included, formed part of the lands leased, took possession of it with the land actually leased, and occupied the whole. In 1891 the defendant allowed a person to occupy the encroached-upon land as tenants, the latter paying the defendant a yearly rental, it being stated by the defendant in a receipt therefor that such land formed part of his leasehold lands. The defendant's tenant continued to pay the yearly rent until 1905, when the plaintiffs, in making a survey of the lands, discovered the mistake made by the defendant, and notified the tenant not to make any further payments. In an action for use and occupation of the part encroached upon:—*Held*, that the defendant could not claim to have acquired a title by possession under the Statute of Limitations, of the land so encroached upon, for his possession was in his character of lessee, and would therefore be deemed to be that of his landlords, the claim made by plaintiffs for the use and occupation not constituting a repudiation thereof; nor could he claim to have the encroached-upon lands included in the new lease to be given him under the covenant for renewal, for under that covenant he would only be entitled to a lease of the lands actually comprised in the old lease:—*Held*, also, that the plaintiffs were not entitled to claim for the use and occupation of such encroached-upon land prior to the termination of the lease to the defendant, but were entitled thereafter to be paid therefor. Judgments in 11 O. W. R. 653 and 12 O. W. R. 426, affirmed. *Toronto* v. *Ward*, 18 O. L. R. 214, 13 O. W. R. 312.

Privileges not specified—*Injunction.*] —Before the construction of a building by the defendant, the plaintiff agreed to rent a shop in the proposed building. The lease, in the short form made in pursuance of the Leaseholds Act, described the premises by metes and bounds, without specifying any privileges. The plaintiff, after entering, demanded the use of a water-closet and of a place for storing coal, and the defendant conceded the right:—*Held*, that the plaintiff was entitled to an injunction restraining the defendant from interfering with his right of access to the closet and with his right to store coal in rear of the premises. *Ross* v. *Henderson*, 21 C. L. T. 219, 8 B. C. R. 5.

Produce of farm — *Agreement as to— Execution against tenant.*] — The plaintiff leased a dairy farm and thirteen cows, by lease in writing, in which was contained the following clause: "All the hay, straw, and corn stalks raised on the . . . farm to be fed to the said cows on the said . . . farm:"—*Held*, that, while the property in hay produced on the farm might be legally in the tenant, yet his contract was to so use it that it should be fed to the cattle and consumed on the premises; he was not to have the beneficial use of it, and could not

by his contract take it off the farm, and his judgment or execution creditor had not such power, under cover of an execution; and an injunction restraining a bailiff and purchaser at a bailiff's sale from removing it was granted. *Sinclair* v. *Leitch*, 21 C. L. T. 157, 32 O. R. 440.

Proof of tenancy—*Rent exceeding $50—Oral evidence — Occupation — Remedy is of landlord.*]—The lease of an immovable for a rent exceeding $50 cannot be proved by the oral testimony of witnesses, but, when there has been occupation by the alleged lessee, the owner may, in accordance with Art. 1608, C. C., exercise against him all the remedies which the law gives to lessors against lessees. *Superior* v. *Withell*, 14 Que. K. B. 396.

Provisions of — *Damage by fire—Repairs — Abandonment — Lien of landlord—Stock-in-trade—Sale en bloc.*]—1. Where a lease contains stipulations to the effect that the lessee shall deliver the premises at the expiration of the lease in as good order as they were at the commencement of the lease, reasonable wear and tear and accidents by fire excepted, and shall pay extra premiums of insurance exacted by insurance company in consequence of the work carried on by the lessee, the effect is to do away with the presumption, which would otherwise exist by law in favour of the lessor, that the fire which occurred in the leased premises was due to the fault of the lessee, or of persons for whom he was responsible, and it is for the lessor to prove fault before he can recover damages. *Evans* v. *Skelton*, 16 S. C. R. 637, followed.—2. Damage by fire so inconsiderable in extent that repairs may be made in three or four days does not justify the lessee in abandoning the premises. His remedy is to put the lessor in default to make the necessary repairs, and then, if the repairs be not made, to ask for the cancellation of the lease. —3. The application of Art. 1623, C. C., which says that in the exercise of the privileged right the lessor may seize the things which are subject to it, upon the premises, or within eight days after they are taken away, but "if the things consist of merchandise they can be seized only while they continue to be the property of the lessee"—is not restricted to daily sales of merchandise in detail. The article applies to any sale which a merchant may make in the ordinary course of business; and the sale *en bloc* of a stock which has been damaged by a fire on the premises, is an ordinary and usual transaction; and therefore the lessor is not entitled to seize in recaption, in the possession of the purchaser, a damaged or partly damaged stock bought from the lessee in good faith, even when such merchandise has been sold *en bloc*. Judgment in 14 Que. S. C. 396, affirmed, but damages increased. *Liggett* v. *Viau*, 18 Que. S. C. 201.

Proviso for subletting — *Right of landlord to refuse consent.*] — Action for cancellation of a lease on the ground that the defendant, in violation of one of its terms, sublet the premises without having obtained the plaintiff's written consent. The defendant pleaded that the plaintiffs refused their consent without cause, being only ready to grant the same upon the condition that the rent should be increased: that the subtenant was solvent and was willing to pay the rent yearly in advance, or to furnish security. Against these allegations the plaintiffs inscribed in law, claiming that they were irrelevant, and that the plaintiffs had an absolute right to refuse consent:—*Held*, following *Mackenzie* v. *Wilson*, 10 L. N. 113, that the clause in the lease being absolute, the plaintiffs had the right to refuse consent, and that, therefore, the grounds urged by the defendant did not constitute any legal justification for his conduct in subletting. Inscription-in-law maintained and paragraphs of plea complained of struck out with costs. *Racette* v. *Carriere*, 23 C. L. T. 117.

Reformation — Injury to demised premises—Waste—Injunction—Damages. *Klees* v. *Dominion Coat & Apron Supply Co.*, 3 O. W. R. 841, 937, 6 O. W. R. 200.

Refusal of lessee to take premises.] —An action lies by a lessor against a lessee who refuses to take possession of the premises leased, to rescind the lease and to recover damages for loss of rent during the time necessary for re-letting. Such damages may be awarded by anticipation, subject to the condition that the lessor shall account to the lessee for any rental received during the same time.—In an action for rescission of a lease, with a demand for damages, costs are due and should be adjudged according to the amount of the damages awarded. *Thcoret* v. *Trudeau* (1910), 38 Que. S. C. 520.

Registered lease — *Sale of property by sheriff under hypothec—Opposition by tenant—Security.*] — An hypothecary creditor has a right to demand that a tenant who makes an *opposition afin de charge*, based upon a registered lease, shall furnish good and sufficient security that the property will be sold at a price sufficient to assure the amount of his claim, and this before the property has been advertised subject to the charge.—*Semble*, that a tenant, whose lease has been registered, has a right to proceed by way of *opposition afin de charge*. *Desaulniers* v. *Payette*, 5 Que. P. R. 344.

Relief against forfeiture of lease—Insolvency—Mistake in telegram. *Smith* v. *Wade*, 1 O. W. R. 549.

Renewal — *Arbitration — Appointment of arbitrators — Procedure—Interference by injunction—Jurisdiction.*]—A lease contained an agreement for renewal upon the following terms: the lessors were at liberty to elect either to take the improvements made by the lessees at a valuation or to grant a new lease for a further term at a rent to be fixed by arbitrators one to be chosen by the lessors, one by the lessees, and a third by the two, provided that if either party refused or neglected to appoint an arbitrator within 7 days after being required in writing by the other to do so, the other might appoint a sole arbitrator, whose award should be final. After the original term had expired, the lessors served upon the lessee a notice requiring them to appoint an arbitrator. The lessees answered by stating that they contended that the lessors had no longer any right to insist upon a renewal and protest-

ing against any arbitration, but at the same time naming an arbitrator. The lessors did not accept this as an appointment of an arbitrator, and assumed to appoint a sole arbitrator as upon default for 7 days after notice:—*Held*, affirming the judgment of Boyd, C., 5 O. L. R. 105, 23 C. L. T. 13, that the lessees had made a valid appointment of an arbitrator, and the lessors had no right to appoint a sole arbitrator; and that the lessees were entitled to resort to the Court to have the lessors restrained from proceeding before a sole arbitrator and to have a determination of their contention that the lessors had no right to insist upon a renewal. *North London Rw. Co.* v. *Great Northern Rw. Co.*, 11 Q. B. D. 30, and *London and Blackwall Rw. Co.* v. *Cross*, 31 Ch. D. 354, distinguished. *Direct United States Cable Co.* v. *Dominion Telegraph Co.*, 28 Gr. 648, 8 A. R. 416, followed.—*Semble*, *per* Osler, J.A., that the lessors could not require the lessees to appoint an arbitrator without having first or at the same time appointed one on their own behalf. *Farley* v. *Sanson*, 24 C. L. T. 303, 7 O. L. R. 639, 1 O. W. R. 738, 3 O. W. R. 400.

Renewal — Arbitration or valuation—Irregularities—Acquiescence—Waiver. *Gray* v. *McMath*, 1 O. W. R. 445.

Renewal — *Construction of lease — Rent.*]—A clause in a lease providing for a renewal stated that the renewal lease was to be "at such increased rent as may be determined upon, as hereinafter mentioned, payable in like manner and under and subject to the like covenants, provisions, and agreements as are contained in these presents, including the covenant for renewal, such rent to be determined by three indifferent or disinterested persons as arbitrators." The lease further provided for payment of the yearly rent as follows: "For the first ten years of the said term eighty dollars per annum; for the remaining eleven years one hundred dollars per annum; all the said payments to be made half-yearly on the first day of January and July in each year:"—*Held*, that the proper manner by which the rent should be increased during the renewal term was by adding to each payment during the twenty-one years, that is to say, adding to the rent of $80 per annum for the first ten years of the renewal term and to the rent of $100 per annum for the remaining ten years of the renewal term,—and not by adding together the annual payments for twenty-one years and making an addition to that, nor by adding to the sum payable during the last year before the renewal:—*Held*, also, that the condition as to the rent for the new term being an increased rent, might be satisfied by making a merely nominal addition, whereas here there was no increase in the rentable value of the premises. *Re Geddes & Garde*, *Re Geddes & Cochrane*, 20 C. L. T. 455, 32 O. R. 262.

Renewal — *Increased rent — Arbitration.*]—In a lease for twenty-one years the rent fixed was, for the first year $106.88, for the next four years $130 a year, for the next five years $145 a year, and for the remaining eleven years $178 a year. The lease contained a covenant by the lessor to renew for a further term of twenty-one years, "at such increased rent as may be determined upon as hereinafter mentioned, payable in like manner, and under and subject to the like covenants . . . as are contained in these presents." The lease provided for the appointment of arbitrators to determine the rent to be paid under the renewal lease:—*Held*, that the arbitrators were bound to award an increased rent under the terms of the reference to them, but they might award a mere nominal increase if they thought proper; the increase was to be based upon the rent reserved for the whole term, and not for any particular year or years of it; it might be upon each year's rent or upon the average of the whole twenty-one years, but so that in the result the average annual rent should be greater for the future term than the past. *Re Geddes & Garde*, 22 C. L. T. 455, 32 O. R. 262, approved. *Re Geddes & Cochrane*, 22 C. L. T. 54, 3 O. L. R. 75, 1 O. W. R. 15.

Renewal—Subsequent attempt to cancel—Sub-tenant — Payment of rent direct to landlord — Surrender—Release — Estoppel. *Yukon Trust Co.* v. *Murphy* (Y.T.), 2 W. L. R. 298.

Renewal lease — Arbitration to determine rental — Award — Appeal — Reimbursement of lessee for buildings — Potential value of property — Expenditure of money by lessee. *Re Denison & Foster*, 12 O. W. R. 1106.

Repair of premises — *Injury to third person.*]—A tenant, bound by the terms of his lease to make repairs, is not responsible (as between himself and his landlord) for an accident to a third person happening on the premises which he occupies as tenant, when he has not been guilty of negligence on his part, and the accident has happened by reason of faulty construction of a structure upon the premises. *Allan* v. *Fortier*, 20 Que. S. C. 50.

Repairs—*Liability of landlord—Factory—Insurance.*]—Repairs to a furnace, such as substituting a new section for one that is cracked and leaks from long usage, are not tenant's repairs, and the cost must be borne by the lessor.—In construing a lease, in which the lessor and lessee are both described as manufacturers of tobacco, and the premises as "a four-storey building, *etc., now occupied by the lessor as a factory*," it is fair to infer that the premises were leased to be used as a tobacco factory. Therefore, a clause in the lease that "the lessee shall pay all extra premiums of insurance of the premises, exacted in consequence of the business or work he carries on therein," does not make him liable for the difference between warehouse and factory rates of insurance. *Fortier* v. *Youngheart*, 28 Que. S. C. 118.

Repudiation by tenant — *Breach of contract — Surrender — Acceptance — Re-letting—Measure of damages.*]—The plaintiffs made a lease of an hotel to the defendant, but before the day when the lease was to become operative, the defendant notified the plaintiffs that he refused to carry out the contract. The plaintiffs declined to release the defendant, and notified him that they

would claim damages for the breach, and continued to carry on business in the hotel and endeavoured to relet it, which they succeeded in doing after an interval:—*Held*, that the effect was that the defendant renounced his contract by refusing in advance to perform it, and, as far as he could, he thereby rescinded it; the plaintiffs adopted the renunciation of the contract by so acting upon it that they treated the contract as ended except for the purpose of bringing an action upon it for breach of contract; and this they had a right to do. There was no acceptance of the attempted surrender. The plaintiffs were entitled to damages based on the difference between the rent agreed to be paid by the defendant and that at which the plaintiff subsequently leased.—Judgment of Ryan, Co.C.J., affirmed. *Arden Hotel Co.* v. *Mills* (1910), 14 W. L. R. 410.

Rescission — *Immoral use of premises—Knowledge — Costs.*] — The fact that the lessor's auteur, who was also manager of the company appellant, was aware, during several years, that a portion of the leased premises was being used for immoral purposes, and that he acquiesced therein, does not deprive the purchaser and transferee of such premises of the right to demand the resiliation of the lease on the ground of such immoral use of premises. Such knowledge can only affect the question of costs. *Provident Trust & Investment Co.* v. *Chapleau*, 12 Que. K. B. 451.

Rescission — *Tenant quitting possession — Rent to fall due — Damages — Injury to premises.*]—Where the tenant leaves the demised premises before the expiry of the lease, the landlord cannot claim as damages a sum equal to the rents which would fall due under the lease, unless he also claims cancellation of the lease.—2. The landlord, in these circumstances, cannot, before the expiration of the lease, claim damages for injury done by the tenant to the demised premises. *Amiot* v. *Bonin*, 23 Que. S. C. 42.

Rescission of lease—Action for—Fraud — Improvidence — Execution — Sunday. *Duprat* v. *Daniel*, 1 O. W. R. 561, 2 O. W. R. 940.

Right to drill for oil—Construction of lease — Covenants — Breach — Commencement of operations — Alternative payment of rent — Forfeiture — Relief — Ceasing to operate — Payment into Court—Costs. *Docker* v. *London-Elgin Oil Co.*, 10 O. W. R. 1056, 11 O. W. R. 726.

Rights of tenant — Appurtenance — Light and ventilation — Interference with —Lease. *Ellis* v. *White*, 11 O. W. R. 184.

Shop — Covenants—Insolvency of tenant —Assignment for creditors—Election of assignee to retain premises—Rent—Use and occupation. *Lazier* v. *Armstrong*, 5 O. W. R. 596.

Short Forms Act—*Lease—Surrender—Evidence of destruction of building by fire—Obligation of tenants to rebuild—Covenants to repair—Breaches—Assignment of lease—Assignment of reversion — Parties—Amendment.*]—The male plaintiff, being the owner of a farm in the township of Pelham, by indenture of lease, dated 29th June, 1891, and expressed to be made in pursuance of the Act respecting short forms of leases, R. S. O. 1897, c. 166, devised it to the defendants the Brown Brothers Co. for the term of 12 years, to be computed from 1st April, 1892. The lessees covenanted "to repair," "and that the said lessor may enter and view state of repair and that the said lessees will repair according to notice," "and that they will leave the premises in good repair, ordinary wear and tear only excepted." After the making of the lease, plaintiff Ira Delamatter conveyed the lands demised to plaintiff Emma C. Delamatter, and defendants the Brown Brothers Co. conveyed all their interest under the lease to their co-defendants, who accepted the lease and became liable to all the covenants. In August, 1902, one of the buildings on the demised premises—a barn—was destroyed by fire, and was not rebuilt. The action was brought to recover damages for breaches of covenants on the part of the lessees:—*Held*, Magee, J., dissenting, that words annexed to the short form which are designed to increase the obligation of the covenanter cannot introduce into the form an exception from it, or annex to the form a qualification of it, and the covenant must be construed as it stood without the aid of the long form. Therefore the covenant as to damage by fire and tempest did not apply. *Delamatter* v. *Brown Bros.*, 5 O. W. R. 423, 9 O. L. R. 351.

Special clause in lease — Defect in building — Neglect of landlord to repair—Tenant leaving building — Liability for rent — Distress — Excess — Damages — Tender — Amount of rent due. *McDougall* v. *Kerr* (Alta.), 8 W. L. R. 528.

Surrender—*Eviction—Surrender by operation of law.*]—The plaintiff let a store to H. A. & Co., who afterwards executed an assignment for the benefit of creditors to the defendant, who did not take possession of the premises. The plaintiff, on the third day after the assignment, requested and obtained from H. A. & Co. the keys of the premises, which she proceeded to clean up and repair, and she took down a sign board having on it the firm name of H. A. & Co., and painted the name out. The plaintiff afterwards sued for a declaration that she was entitled to a privileged claim against the estate for rent accruing due after the assignment:—*Held*, that there had been a surrender of the premises to the landlord by act and operation of law. *Phené* v. *Popplewell*, 12 C. B. N. S. 334, applied. *Gold* v. *Ross*, 23 C. L. T. 283, 10 B. C. R. 80.

Surrender—*Forfeiture of breach of covenant—Eviction by notice.*] — The plaintiff, tenant of the defendant's farm under a lease for three years from March, 1903, containing a covenant by the plaintiff to buy three horses and to pay for them by doing certain work on the farm, or in cash at the time of threshing, being embarrassed financially, about the 1st December, 1903, met the defendant and asked him to assist him by guaranteeing certain accounts, in default of which he said he would be unable to go on working the farm, and terms were discussed, on which the plaintiff should abandon the lease and

give up possession of the premises. While the defendant was willing to assist the plaintiff, they failed to agree, whereupon the former told the latter that he would cancel the lease for non-performance of covenants, and, on the plaintiff's request for a writing, gave him the following written notice: "Take notice that I have this day cancelled lease of my farm to you on the grounds of non-fulfilment of terms of said lease." On the same day the plaintiff vacated the premises, after selling to the defendant some oats, barley, and feed he had there. The defendant resumed possession at once. A few days afterwards the plaintiff came back and sold to the defendant his poultry, and then left the farm altogether:—*Held*, that there had been no surrender of the lease, and that the defendant was liable in damages as for an eviction of the plaintiff. The defendant also contended that he was entitled to terminate the lease for breach of the covenant referred to. As to this, it appeared that the plaintiff had done some of the work stipulated for, and that there was a dispute over their accounts, but that at all events there was not more than about $38 due on the horses:—*Held*, that there was not such a clear breach of the covenant as to entitle the defendant to declare the lease forfeited on that ground. *Watson* v. *Moggey*, 15 Man. L. R. 241, 1 W. L. R. 438.

Surrender—*Substitution of tenant—Liability for rent — Distress — Amendment — Rent accruing after action.*]—Where a tenant by arrangement with his landlord secured another occupant for the premises, but was given to understand at the time that he would still be liable for the rent:—*Held*, that this did not amount to a surrender of the lease. In order to constitute a surrender it must be shewn that the incoming tenant has been expressly received and accepted by the landlord as his lessee in the place and stead of the original lessee by the mutual agreement of the parties.—*Held*, also, that the fact that the landlord at the request of the tenant has issued a distress warrant against the sub-tenant is not sufficient to constitute a surrender by operation of law. Amendment allowed so as to include a claim for additional rent which fell due after the commencement of the action. *Lougheed* v. *Tarrant*, 2 Terr. L. R. 1, 13 C. L. T. 473.

Tacit reconduction—*Oral lease—Mise en demeure — Damages — Non-repair.*] — Lease by tacit reconduction is not a verbal lease. 2. Under such a lease, a verbal *mise en demeure* to make repairs is insufficient. 3. A *mise en demeure* is necessary in order to claim from the landlord damages resulting to the tenant from non-repair of the premises. *Pelletier* v. *Boyce*, 21 Que. S. C. 513.

Tenant repudiated the lease — *Landlord re-let premises — Not eviction by landlord — Termination of lease — Action by landlord for damages — Rent, taxes and improvements — Method of computing damages.*]—Landlord leased certain premises to tenants by indenture. Tenants repudiated the lease. Landlord immediately entered action to recover damages for breach of contract and claimed $500 for two gales of rent.—Riddell, J., *held*, that landlord was entitled to the two gales of rent with interest.—*Skerry* v. *Preston*, 2 Chit. R. 245, followed:—*Held*, also, that tenants were liable in damages for breach of contract, under the heads of rent, taxes, and improvements which tenants had covenanted to add to the premises. Judgment for landlord for $10,982.87 and costs.—*Fitzgerald* v. *Mandos* (1910), 16 O. W. R. 425, 21 O. L. R. 312, 1 O. W. N. 878.

Valuation of buildings—*Extension of time for making award — Interest.*]—By a lease made on the 1st November, 1879, land was demised for a term of twenty-one years, and it was agreed that all the buildings on the land at the end of the term should be valued by valuators or arbitrators, and that the reference should be made and entered on and the award made within six months next preceding the 1st November, 1900; and it was further agreed that within six months from that day the value of the buildings found by the arbitrators should be paid with interest at the rate of seven per cent. per annum from that day, and that until paid it should be a charge on the land. By deed dated the 23rd October, 1900, the parties agreed that the time for making the award should be extended to the 1st December, 1900, and until such further day as the valuators or arbitrators might extend the same. The time was duly extended until the 30th November, 1901, on which day an award was made fixing the value of the buildings. Possession of the land and buildings was given up by the lessees to the lessors on the 31st October, 1900:—*Held*, Osler, J.A., *dubitante*, that, supposing the extension of time and delay to have been agreed to for the convenience of both parties and without the fault of either, the lessees were entitled to interest on the value of the buildings from the 31st October, 1900, to the 30th November, 1901, for the first six months at seven per cent. and for the remainder of the time at the legal rate of five per cent. Judgment of a Divisional Court, 3 O. L. R. 519, 22 C. L. T. 178, 1 O. W. R. 198, varied. *Toronto General Trusts Corporation* v. *White*, 23 C. L. T. 10, 5 O. L. R. 27, 1 O. W. R. 760.

Verbal lease — *Rent in advance.*]—To put an end to a verbal lease agreed to for one year and paid in advance, the lessor must give a three months' notice, pursuant to Art 1657, C. C. *Hébert* v. *Laberge*, 2 Que. P. R. 392.

Waste — *Cutting timber — Justification under oral agreement — Evidence to vary lease — Findings of Judge — Appeal.*] — The plaintiff leased to his sons S. J. M. and W. S. M., for the period of one year, and thereafter from year to year, the farm occupied by him, to be held by them in proportions stated, the consideration being that the sons should reside with their father and pay him a specified sum in money yearly, in addition to furnishing him with sufficient food and clothing, etc., for himself and his wife. In an action against S. J. M. for cutting down trees on the portion of the land held by him, the defendant sought to give evidence of an oral agreement that, in consideration of the transfer of part of his land to W. S. M., he was to have the land upon which the trees were cut during the plaintiff's lifetime and in fee after his death:—

Held, that the evidence was inadmissible as varying or contradicting the terms of the lease in writing; and, the trial Judge having found the facts against the defendant, as to the agreement with the plaintiff in relation to the lot of land upon which the cutting took place, and the evidence being of a contradictory character, that there was no good reason for disturbing the findings on this branch of the case. *Meisner* v. *Meisner*, 37 N. S. R. 23.

See COSTS — COURTS — PARTNERSHIP.

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2. COVENANTS.

Action for breach of covenants — *Expiry of lease — Lease of land before patent — "Assignment or transfer of homestead or pre-emption right" — Dominion Lands Act, s. 142—Void lease—Estoppel.*]—A lease of land, being land for which the lessor has made a homestead entry under the Dominion Lands Act, but for which a patent has not issued, is an "assignment or transfer of homestead or pre-emption right," within the meaning of sec. 142 of the Act, and is void, and no action can be brought upon it.—*American-Abell Engine and Thresher Co.* v. *McMillan*, 42 S. C. R. 377, followed.—*Spence* v. *Arnold*, 5 Terr. L. R. 176, not followed. — A tenant is estopped from denying his landlord's title, but the estoppel lasts only so long as the lease is in force.—An estoppel will not be allowed so as to interfere with the proper carrying out of an Act of Parliament.—An action by the landlord, after the expiry of the lease and after the defendant had gone out of possession, for damages for breach by the tenant of covenants contained in the lease, was dismissed because the lease was void as above. *Klinck* v. *Greer* (1910), 14 W. L. R. 282, 3 Sask. L. R. 157.

Agreement by tenant to insure—Insolvency of insurance company—Warranty by tenant of solvency of company—Liability. *Bannerman* v. *Consumers' Cordage Co.*, 5 E. L. R. 456.

Breach of covenant to repair—Tenant's fixtures — Alteration in premises — Breach of covenant not to assign or sublet —Waiver — Acceptance of rent — School taxes — Action — Scale of costs. *Nellis* v. *McNee*, 7 O. W. R. 158.

Collapse of building—*Implied warranty as to fitness for purpose for which used by sublessees—Land Titles Act—Parties contracting themselves into—Implied covenant to repair—Overloading by sublessees—Latent defects in construction — Burden of proof — "Unavoidable casualty" — "Accident or other casualty"—Notice to repair—Form of judgment — Relief over — Third parties — Costs.*]—The plaintiffs, the owners of land on which they had commenced to construct a building, on the 16th January, 1907, granted a lease of the basement and three flats of the north and the two upper flats of the south half, to the defendant F. for a term of 2 years from the date of the completion of the building. This lease was stated to be made pursuant to the Land Titles Act, and was in the form prescribed by that Act for leases for terms exceeding 3 years. It was expressed to be made subject to the covenants and powers implied, except as thereinafter modified, and subject to specified covenants, terms, and conditions, one of which gave the lessee the right to continue the lease for a further period of 2 years, at the same rental, upon giving notice. Another term was that if the demised premises should at any time during the term be destroyed by fire or other unavoidable casualty so as to be a total loss, the lessee should be obliged to pay only a proportionate part of the current rent, and the term should become forfeited and void. On the 19th March, 1907, the defendant F. executed a transfer of the lease to the defendants N. and B., and the plaintiffs assented thereto. The defendant F. never occupied the premises individually, but formed a partnership with defendants N. and B., and the firm commenced their occupation on the 22nd April, 1907. On the 18th June, 1908, N. and B. executed a sublease of the north half of all the floors of the building, except the basement, to another mercantile firm, for a term commencing on the 1st July, 1908, and ending on the 22nd April, 1909. This sublease was also expressed to be pursuant to the Land Titles Act, and contained the provisions referred to above. The sublessees occupied the portion of the building sublet to them, and stored therein a large quantity of goods. On the 26th October, 1908, all 3 floors occupied by them collapsed, and a large proportion of their goods were precipitated into the basement. The plaintiffs repaired the building, and brought this action against the defendant F. to recover the amount expended in repairs; N. and B. were afterwards added as defendants, and they brought in the sublessees as third parties, claiming indemnity against them. The third parties counterclaimed against N. and B. for the loss of goods resulting from the collapse; and the defendants N. and B. counterclaimed against the plaintiffs for indemnity against the counterclaim of the third parties: — *Held*, that where there is no express agreement or warranty, a landlord is not liable in damages for breach of an implied covenant or warranty that the building is fit for the purpose for which it is to be used.—And *held*, that no express covenant or warranty was ever made or given by any one, either by the plaintiffs or by the defendants N. and B.—*Held*, also, that there was nothing to prevent the parties from contracting themselves into the terms of the Land Titles, where they would not otherwise have been brought within them, and they had so contracted both in the lease and sublease; and, therefore, the covenant as to repairs, which, by s. 55 of the Act, is declared to be implied in every lease under that Act, was implied in the lease to F. and the sublease to the third parties, and they were bound thereby, and were liable to rebuild the whole building, and therefore liable to the plaintiffs for the amount properly expended by them.—*Semble*, that the lessees, having covenanted to restore the building, or parts of it, demised to them, were bound to do so, even if there were some latent defects in its construction.—And *held*, that the burden of proof was upon the lessees, and it was impossible

to say, upon the evidence, that they had not put a greater load upon the piers than they were apparently fit to carry. — *Held*, also, that the collapse of the building did not come within the exception as to "other unavoidable casualty" in the express provision of the leases, or within the exception of "accident or other casualty" in the implied covenant.—*Held*, also, that where the tenant's covenant to repair contains no provision as to notice, the landlord is under no obligation to give the tenant notice to repair before doing the repairs himself and proceeding to recover the cost.—*Manchester Bonded Warehouse Co.* v. *Carr*, 5 C. P. D. 510, followed. —*Held*, also, that judgment should be entered for the plaintiffs against F. for the cost of the repairs and the plaintiffs' costs; for F. against N. and B. for this amount and F.'s costs of defence; for the plaintiffs directly against N. and B. for the cost of the repairs and the plaintiff's costs; for the defendants N. and B. against the third parties for the cost of the repairs, and for N. and B.'s costs applicable to the enforcement of their claim against the third parties, but not for the amount of the plaintiff's costs. *Telfer Bros.* v. *Fisher* (1910), 15 W. L. R. 400, Alta. L. R.

Covenant to insure—*Default of lessee— Difficulty of insuring — Rights of lessor.*]—A covenant in a lease that the lessee will insure the premises and transfer the policies to the lessor, and, in default of doing so, the lessor will have the right to insure them himself and recover the premiums from the lessee, is binding, notwithstanding difficulties in the way of obtaining insurance from regular underwriters, particularly when such difficulties arise from the circumstance that the lessee does not occupy the premises. In such a case, the lessor has the right to insure as best he can and to recover the premiums, even if somewhat in excess of ordinary rates. *Bannerman* v. *Consumers Cordage Co.*, 34 Que. S. C. 441.

Covenant to renew or pay for improvements — *Exercise of option to pay— Invalid appraisement — Right of lessee to possession — Equitable plea — Ejectment —Equitable plea.*]—A lease for years provided that on its termination the lessor, at his option, could renew or pay for improvements. When it expired, the lessor notified the lessee that he would not renew, and that he had appointed a valuator of the improvements, requesting her to do the same, which she did. The valuation was made, and the amount thereof tendered to the lessee, which she refused, on the ground that valuable improvements had not been appraised; and, as she refused to give up possession when demanded, the lessor brought ejectment. By her plea to the action the lessee set up the invalidity of the appraisement, and asserted that, as the lessor's option could not be exercised until a valid appraisement had been made, he was not entitled to possession. By a plea on equitable grounds she again set up the invalidity of the appraisement and asked that it be set aside and the lessor ordered to specifically perform the condition in the lease for renewal and for other and further relief: — *Held*, affirming the judgment in *Purdy* v. *Porter*, 38 N. B. R. 465, 5 E. L. R. 350, Idington, J., dissenting, that, though the appraisement was a nullity that fact did not defeat the action of ejectment; that the acts of the lessor in giving notice of intention not to renew, demanding possession, and bringing ejectment, constituted a valid exercise of his option under the lease; and that the lessor was entitled to possession.—*Held*, also, Idington, J., dissenting, that s. 289 of the Supreme Court Act of New Brunswick did not authorise the Court to grant relief to the lessee under her equitable plea; that such a plea to an action of ejectment must state facts which would entitle the defendant to retain possession, which the plea in this did not do. *Porter* v. *Purdy*, 41 S. C. R. 471, 6 E. L. R. 440.

Covenant to repair.]—T. rented a farm to defendant who covenanted to repair buildings erected or to be erected, and to leave premises in good repair on termination of lease. On 26th January defendant agreed to surrender as of the 1st of April. On 2nd February T. entered into an agreement to sell to plaintiff, and shortly thereafter defendant tore down and removed a corn crib which he had erected. On 1st of March T. conveyed to plaintiff, who brought this action for damages for removal and conversion of corn crib. Defendant contended that he had to leave only the buildings in repair on the date of the deed, namely, 1st March:—*Held*, plaintiff entitled to damages equal to amount necessary to restore buildings to condition covenanted for. *Lucas* v. *McFee*, 12 O. W. R. 939.

Destruction of building — *Fire—Accident — Negligence — Presumption of fault — Burden of proof.*] — One of the covenants of the lease from plaintiff to defendant provided that the tenant should deliver up the premises, at the expiration of the lease, "in as good order, state, and condition as the same may be found in at the commencement of the same, reasonable wear and tear, and accidents by fire, excepted." The building was destroyed by a fire, the origin or cause of which was not definitely determined. In an action by the lessor to recover from the lessee the value of the building destroyed, less the amount of the insurance money received:—*Held*, affirming the judgment in 21 Que. S. C. 1, that a fire in the leased premises, the cause of which is unknown, or not legally proved, is an accident within the meaning of the above-mentioned clause in the lease excepting "accidents by fire." 2. In such case there is no presumption of fault against the lessee, where a fire occurs the origin of which is unknown, but rather a presumption of absence of fault, and the burden of proving fault is on the lessor. 3. Even assuming that the burden of proving absence of fault was on the lessee, he had succeeded in doing so in the present case. *Ford* v. *Phillips*, 22 Que. S. C. 296.

Executory condition subject to a future event.]—The lessee cannot compel the performance of an executory condition depending on circumstances foreseen and expected but which do not happen. Hence, the lessor bound to bring in water and put in bathroom fixtures, etc., on the demised premises as soon as an aqueduct shall be

placed along the street they face, cannot be compelled to do so sooner. The lessee may bring a suit for damages, or to lessen the rent or to set aside the lease. *Lazanis* v. *Grenier* (1909), 36 Que. S. C. 171.

Farm lease — Covenants — Breaches — Waiver — Acceptance of rent—Damages. *Wilson* v. *McLean*, 7 O. W. R. 540.

Farm leased on profit-sharing agreement — *Crops — Division — Setting apart of landlord's share — Property passing — Subsequent shortage by theft — Tenant's improvements — Right of landlord to terminate lease — Breach of tenant's covenant to pay taxes — Covenant for cultivation of land — Tenant's fixtures.*]—Action to recover amount due under a lease of a farm to defendant. Counterclaim for improvements and chattels left on premises:—*Held*, that after threshing, the grain was divided and plaintiff's share placed in granaries by instruction of plaintiff's agent. As plaintiffs then owners, it was at their risk:—*Held*, further, that non-payment being a continuing breach, plaintiffs justified in terminating lease, and taking possession. As water tank not attached to freehold defendant may remove it. The fence, windmill and shed are fixtures and as not removed before termination of tenancy belong to plaintiffs. Defendant not entitled to getting land ready for crop after termination of lease as above. *Saskatchewan* v. *Gombar*, 11 W. L. R. 520.

Ground floor of building—*Lease for one year — Covenant for renewal—Proviso as to breach of covenants—Covenant to heat upper floor—Covenant not running with land —Assignment of lease—Notice of covenant —Covenant binding on assignees—Guarantee of heating apparatus—Breach of covenant— Loss of right of renewal—Overholding tenants — Possession — Double damages — Special damage.*]—The plaintiff leased to L. *et al.* for one year the ground floor of a building. The lease provided for a monthly rent of $275, payable in advance monthly. The lessees covenanted that they would satisfactorily heat, at their own expense, during the term of the lease, the rooms of the upper flat of the building; and also that they would, at their own expense, keep the basement of the premises and all plumbing work in proper sanitary condition. The plaintiff, the lessor, by a clause in the lease, guaranteed that the heating apparatus and the plumbing of the building was in a good working and proper condition and competent for the purposes for which they were intended. The lease also contained a clause giving the lessees the right to a renewal of the lease for a further term of one year, "provided always, and these presents are upon this express condition, that, if the said yearly rent hereby reserved . . . shall at any time remain unpaid for a space of 10 days . . . or if a breach or default shall be made in any of the covenants herein contained, by the said lessees, then the covenants herein which relate to a renewal lease for a period of one year on the expiration of this lease shall become null and void and of no effect;" and it gave the lessor a right to re-enter after a breach of these covenants. The defendants were the assignees of the lease from L. *et al.* There was no express demise of the basement of the building, but the defendants took possession of it and used the furnaces there for the purpose of heating the building, with the consent of the lessor. The plaintiff, alleging that the covenant properly to heat the rooms in the upper flat was not complied with, and therefore the defendants had lost their right to a renewal of the lease, and were overholding after the end of the year, brought this action to recover possession of the demised premises:—*Held*, that the covenant to heat the upper rooms was not a covenant which ran with the land, but the defendants took the assignment with the notice of that covenant, and in equity it was binding upon them; but it was a condition precedent to its binding effect that the heating apparatus should be in good working and proper condition and competent for the purposes for which it was intended.—And *held*, upon the evidence, that the upper rooms were not satisfactorily heated by the defendants, within the meaning of the covenant; that the heating apparatus was in good working and proper condition so far as it could be, considering the system adopted, which was to some extent defective; that the defendants did not make the best use they could reasonably have been expected to make of the system, such as it was; that there had been a breach of the covenant; that there had been nothing to constitute a waiver of the breach; and, therefore, the right to a renewal was gone.—*Held*, therefore, that the plaintiff was entitled to possession, but not to double damages, the holding over not being wilful and contumacious, and not to special damage, none having been proven. *Nankin* v. *Starland Ltd.* (1910), 15 W. L. R. 520, Alta. L. R.

Impossibility of execution—*Covenant in a lease to insure—Refusal of the assurers —Assurance affected by the lessor.*]—The obligation of the tenant arising from a clause in a lease of a factory to have it insured is not nullified because recognised assurers refuse to accept the risk, especially when this refusal is prompted by the fact that the tenant does not occupy nor keep the factory running. The lessor who in terms of the clause has it insured himself has a right to recover the premium although it exceeds the ordinary rate. The tenant cannot object that the insurance effected does not offer sufficient guarantees, it is sufficient if the lessor is satisfied with it, for it is he who has stipulated and the lessee who has promised in the clause being dealt with. *Cordage Co.* v. *Bauncrman*, 18 Que. K. B. 305.

Land let "for pasturing" — *Hay raised by tenant — Injunction against selling — "Grazing" and "pasturing" distinguished — Breach of contract — Damages to land.*] — The defendant agreed to rent a farm from the plaintiff "for pasturing purposes," by a memorandum containing no other stipulation as to the use of the place. Instead of using the entire farm for grazing purposes, the defendant raised a crop of hay on part of the land, which he cut and stored in his barn and endeavoured to sell:—*Held*, that the defendant was rightly enjoined from selling and

removing from the farm any part of the hay, but that his raising a crop of hay on the farm was not a breach of the contract to use it for "pasturing purposes," as these words did not require that the grass should be severed only by the teeth of the feeding beasts, but permitted him to cut the hay and remove it to his barn, and either use it for feeding his cattle during the winter or leave it on the premises after the termination of the lease. *Westropp* v. *Elliott* (1884), 9 App. Cas. 815, discussed and followed. Judgment of Anglin, J., at the trial, as to damages for breach of contract, reversed, but otherwise affirmed. *Bradley* v. *McClure* (1908), 18 O. L. R. 503, 12 O. W. R. 215, 695.

Lease of furnished house —*Unsanitary condition of house — Liability of tenant to conform to contract.*] — Defendant leased a furnished house from plaintiff for six months and went into possession. About two weeks later he became ill, and upon discovering that the house was in an unsanitary condition he moved out. Plaintiff brought action to recover $1,000 for alleged breach of the lease. At trial, Clute, J., gave plaintiff judgment for $600 and costs. The Divisional Court *held*, that upon the letting of a furnished house there is an implied undertaking that the house is reasonably fit for habitation, and if from any cause this is not the case the tenant is justified in repudiating the tenancy. And that the house must be so at the beginning of the term, and the lessor has no right to be allowed after that time to put it in the condition it should have been in. *Wilson* v. *Finch-Hatton*, 1877, L. R. 2 Ex. D. 336, and *Chaisley* v. *Jones*, 53 J. P. 280, followed. *Gordon* v. *Goodwin* (1910), 15 O. W. R. 215, 20 O. L. R. 327.

Lease of unfurnished house — *Warranty as to habitable condition—Evidence—Trespass — Lands appurtenant to dwelling.*]—The plaintiff alleged an oral warranty of the habitable condition of an unfurnished house leased to him by the defendant:—*Held*, upon the evidence, that the plaintiff relied upon his own inspection, and was not given any assurance as to the condition of the house; and, therefore, the case was not brought within *De Lassalle* v. *Guildford*. [1901] 2 K. B. 215.—The plaintiff also alleged a trespass by the defendant upon three feet of land appurtenant to the demised dwelling.—*Held*, upon the evidence, that the three feet were not in fact appurtenant. *Evans* v. *Templin* (1910), 13 W. L. R. 714.

Lease on shares—*Construction—Breach of covenant — Re-entry.*]—Action by tenant against landlord to restrain defendant from re-entering upon demised premises. Counterclaim by defendant for breach of covenant in lease:—*Held*, that it was inadvisable to plough the land in 1907 and impracticable to do so in spring of 1908. Ploughing, reaping, and harvesting do not imply that the plaintiff should also seed. Clauses in agricultural leases should be precise. Judgment for plaintiff; counterclaim rismissed. *Alexander* v. *Walters*, 10 W. L. R. 441. See 11 W. L. R. 26.

Lessees' covenant not to employ more than 10 men in quarry—Oral evidence to vary lease — Rejection of — Weight of evidence — Remedy for breach — Injunction — Construction of negative covenant —Damages. *Simmons* v. *Gilbert* (N.W.P.), 6 W. L. R. 531.

Lessee's covenant not to sublet — *Partnership — Dissolution — Partner continuing in possession — Notice to quit — Time — Post-letter.*]—A covenant not to sublet in a lease made to a firm does not involve the cancellation of the lease, when the firm being dissolved, one of the partners continues in the enjoyment of the demised premises.—When the landlord has reserved to himself the right to sell the demised premises, and in that case to put an end to the lease on giving three months' notice before the expiration of the year ending on the 1st May, a notice by letter to the tenant deposited in the post on the 31st January and received on the 1st February, is insufficient. *Carter* v. *Urquhart*, 15 Que. K. B. 509.

Lessee's covenant to leave premises in repair—*Lien upon lessee's machinery—Insurance by lessee — Fire — Reinstatement of premises — Application of insurance money — 14 Geo. III. c. 78, s. 83 — Non-repair — Damages.*]—A lessee covenanted for himself and assigns that buildings of the lessor on the premises at the date of the lease would be left on the premises in as good repair as they then were; also that machinery of the lessee would not be removed from the premises during the term without the lessor's consent, but the same should be held by the lessor as a lien for the performance of the lesee's covenants and for any damage from their breach. Under a deed of assignment for the benefit of the lessee's creditors the lease became vested in the trustees. A fire subsequently occurring, which destroyed the buildings and machinery, insurance on the latter was paid to the trustees. The lessor demanded of the trustees that the insurance be applied to reinstating the buildings or the machinery. By 14 Geo. III. c. 78, s. 83, insurance companies are authorised and required, upon request of a person interested in or entitled unto a house or other buildings which may be burnt down or damaged by fire, . . . to cause the insurance money to be laid out and expended towards rebuilding, reinstating or repairing such house or buildings:—*Held*, without deciding whether the Act was in force in this province, or not, that the lessor was not entitled to the benefit of it, the Act not applying to machinery belonging to a lessee, and the lessor not having made a request upon the insurance company, as provided by the Act. — (2) That, even had the insurance been upon the buildings, the lessor would have had no equity to it, there being no covenant by the lessee to insure for the former's benefit.— (3) That the lessor was not entitled to prove for damages against the estate with respect to the covenant to leave the premises in repair the term not having expired. *Randolph* v. *Randolph*, 4 E. L. R. 17, 3 N. B. Eq. 576.

Lessee's covenant to pay insurance premiums — *Extra insurance premiums* —

Payment by lessee — Notice — Laches — Waiver.]—A covenant in a lease that the lessee should pay, in addition to rental, any "extra premiums of insurance of the premises exacted in consequence of the business or work he carries on therein," does not impose on the lessor the obligation to notify the lessee when such extra premiums are exacted, even though the premises were occupied for a number of years by the same tenant, carrying on the same business, under a lease containing the same clause, during which no extra premiums had been paid.—Dilatoriness on the part of the lessor and his not making the demand of such extra premiums for several years cannot be construed as a waiver of his right to recover them. *McMillan* v. *Wing Sang Kee*, 29 Que. S. C. 440.

Lessee's remedy *when such hidden defects were unknown to, or could not be known by the landlord—C. C. 1614, 1634.*]—In law, the landlord is bound to warrant the lessee for all defects in the thing leased which prevent or diminish its use, and whether he knew of them or not.—Although the landlord is bound to such warranty whether he knew of them or not, still, if he did not know of them and could not know of them, then the action in warranty could only have for effect to obtain a reduction in the rent, without damages, while, if the landlord was aware of the existence of such defects, or should have known them, the action will have for object the recovery of damages in addition to a reduction in the rent or cancellation of the lease. *Mergeay* v. *Redon* (1910), 16 R. de J., 354.

Lessor and lessee—*Covenant to renew—Severance of term — Consent of lessor — Enforcement of covenant — Expropriation.*]—A lease of water lots in Toronto contained a covenant by which the lessees at the expiration of the term, on conforming to the conditions and giving notice to the lessors, would be entitled to a renewal or payment for their improvements at the option of the latter. Part of the leasehold premises were sold by the lessees to the C. P. Rw. Co., and the balance became vested in the appellants who gave the required notice for renewal as to their portion and remained in possession for some time after the lease expired with no intimation from the lessors that it would be refused. The C. P. Rw. Co. proceeded to expropriate a further strip of the leased lands, and an action was brought to determine the right of the appellants to compensation on the basis of the term being renewed:—*Held*, affirming the judgment of the Court of Appeal for Ontario (18 Ont. L. R. 85) that the covenant for renewal could only be enforced for the whole of the lands and not for the part held by appellants.—*Held*, also, that though the lessors by consenting to the assignment to the C. P. Rw. Co. had recognized the existence of some right of renewal which was also assigned, it was the right to renew for a part only. The appellants, therefore, were not entitled to the compensation claimed. *Brown Milling Co.* v. *Can. Pac. Rw. Co.* (1910), 30 C. L. T. 335.

Lessor's covenant to contribute to expenses of feeding stock — *Breach by lessor — Remedy.*]—A covenant in a lease of a farm that the lessor will contribute one-half the expenses of feeding the stock, and that the latter, as it becomes unproductive, will be renewed by sale and purchase, will, in case of breach by the lessor, give the lessee a right of action to be allowed to carry it out at the cost of the lessor. *Laurin* v. *Meunier dit Legacé*, 30 Que. S. C. 78.

Neglect to deliver premises — *Damages.*]—The obligation to deliver the premises leased at the time agreed upon is of the very essence of a contract of lease, and a refusal or neglect to deliver is ground for a summary action for the recovery of damages resulting from the failure to carry out the obligations of the lease. *Davignon* v. *Chevalier*, 8 Que. P. R. 104.

Not to sublet — *Equity — Abrogation—Receipt of rent from sub-tenant—Estoppel.*]—A clause in a lease prohibiting subletting is always to be strictly observed, and the Court will not consider whether it is equitable or not. It cannot be abrogated unless by a new agreement in form as binding as the lease.—2. A landlord who continues to receive rent for the demised premises, giving a receipt in favour of the tenant, does not thereby renounce the benefit of the clause forbidding subletting, although the payments of rent are in fact made by the subtenant. *Vaillancourt* v. *Saint-Denis*, 34 Que. S. C. 25.

Not to sublet without leave—*Breach—Assignment of interest in lease to co-lessee and co-partner — Change of possession — Right to renewal of term.*]—A lease of land for five years, made pursuant to the Act respecting Short Forms of Leases, contained a covenant by the lessees not to assign or sublet without leave, and a covenant by the lessor for renewal, provided that the lessees should have duly kept and performed all the covenants, etc., and have given six months' notice that they required a further term. While the lease was current it was assigned by the lessees to the two defendants, who were partners, with the written consent of the lessor, and before the expiry of the lease one of the defendants, by deed, without the leave of the lessor, assigned all interest in the lease to his co-defendant, and surrendered to him possession of the demised premises, of which he had since been in exclusive occupation: — *Held*, that the execution of this deed, followed by the change of possession, constituted a breach of the covenant of the lessees not to assign or sublet, for which the lessor was entitled to enter, and had the effect of putting an end to the right to a renewal provided for by the lease. *Varley* v. *Coppard*, L. R. 7 C. P. 505.

Obligations of lessor—*Keeping premises in repair — Apparent defects.*]—The legal obligation to keep the premises in a condition to serve the purpose for which they have been let, being of the nature but not of the essence of the contract of letting, the lessor may validly stipulate that he shall not be bound to do so.—The lessor incurs no obligation by reason of apparent defects

of which the lessee was aware at the time of the making of the lease. *Ricard* v. *Pelchat*, 28 Que. S. C. 8.

Permitting the lessor to re-let — *Premises leased for landlord's advantage if the lessee vacates them.*] — The lease between the parties provided that in case the lessee abandoned the leased premises or any part thereof before the end of the lease, the lessor was free to take possession of them immediately and re-let them in whole or in part for his own advantage by way of damages, without prejudice as to his rights against the lessee for the fulfilment of his obligations and the payment of the rent. The lessee abandoned the premises and the lessor took possession of them and re-let them:—*Held*, that the clause cited of the lease did not give the lessor the right to receive double rent for the premises, but, on the contrary, he was, and is, obliged to account to the lessee for what he has received or will receive from his new tenant. *Richardson* v. *Leonard & Cote*, 16 R. de J. 193.

Prohibition to sublet.]—Knowledge by a lessor during several months that the leased premises are sub-let in violation of a prohibitive clause, is no bar to an action brought by him against the lessee to have the lease rescinded for such violation. *Venner* v. *Thienel* (1909), 36 Que. S. C. 223.

Prostitution — *Immoral contract — Knowledge by lessor — Clause providing for re-letting — C. C. 1637.*]—A tenant cannot refuse to pay his rent under the pretext that he leases the premises for the purposes of prostitution, unless he prove that the lessor knew that the premises were leased and occupied for such purposes.—A clause in a lease wherein it is stipulated that in case the lessee should leave the premises, the lessor would have the right to take possession of them and re-let for his own benefit, without prejudice to his rights against the tenant, cannot be interpreted in such a way as to allow the lessor to receive double rent, but it means that the lessor must credit the tenant with such moneys as are received from the re-letting. *Richardson* v. *Léonard & Cote*, 16 R. L. n. s. 213.

Quiet enjoyment — *Lease for term — Park owned by landlords — Company — Charter — Subdivision into lots and streets —Imposition of admission fee — Right of access.*] — Under letters patent issued in 1875 incorporating the defendants, power was conferred to acquire a tract of land and to improve, sell, or otherwise dispose of the same in lots, plots, or parcels, as the by-laws might provide, which the defendants did, and by plans duly registered subdivided it into lots with streets or avenues giving access to the lots. By s. 6 of 47 V. c. 83 (O.), the company were authorised to impose and collect an admission fee from any person seeking an entrance into "the premises occupied by the company," and those claiming under them; but such payment was not to prevent the company from excluding or ejecting any person from the premises for disorderly conduct. In 1885, by a lease under the Short Forms Act, the company leased two of the lots for 999 years, subject to the letters patent and the company's by-laws then or thereafter to be enacted, the lease containing a covenant by the lessee, on behalf of herself and her assigns, at all times during the term to observe, keep, and perform all such by-laws, etc., there being also a covenant by the company for quiet enjoyment. In 1889 the lease was assigned to the plaintiff. In 1902 a gate was placed at the entrance to the grounds, and a by-law passed requiring an admission fee or toll to be paid by all persons seeking admission to the grounds, under which the company claimed the right to demand payment thereof from the plaintiff and each adult member of his family, and by-laws were subsequently passed in 1904, 1906, and 1907, raising the amount of the fee:—*Held*, that the plaintiff, by virtue of the lease, was entitled to the reasonable use of the roads, streets and avenues leading to his premises for access thereto, and, though it was doubtless intended that the lessee personally, if not his lands, should be subject to some control by means of by-laws, and to charges for certain services, the power to regulate such services did not carry with it the right to impose an admission fee, with the corresponding right to exclude for non-payment, etc.; and that s. 6 of the Act was applicable to those, such as casual visitors, who merely sought an entrance to the defendants' premises or through them to the premises of others, and not to a person such as the lessee who sought an entrance to the grounds for the purpose of reaching his own premises; Maclaren and Meredith, JJ.A., dissenting. *Irving* v. *Grimsby Park Co.*, 16 O. L. R. 386, 11 O. W. R. 748.

Renew or pay for improvements— *Exercise of option to pay — Right of lessee to possession until payment — Equitable lien — Ejectment — Defence on equitable grounds — Relief — Incomplete appraisement.*]—A lease (a renewal of a former lease of the same premises) contained a covenant to renew at the end of the term or pay for improvements "heretofore erected, or which may be hereafter erected or made by the said A. C." (the lessee); the improvements to be valued by two disinterested persons to be chosen by the parties, which two persons in case of disagreement were to choose a third, the appraisement of whom or any two of whom was to be conclusive as to the value. The lessor having determined not to renew, appraisers were appointed by the parties, and they, failing to agree, appointed a third. The three met, and the appraisers of the plaintiff and the third chosen agreed on the sum of $2,500 as the value of the improvements, which sum the plaintiff tendered and the defendant refused to accept, and also refused on demand to give up possession, and the plaintiff brought ejectment. At the trial, without a jury, the Judge found that improvements for which the defendant was entitled to compensation had not been considered by the appraisers, and the appraisement was not full and complete. In addition to denying the plaintiff's title, the defendant, by plea, asserted the right to hold possession on equitable grounds, asked to have the award set aside, and a renewal lease decreed to be executed:—*Held*, that the lease neither expressly nor impliedly

gave the defendant the right of possession claimed, and the facts did not entitle her, on equitable grounds, to retain possession, or on this application to have the award set aside or the relief asked for. *Purdy* v. *Porter* 38 N. B. R. 465, 5 E. L. R. 350.

Repair — *Implied covenant — Demise of part of premises — Defect — Injury to tenant's goods.*]—There is no implied covenant on the part of a landlord to protect a tenant of the ground floor against water percolating through a defective roof. A tenant taking part of a building, in other parts of which are defects likely to result in damage to him, should examine the premises and contract for the removal of such defects as are apparent, otherwise he will have no remedy afterwards against the landlord for damages caused by such defects.—*Rogers* v. *Sorell*, 14 Man. L. R. 450, specially referred to. *Barker* v. *Ferguson*, 16 O. L. R. 252, 11 O. W. R. 257.

Repair—Leave to repair buildings to be erected — Assignment of reversion — Removal of building erected by tenant—Right of assignee to sue — Trespass — Damages —Costs — Distribution — Divided success —Distinct issues — Scale of costs — Jurisdiction of Division Court — Title to land. *Lucas* v. *McFee*, 12 O. W. R. 939.

Repairs—*Expiry of lease—Resiliation of lease — Damages — Amendment — Incidental demand — C. C. 1624, 1626, 1632, 1633.*]—Although the obligation of the lessee is to deliver to the lessor the leased premises in the condition in which he received them, only at the expiration of the lease, nevertheless if he commits waste of a serious nature, the lessor is not bound to wait until the expiry of the lease to take action.—A lessor who sues his tenant to force him to put the leased premises, which he allowed to deteriorate, in good order, and also claims damages, may, by an incidental demand for subsequent damages, demand the cancellation of the lease. *Ruffernacht* v. *Tsipuras* (1910), 16 R. L. n. s. 532.

Repairs by landlord.]—When there is no immediate necessity for vacating leased premises requiring repairs, the tenant should first take action against the landlord to have him ordered to make the necessary repairs. *Stagg* v. *Frigon* (1910), 17 R. L. n. s. 49.

Return of articles on premises—*Assignment of lease — Personal covenant — Breach prior to assignment — Liability of assignee.*] — The assignee of a lease of a store and premises and of certain personal property, enumerated in a schedule annexed to the lease, which contained covenants not to assign without the consent of the lessor and at the expiration of the term to yield up the premises and return the articles mentioned in the schedule, who got the lessor to sign an assent to the assignment, containing a proviso that it was subject to the payment of the rent and the performance of the covenants in the lease reserved, is not liable, in an action on the covenant to return the goods, for a breach committed by the original lessee. *Goggin* v. *Whittaker*, 38 N. B. R. 415, 4 E. L. R. 543.

Specific performance by lessor — *Right to sue for a reduction of rental.*]—The right of the lessee to sue for specific performance, under s. 1 of Art. 1641 C. C., applies only, as stated therein, to repairs and ameliorations stipulated in the lease, or which the lessor is bound by law to make; it does not extend to the erection of works (especially outside the premises leased), required to procure a covenanted state of things. Hence, an undertaking in a lease by a lessor to heat the premises *convenablement et confortablement*, does not give the lessee a right of action to compel the lessor to build a furnace, for that purpose, in a cellar under the leased premises. Failure by the lessor to carry out the above agreement does not give the lessee a right of action to have a different lessor rental substituted to that agreed upon in the lease. *Lapointe* v. *Vincent* (1909), 35 Que. S. C. 485.

Sub-letting forbidden without consent in writing of lessor — *Verbal consent — Proof — Verbal acknowledgment of lessor — Plaintiff in action to rescind — Tacit consent to sub-lessee.*]—A clause in a lease forbidding sub-letting without the written consent of the lessor is not so inflexible that a verbal consent cannot be given to the lessee, so that in an action brought to set aside the lease by the grantee, the grantor may plead that he has never admitted him as a tenant. Oral proof by the lessor of this former consent to a sale of the real estate to the plaintiff, along with tacit approbation of the latter of the sub-lease arising from the knowledge he had of it for several months without taking any action, is sufficient. *Jilbert* v. *Bauen*, 1909, 36 Que. S. C. 309.

Tenant deprived of possession while landlord made necessary repairs—*Eviction — Breach of covenant for quiet enjoyment — Seizure of goods — Trespass.*] — Action for damages for eviction and trespass. Plaintiff moved out at defendant's request to allow him to make needed repairs. There was no intention to put an end to tenancy. Such dispossession did not amount to an eviction—consequently there was no suspension of rent. Plaintiff asked for his "stuff." Defendant answered: "You pay the rent," and refused to let plaintiff have the goods seized:—*Held*, not to be a sufficient distress. The onus is on the defendant. The landlord is not entitled to hold the articles seized without distraining. *Mah Po* v. *McCarthy*, 10 W. L. R. 670, 2 Sask. L. R. 119.

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3. Distress—Rent.

Acceleration clause in lease—*Distress for three months' rent in advance—Circumstances not justifying acceleration—Distraining goods of third person on premises — Wrongful distress—Right of third person to double damages under 2 W. & M., sess. I, c. 5, s. 5—Liability of landlord and bailiff.*]—A lease of a shop by the defendants H. to L. for one year from the 7th January, 1909, contained a covenant by L. that he would

not assign or sublet without leave; and also a covenant that, if the term or any of the goods and chattels of the lessee should be at any time taken in execution or attachment by creditors of the lessee, or if the lessee should make any assignment for the benefit of creditors, or become bankrupt, or attempt to abandon the premises, or to sell or dispose of his goods and chattels, so that there would not in the event of such sale or disposal, be, in the opinion of the lessors, a sufficient distress on the premises for the then accruing rent, then the current month's rent, together with th rent for the succeeding 3 months next accruing, should immediately become due and payable, and the term should, at the option of the lessors, forthwith become forfeited and determined. There was also a proviso for re-entry by the lessors on non-payment of rent or non-performance of covenants or seizure or forfeiture of the term for any cause aforesaid; and a provision that the word "lessee" should include the heirs, executors, and administrators of the lessee, and also, if the lessee assigned the lease under consent from the lessors, should include the assigns of the lessee. After two months L. sold his business, stock, and good-will to the plaintiff, and placed him in possession of the demised premises, as his (L.'s) tenant. The plaintiff continued to occupy the premises, paying rent to the defendants H.; he was not an assignee under the terms of the lease, as the defendants never consented to an assignment; there was no forfeiture or determination of the lease because of any supposed subdemise. The rent was payable monthly, on the 7th day of each month. The rent due on the 7th May, 1900, not having been paid, on the 17th May a distress warrant for the amount thereof, $35, was signed by the defendant W. O. H. and delivered to the defendant W. as bailiff, and also a warrant for $105, 3 months' rent in advance. The seizure of the plaintiff's goods made under this last warrant was complained of in this action for wrongful distress — the plaintiff denying that any circumstances accelerating the rent had arisen. The defendants justified under the covenant in the lease to L., alleging that the seizure under the warrant for the $35 and another seizure under a chattel mortgage upon L.'s goods were seizures of the goods and chattels of the lessee; that the lessee had attempted to abandon the premises, and attempted to dispose of his goods, etc. The goods seized were the plaintiff's goods, not the goods of the lessee: —*Held*, that the covenant in the lease did not justify the distress; that putting the plaintiff into possession of the premises was not an attempt to abandon the premises; and that the sale of the business as a going concern, and without any indication of intention to withdraw the property from the reach of the landlords, did not come within the covenant; and, at any rate, the defendants H. had never formed an opinion, as required by the covenant, the only cause of the distress for $105 being the non-payment of $35 on the 7th May.—*Held*, also, that, as the goods of the plaintiff had been seized, he came within the statute 2 W. & M., sess. 1, ch. 5, sec. 5, and was entitled to recover double the value of the goods seized; and damages were assessed on that basis; and judgment given therefor against the defendants H. and the defendant W., the bailiff. *Choderker* v. *Harrison* (1910), 15 W. L. R. 687, Man L. R.

Action for — *Abandonment of part of claim—Amendment — Desistment — Rescission of lease.*]—Where a plaintiff renounces a part of the conclusions of his action, and amends accordingly, such proceeding on his part is in reality a desistment and must be treated as such.—2. An action for a rescission of a lease is of a different nature from an action for rent, and a plaintiff who has at first simply claimed a certain amount of rent, cannot amend his declaration with the object of asking the rescission of the lease, because such amendment would change the nature of his action. *Lachance* v. *Desbiens*, 23 Que. S.C. 524.

Action for — *Defence — Disturbance of possession.*]—A tenant being sued for rent may plead that he has not had the peaceable enjoyment of the demised premises, or that he has only a part enjoyment. *Synod of Diocese of Montreal* v. *Kelly*, 20 Que. S. C. 19.

Action for — Defences—Eviction—Entry by landlord to protect property — Demised premises becoming uninhabitable. *Harrod* v. *Watt* (N.W.T.), 1 W. L. R. 216.

Action for — *Mortgagee in possession—Executor de son tort.*]—The defendant and her husband resided in a house which he rented from the plaintiff, the rent being payable monthly. At his decease some rent was due, and the defendant remained in the house for another month, when she removed to another house. She was about to take the furniture with her when it was distrained upon for rent due. Under pressure of the distress she paid the rent then due and expenses, and took the furniture, as she said, for the purpose of care and safe keeping, and not as claiming it as her own. No letters of administration were issued. The widow paid the funeral expenses, over $50. The value of the furniture was less than $200. The lease expired on the 1st May, 1900, and it was for the rent which accrued from September, 1899, to the 1st May, 1900, that the plaintiff brought this action. Before the deceased leased the premises they were mortgaged by the plaintiff to a company, which mortgage was then at the time of this action standing on the premises for $2,200. The company on the 27th July, 1899, took possession of the premises as mortgagees, and gave notice to the deceased to pay all future rent to them, which he did. The distress proceedings were taken by the company, and rent collected paid over to the company, and the property was still at the date of the action in the possession of the company, who, as mortgagees, were receiving the rents: — *Held*, that the company, having entered into possession by collecting and receiving the rents of the premises, alone had the legal right, as mortgagees, to take them, or to bring an action for the rents due; and the plaintiff could not therefore recover in this action. *Morrison* v. *Jackson*, 21 C. L. T. 85.

Action for—*Time for bringing.*]—When a gale of rent is payable on a day certain, the tenant has the whole day to pay, and an action begun on that day is premature. *Robert* v. *Gagnon*, 10 Que. K. B. 237.

Action for found breach — Jury assessed damages at $125, value of property rescued—Rule *nisi* for nonsuit or in alternative for new trial—Grounds tenancy had terminated and distress could not be made—Acceptance of key and other grounds—Justification—Goods in *custodia legis*—12 Edw. VII. (P. E. I.), c. 12, s. 1.—No attempt to prove second distress—Rule discharged with costs. *Myers* v. *Smith*, 9 N. B. R. 223, and *Attack* v. *Bramwell*, 3 B. & S. 529 followed. *Hasyard* v. *Sterns* (P. E. I. 1911), 9 E. L. R. 321.

Action for rent — *Application for lease and negotiations — Condition — Possession of sub-tenant — Invalidity of document set up as lease.*]—Action for rent for part of a building:—*Held*, on the evidence, that the defendant had never been in possession either personally or by tenant. The defendant never received a valid lease. The plaintiff failed to prove compliance with the conditions of defendant's application to the agent for a lease. Action dismissed. *Lauder* v. *Peltier*, 11 W. L. R. 333.

Action for rent—Surrender of premises—Operation of law—Acceptance—Delivery of key—Subsequent renting of premises. *Yukon Trust Co.* v. *Popich* (Yuk.), 8 W. L. R. 852.

Agreement for lease—Refusal to sign — Taking possession — Effect of—Referable to agreement—Possession—Use and occupation. *Toronto* v. *Mallon*, 2 O. W. R. 933, 4 O. W. R. 386.

Attachment for rent — *Rent due — Benefit of the term—Lessee's intention to remove effects—C. P. 552, C. C. 1639.*]—The *dies ad quem*, the day upon which something is due or payable, belongs wholly to the debtor, and he has the whole of that day to discharge his indebtedness.—Thus, if rent is due on the 1st September, the lessee has the whole of that day to pay it; the landlord cannot issue an attachment for rent on that day even though the tenant may have refused to pay on the morning of the same day.—The tenant's intention to remove his effects does not deprive him of the benefit of the term. *Decary* v. *Poulis* (1910), 12 Que. P. R. 211.

Attachment for rent.]—When movable effects garnishing the leased premises are fraudulently and secretly removed and are acquired by a third person, the delay within which to attach them by recaption only commences to run from the date upon which the landlord is made aware of their removal. But he should attach them within the next following eight days, otherwise, that delay having expired, he is deprived of his privilege and all recourse against the third person in possession of such effects. *Lallemand* v. *Larue* (1910), 39 Que. S. C. 218.

Attachment for rent and damages—*Desistment as to damages.*]—There is nothing to prevent the plaintiff in an attachment of goods for rent and damages from abandoning the claim for damages, and such desistment will not be rejected on motion. *Gariépy* v. *Poulin*, 4 Que. P. R. 105.

Bonus for improvements — *Rent by anticipation — Cancellation of lease — Recovery of bonus — Commercial establishment — Civil contract.*]—A sum of $300 paid by the tenant to the landlord as a bonus for improvements made to the demised premises, is equivalent to an additional rent paid by anticipation. 2. If the lease is afterwards by a judgment, cancelled at the suit of the tenant, for default of the landlord to make repairs which it is his duty to make, the latter will be ordered to pay back such bonus in the same way as any other rent paid by anticipation. 3. The letting of an immovable for a commercial establishment is a purely civil contract. *Coté* v. *Cantin*, 21 Que. S. C. 432.

Building lease — *Value of buildings erected by lessee—Ascertainment by arbitration—Evidence of rentals and expenditure—Admissibility — Special case — Question of law—Arbitration Act.*]—Evidence of rentals and other income received from buildings erected on leasehold property, and of all outgoings or expenditure in respect thereof during the term, is admissible on an enquiry before an arbitrator for the purpose of determining the value of the same, although, owing to exceptional circumstances, the revenue derived by the lessees may not in fact afford assistance.—A question as to the admissibility of evidence is one of law within the meaning of s. 41 of the Arbitration Act. *Rogers* v. *London & Canadian Loan & Agency Co.*, 18 O. L. R. 8, 12 O. W. R. 1295.

Chattel mortgage — Seizure under — Illegal distress — Appropriation of payments — Abandonment of distress — Renewal — Proceeding under Overholding Tenants Act — *Res judicata* — Estoppel — Rent — Damages — Counterclaim — Use and occupation — Findings of jury—New trial. *Stone* v. *Brooks*, 2 O. W. R. 306, 3 O. W. R. 482, 727.

Claim to goods — *Notice to landlord — Service — Proof.*]—A bailiff is not empowered to serve upon a landlord the notice required by law to be given him by the owner of chattels in order to deprive the landlord of his right to a lien upon goods on the premises demised; and the bailiff's certificate alone is not sufficient evidence of the notice required by law in such cases. *Duperreault* v. *Pauzé*, 25 Que. S. C. 401.

Claimant of goods seized—*Formal defects in seizure — Purchase of goods from tenant.*] — The plaintiff, being the defendant's landlord, seized under a writ of *saisie-gagerie* goods which the defendant had removed from the demised premises. These goods were claimed by an intervenant:—*Held*, that he could not rely upon defects of form which the defendant had neglected to invoke within the time allowed; if the seizure was regular as against the defendant, it must be held regular as against the intervenant.—2. The intervenant, the purchaser from the defendant of the goods seized, took subject to the superior rights of the landlord; the tenant could not by selling the goods deprive the landlord of the privilege acquired before the sale. *Wilson* v. *McAvoy*, 2 Que. P. R. 440.

Common wall—*Tearing down—Lessee—Damages — Warranty — C. C. 1618.*]—A sub-tenant whose dwelling is made uninhabitable by the tearing down of a common wall has the right to be released from his rent from the date upon which he was obliged to vacate the premises. When a lessee to suit his own convenience persists to remain in an uninhabitable house, it cannot be considered as acquiescence on his part in the state of affairs nor a renunciation of his right to take advantage of the uninhabitable condition of the premises if he deems proper to do so. When, for the foregoing reasons, the lessee's action against the sub-tenant for rent is dismissed, the lessee has the right to call the lessor in warranty for the amount of rent the lessee may be adjudged to pay him, besides what he receives from the sub-tenant, but he has no such action in warranty if the rent received from the sub-tenant exceeds the rent payable by such lessee, and in this way covers the amount representing the diminution in rent obtained by the sub-tenant. *Lanctot* v. *De Boeck & Latreille*, 16 R. L. N. S. 195.

Default in payment of rent—*Proviso for re-entry — Forfeiture — Waiver — Pleading — Demurrer.*]—A plea in an action of trespass by a tenant against his landlord alleging that it became lawful under a proviso in the lease for the landlord to re-enter for non-payment of rent, without setting out the proviso, is bad on demurrer, as stating a conclusion of law.—A landlord can not, during the currency of the lease and before the expiration of the term, re-enter for non-payment of rent for which he has distrained on goods and chattels still held by him under the distress. *Whittaker* v. *Goggin*, 38 N. B. R. 378, 4 E. L. R. 530.

Default to sell — *Suspension of action for rent.*]—Where a distress for rent has been made, and the goods distrained remain unsold in the landlord's hands, his right of action for rent is suspended. *Lehain* v. *Philpot*, L. R. 10 Ex. 242, followed. *Smith* v. *Haight*, 4 Terr. L. R. 387.

Distress — *Wrongful — Damages — R. S. O. c. 342, s. 18, s-s. 2.*]—Where landlord levied wrongful distress when there was no rent due judgment was given for double value of goods seized. *Webb* v. *Box* (1909), 14 O. W. R. 802, 1 O. W. N. 112, 19 O. L. R. 540.

Appeal to Court of Appeal refused, 15 O. W. R. 205, 1 O. W. N. 317.

Distress—*Wrongful—No rent in arrear—Damages — Terms.*]—Action for illegal distress. As no lease established under which any rent in arrears judgment for plaintiff with damages. *Canadian Flax Mills* v. *McGregor* (1909), 14 O. W. R. 17.

Distress for rent—*Goods of sub-tenant — Replevin — Forfeiture of rent — Proof of breach of covenant—Cross-examination of landlord.*]—In an action of replevin by a sub-lessee against the lessor for goods taken by the lessor under a distress for rent, the plaintiff is entitled to prove, on cross-examination of the lessor, that there had been a breach of a covenant in the lease which forfeited the rent claimed.—A sub-lessee in such an action is entitled to the benefit of a covenant in the lease which forfeits the rent as a penalty for a breach, though there has been no assignment of the lease in writing. *Roquette* v. *Hebert*, 37 N. B. R. 68.

Distress for rent—Illegal distress—Rent not in arrear—Clandestine removal—Goods subject to bill of sale—Damages. *Clarke* v. *Green*, 1 E. L. R. 552.

Distress for rent — *Irregularities — Protection of statute—Failure to prove actual damage.*] — The defendant distrained upon the plaintiff's goods for rent, then overdue, but nothing further was done and no special damage was shewn:—*Held*, that, if there were irregularities in connection with the making of the distress, the defendant was protected by R. S. N. S. 1900, c. 172, s. 10.—A previous distress of the plaintiff's goods was irregular in a number of particulars, among others as including goods which were not distrainable, and omission to give the notice required by the statute, s. 2, but none of the articles were removed from the premises; the plaintiff continued to use them as before, and the distress was abandoned before anything had been sold:—*Held*, that, to entitle the plaintiff to damages on account of the irregularities committed, some substantial hurt or injury must be shewn, resulting from the irregular proceeding, and that, in the absence of proof of actual damage, the trial Judge erred in awarding damages to the plaintiff, but his decision on this point must be reversed with costs. *Beckham* v. *Hickey*, 38 N. S. R. 55.

Distress for rent — *Money obtained by landlord by fraud — Application on rent — Transfer of tenant's goods to plaintiff—Bona fides—Landlord not entitled to set up illegality.*] — The defendant, as bailiff of D., levied upon goods in premises occupied by R. as tenant of D., but which were claimed by the plaintiff under a bill of sale given to secure a debt due for services rendered. The evidence shewed, and the trial Judge found, that the wife of R., being entitled to a sum of money held in trust for her, D. and R. were parties to a misrepresentation to the trustee, as the result of which D. obtained possession of a portion of the money so held in trust, it being agreed between the parties that D. should retain a portion of the money in payment of a debt due to him for professional services, and that the balance should be applied by him in payment of the rent of the premises occupied by R. as tenant of D. It was further shewn and found that the amount received by D. was more than sufficient to satisfy the debt due him for professional services and the rent due up to the time of the distress:—*Held*, that, as the plaintiff was not shewn to be a party to the fraud, and was not a privy in any sense which would subject her to its consequences, and as her title to the property in question was founded on a bill of sale given for good consideration, the defendant's principal could not be heard to make the contention that the money obtained from the trustee was received under a fraudulent proceeding, to which he himself was a party. *Hains* v. *Leblanc*, 38 N. S. R. 528, 1 E. L. R. 13.

Distress for rent—Non-payment of bailiff's expenses—Excessive distress to realise them — Collusive sale — Depriving of costs. *Gardner* v. *Simpson*, 2 E. L. R. 99.

Distress for rent—Purchase by landlord at open auction sale—Illegal sale—Replevin—Damages. *Tingley* v. *Sharpe* (B.C.), 3 W. L. R. 159.

Distress for rent—*Replevin—Pleading—Non cepit—Replication impeaching lessor's title.*]—A replication which admits the taking of goods under a distress for rent and impeaches the lessor's title to the demised premises, pleading in answer to a plea of *non cepit* in an action of replevin, is bad on demurrer; *per* Tuck, C.J., Hanington and McLeod, JJ.—*Per* Barker and Gregory, JJ., that the replication should have been objected to by an application to strike it out. *McLean* v. *Green*, 37 N. B. R. 204.

Distress for rent—Suspension of remedy — Promissory note — Rent of chattels — Abatement of claim—Illegal distress—Excessive distress—Detention of chattels — Damages—Counterclaim. *Armstrong* v. *Sherlock*, 8 O. W. R. 577.

Distress when no rent due—*Damages for illegal distress — Nominal damages.*]—Action for damages for illegal distress. Defendant's agent had told plaintiff to pay an account, keep same out of the rent and remit balance, which he did. Defendant then distrained for the rent, the chattel seized being at once replevied:— *Held*, no evidence of special damage. Judgment for $5 damages with High Court costs. *Gormally* v. *McFee*, 13 O. W. R. 590.

Distress when no rent due — Illegal distress — Damages — Judgment — Terms —Costs—Injunction. *Canadian Flax Mills Limited* v. *McGregor*, 14 O. W. R. 17.

Evidence—*Hypothec—Nature of action.*]—The hypothec security of a certain *rente* cannot be extended beyond the limits of the piece of ground described in the deed constituting that rent.—2. No hypothec can result from any alleged verbal contract to pay a certain rent.—3. A contract to pay an annual rent forever cannot be proved by mere parol testimony. — 4. If the ground occupied is greater than that described in the deed constituting the rent, the action should be to compel the defendant to restrict his possession to the limits expressed in the deed, and to obtain a "*quantum meruit*" sum as the value of the past use and occupation of the excess. *Bourk* v. *Cormier*, 16 Que. S. C. 296.

Excessive distress — Irregularities — Waiver — Sale for full value — Account of proceeds. *Piché* v. *Montgomery*, 1 O. W. R. 325.

Excessive distress—Scope of bailiff's authority — Adoption — Ratification—Finding of jury. *McClellan* v. *Simpson*, 12 O. W. R. 1290.

Excessive rent—*Device to protect tenant —Seizure of tenant's goods under execution —Claim by bank under lease—Interpleader.*]—Where the rent fixed by the document creating a tenancy is so excessive that a Court might come to the conclusion that it was never intended to create a real tenancy, but that the provision reserving rent was a mere device to enable the landlord to obtain an additional security on chattels which would otherwise be available to creditors, such provision, and the distress levied under it, are invalid.—*Ex p. Jackson, In re Bowes*, 14 Ch. D. 725, followed.—The defendant, being indebted to a bank, in $5,200, transferred to the bank all his interest in certain lands, and the bank made a lease of the lands to the defendant at an annual rental of $8,000. Under the execution of the plaintiff's against the defendant, the Sheriff seized the crop upon the land, and the bank claimed the crop under the provisions of the lease. The evidence shewed that a fair annual rental for the land would be $2,000:—*Held*, in interpleader, that the tenancy was not a *bona fide* one but a sham; the very object of the arrangement was to protect the defendant and prefer the bank; and, therefore, the claim of the bank to the crop should be barred. *Waterous Engine Works* v. *Wells* (1911), 16 W. L. R. 274, Sask. L. R.

Exemptions—*Goods of lodger — Notice.*]—Goods declared exempt by law belonging to a person who lives with the tenant of a house cannot be seized for the rent by the landlord, with those of the tenant, the latter having by his lease renounced the privilege conferred by law as to exemptions from seizure.—2. A notice to the landlord in such case is not necessary; it is necessary only in a case where the lodger has upon the premises goods which are not exempt. *Nolin* v. *Ratté*, 17 Que. S. C. 182.

Exemptions — *Machine.*] — A machine which a workman keeps habitually going as a means of gaining his livelihood, is exempt from seizure under distress for rent, according to Art. 598, para. 10, C. P. *Thurston* v. *Hughes*, 16 Que. S. C. 472.

Exemptions — *Renunciation—Office furniture.*] — The defendant rented an office from the plaintiffs and in doing so renounced the exemptions from seizure which the law establishes in favour of the debtor. The plaintiffs, having made a seizure for rent due upon the furniture in the office of the defendant, he pleaded that these effects were exempt from seizure by virtue of Art. 598, C. P. C.:—*Held*, that, although, from motives of humanity, when the bedding, clothing, and food of the debtor and his family are in question, there is ground for coming to his relief and freeing him from the improvident renunciation which he has made of the privilege accorded him by Art. 598, these motives do not apply to the case of the furniture, more or less luxurious, of an office, the exemption from seizure existing thus only in the purely private interest of the debtor. *New York Life Ins. Co.* v. *Garceau*, 16 Que. S. C. 247.

Expired lease — *Renewal — Sufficiency of goods — Pleading — Jurisdiction — Superior Court.*]—The landlord's privilege in respect of goods upon the demised premises may be exercised even in respect of rent due by virtue of a lease which has expired.

— The allegation that the defendant has sufficient goods is an allegation of fact, which may not be pleaded in a defence in law, even if the declaration does not contain an allegation to the contrary. — Want of jurisdiction cannot be set up by way of defence in law.—The Superior Court has jurisdiction to adjudicate upon the validity of a distress and eviction for $110 of rent due by virtue of two leases, one of which has expired, and $30 of rent to fall due. *Leclaire* v. *Beauchamp*, 3 Que. P. R. 312.

Fault of another tenant.]—The owner of a house is not responsible for the damage which the tenant of the cellar suffers by reason of the infiltration of water escaped from a supply pipe broken by the fault of the tenant of the storey above the cellar, these damages resulting from a plain invasion of the enjoyment of the tenant of the cellar, which makes Art. 1616, C. C., applicable. *Beaulieu* v. *Beaudry*, 16 Que. S. C. 475.

Fraudulent removal of tenant's goods — *Active procurement of third party — Liability to landlord — Pleading—Privity —Inscription in law — Preuve avant faire droit.*]—A third party who removes and conceals, fraudulently and in concert with the lessee, personal property subject to the privilege of the lessor, is responsible for the damages caused to the latter by the loss of the rent.—2. An allegation in these terms: "On the 15th November, 1907, in the night, the defendants or their employees surreptitiously removed the personal property which filled the shop rented by the plaintiff to Picard and appropriated them, without the knowledge and without the consent of the plaintiff, and disposed of them to their profit" is sufficient; and on an inscription in law, upon the ground that there no privity between the parties is alleged, the action will not be dismissed, but "*preuve avant faire droit*" will be ordered. *Lallemand* v. *Larue*, 35 Que. S. C. 431.

Gale accruing after action—Counterclaim—Damages to tenant's crop—Cattle — Fences — Duty of tenant neighbour — Evidence—Leave to adduce on appeal. *Littler* v. *Berlin Acreage Co.*, 2 O. W. R. 1153.

Goods fraudulently removed—*No rent in arrear — Illegal distress — Bill of sale — Damages.*]—Goods fraudulently or clandestinely removed to avoid distress can not be seized under distress if there is no rent in arrear. *Hoyt* v. *Stockton*, 13 N. B. R. 60, considered.—In an action for an illegal distress the plaintiffs are entitled to recover the value of the goods sold, although they are subject to a bill of sale by way of mortgage to secure a compromise which the plaintiffs have made with their creditors.—*Semble*, *per* Barker, J., that an unlawful sale of the defendant's goods by the plaintiffs, which goods the defendant were using in a particular way, gives the defendants the right to demand the return of the proceeds by way of damages. *Clark* v. *Green*, 1 E. L. R. 552, 37 N. B. R. 525.

Goods of stranger and of tenant.]—A landlord, having distrained on property found on premises occupied by his tenant, is not bound first to sell all the property of a third person found on the demised premises. Notes of other cases relating to distraint. *Miller Bros.* v. *Twohey*, 40 N. S. R. 428. See, also, *Gunning* v. *Sutherland*, 46. 425n; *Williamson* v. *Andrews*, 426n.

Goods of tenant — *Refusal to deliver up.*]—The plaintiff had rented an office from the defendants until the 1st May. On the 15th March he notified the defendants that he abandoned the office from that day, and engaged to pay $35, the amount due up to that day, on the 2nd April. At the end of March the plaintiff claimed his goods left in the office, which the defendants refused to give up:—*Held*, that the defendants had the right to retain the goods of the plaintiff until payment of the $35. This principle was a result of the right to follow which expressly belongs to a landlord. The goods are his pledge, and he cannot be forced to part with them until the sum for payment of which they are security has been paid. *McAvoy* v. *Merchants Bank of Halifax*, 3 Que. P. R. 400.

Goods of third party — *Exemptions—Claim by third party.*]—A landlord has no right to seize the chattels of a third person found on the demised premises, which are exempt from seizure, or those which should be left to the debtor at his election; and, as the law does not make any distinction of persons, this choice may be exercised as well by the third party interested as owner of such chattels, as by the debtor himself. *Battison* v. *Potvin*, 27 Que. S. C. 165.

Goods of third person—*Claim—Notice —Opposition.*]—The landlord's lien for his rent upon the goods which are on the demised premises extends to those which belong to a third person, and an opposition made by such third person to a seizure for rent which is based solely upon his right of property, and not upon a notice given to the landlord before seizure, will be dismissed as frivolous and ill-founded. *Quebec Bank* v. *Tozer*, 4 Que. P. R. 131.

Goods of third person—*Claim*—Notice *to landlord — Description of goods—Intervention—Costs.*]—A third party, the owner of goods in the possession of a tenant, who wishes to take advantage of the provisions of Art. 1622, C. C., as modified by 61 V. c. 45 (Q.), should give a notice to the landlord describing the goods of which he is the owner, and it is not sufficient for him to notify the landlord that he is the owner of the greater part of the goods which are found in the possession of the tenant.—2. An intervention filed in a suit begun against the tenant by the landlord, with conservatory seizure of the furniture upon the demised premises—no rent being then due—is a sufficient notice of the ownership of such third party, if it describes the goods which belong to the intervener.—3. Nevertheless, in this case, the intervener, having given occasion for the proceedings of the landlord—by taking away without distinction the goods upon the demised premises, of which some belonged to the defendant, before any sufficient notice of his ownership had been given to the landlord—was responsible for the costs incurred by the latter, and should have tendered them with his interven-

tion, and, in the absence of such tender, he should be condemned in the costs of the contestation of his intervention. *Mathieu* v. *Clifford*, 19 Que. S. C. 410.

Ground rent—*Arrears—Movable or immovable—Promise to pay — Acceptance.*]—A ground rent established before the coming into force of the Civil Code, even if it were immovable under the law as it existed at the time the rent was settled, has become movable by the operation of the Code, under the provisions of which it is convertible into money, and redeemable, and consequently movable: Arts. 388, 389, 390, 391, C. C.—2. Where there is a personal promise by the purchaser to pay the rent to the vendor at a given date each year, there is a personal liability to pay the amount so soon as the time has elapsed, and the arrears are movable.—3. Acceptance of such promise, by the person by whom the rent was created, is sufficiently established by the fact that he received payments and gave receipts to the purchasers in their own names, and entered them in his books as owing the amount. *Laviolette* v. *Toupin*, 21 Que. S. C. 538.

Ground rent — *Prescription—Renunciation — Acknowledgment — Heirs — Costs.*]—The prescription of five years applies to arrears of a *rente foncière*.—2. To effect a renunciation of an acquired prescription, both an acknowledgment of the debt and a promise to pay such debt are necessary.—3. The heirs or legal representatives of a party who bound himself by deed to pay a *rente foncière*, are not jointly and severally liable for the payment of the rent unless expressly declared to be so.—4. Nor are they jointly and severally liable for the costs of an action brought against them in respect of such rent. *Ursuline Reverend Religious Ladies* v. *Lampson*, 22 Que. S. C. 7.

Illegal—*Building regarded as a chattel—Intention of parties — Notice and appraisement—No special damages proved — Action dismissed with costs.*]—An action for damages for breach of a covenant and agreement, for illegal distress and withholding possession, and for an accounting, etc.—Latchford, J., *held*, that both plaintiff and defendant intended that the building should be regarded as a chattel, and as a chattel it was properly the subject of a distress; that the rent claimed was due and that distress was not illegal; that there were irregularities. No notice was given or appraisement made as required by statute, but in the absence of proof of special damages the tenant was without redress. Action dismissed with costs. *Blanshard* v. *Bishop* (1911), 19 O. W. R. 28, 2 O. W. N. 996.

Illegal distress — *Abandonment—Agreement to suspend right — Violation — Trespass.*]—Under a distress for rent issued on the 12th March the defendant took possession of the plaintiff's store and evicted him. On the 13th March, discovering that the distress was illegal, he induced the plaintiff to go to the store with his attorney and the bailiff who made the distress, where they informed him that the distress was illegal, and a new one would have to be made, and they then handed him the key of the store and an inventory of the goods distrained, and tendered him $17 as damages for the eviction. The bailiff immediately informed him that he had a new demand, and received back the key and they left the store. In an action for illegal distress, it was not left to the jury to say whether there had been an abandonment of the distress under the first warrant, but they found, in answer to a question, that the bailiff at no time prior to the service of the second warrant gave up the possession and control of the goods under the first:—*Held*, that it should have been specifically left to the jury to say whether what took place, and what was done on the discovery of the mistake made on executing the warrant, and making the distress after sunset, was done with the intention of abandoning the distress. *Per* McLeod, J., that the evidence and the answers of the jury to the questions submitted showed that the defendant at the time the second warrant was issued had the goods in his possession by virtue of an illegal warrant, and the trespass continued as if no second warrant had issued. Where an agreement was made between the plaintiff and the defendant that if the plaintiff would pay the rent on the 1st April and give up the premises so that the defendant could have the month for making repairs for a new tenant coming in on the 1st May, he, the plaintiff, would not distrain for the rent until after default on the 1st April:—*Held*, that the agreement would have the effect of suspending the right to distrain, and, if the defendant in violation of it distrained, he would render himself a trespasser. *Moores* v. *Manzer*, 36 N. B. R. 205.

Illegal distress — Seizure of growing crops—Chattel mortgage. *Meighen* v. *Armstrong* (Man.), 2 W. L. R. 578.

Improvements—To be made as a condition of paying rent—Tenant induced to go into possession by the misrepresentation of landlord—No rent due only on undetermined liability for use and occupation—No sum certain due—No right to distrain. Replevin order of County Court—Motion to set aside dismissed by Boyd, C. *Ryan* v. *Fraser* (1911), 19 O. W. R. 700, 2 O. W. N. 1386.

Injury to goods of tenant on demised premises — Damages — Reference. *Burroughs* v. *Morin*, 7 O. W. R. 374.

Injury to goods on demised premises—*Alteration of premises above—Breach of covenant for quiet enjoyment — Derogation from grant—Premises leased for particular purpose — Landlord's knowledge — Independent contractor — Covenant to repair — Deprivation of access to part of premises—Damages—Loss of business.*]—The defendant, the landlord of premises, was *held* liable to the plaintiff, the tenant, for damage done to goods of the plaintiff upon the demised premises by water and lime dust from the upper storeys of the defendant's building coming down upon the demised premises, it being known to the defendant, when he made the lease, that the plaintiff proposed to use the premises for the purposes of a shop for the reception and sale of second-hand furniture, and the premises being, by reason of the dust and water, rendered unfit for carrying on such business. The defendant was liable for a derogation from his grant, and also for breach of his covenant for quiet en-

joyment; and he was not relieved by the employment of an independent contractor to make the repairs to the upper storeys which caused the descent of the dust and water.—The plaintiff's covenant to repair did not constitute a defence, for, if the ceiling had been repaired, it would not have kept out the water, nor wholly kept out the lime dust.—Damages assessed for the goods injured—but not for loss of business.—The conversion of the water-closet from a private one to one to be used by other tenants, and the cutting off of the private access thereto, constituted a breach of covenant for which the defendant was liable in damages. *Gregory* v. *Tunstall* (1910), 15 W. L. R. 140.

Intervenant who claims ownership of goods attached for rent and against whom plaintiff, although acknowledging such right to property, sets up the privilege to which they are subject as being on the leased premises, and who proves neither notice to plaintiff nor "knowledge acquired" on the latter's part, under provisions of Art. 1622 C. C., has no right to a declaration of ownership in his favour in a judgment dismissing the intervention. He will be also condemned to pay costs without any reduction therein, even if the amount for which his movable effects are declared to be subject to said privilege is established by the Court at a sum less that that for which the attachment for rent was issued. *Gosselin* v. *Morin & Ethier* (1910), 38 Que. S. C. 385.

Judgment for costs—*Priority.*]—On a landlord's distress upon the goods of a tenant the costs of an action brought by the tenant, which has been dismissed, are costs "*de justice*," and ought to be ranked as such *par privilege*, by virtue of Art. 1994, C. C. *Roberge* v. *Loyer*, 27 Que. S. C. 32.

Lease of farm—*Rent payable by share of crops—Seizure of crops by landlord—Conversion of tenant's share—Breach of covenants—Cancellation of lease—Counterclaim for instalment of purchase money of land—Assignment of agreement — Amendment — Costs.*]—Action by tenant for damages for wrongful conversion. Rent was payable in kind:—*Held*, that plaintiff had performed his covenants and judgment given him. Defendant having assigned the agreement for purchase to M., applied for leave to amend his counterclaim, so as to claim amount going to plaintiff, defendant being surety to M., or to have payment made to M. Leave refused, M. had also served notice of cancellation of the agreement. *Sutton* v. *Hinch* (1909), 12 W. L. R. 500.

Lease of hotel by executors—*Effect of one not joining—Proviso for reasonable rent in certain event — Reference.*]—Action to have declared amount of rent payable for an hotel. Two of the three executors and trustees along with the beneficial owner executed the lease, which is therefore valid during the latter's life. The lease contained a clause providing for a rebate in the rent, if any prohibitory law passed. A local option by-law had been passed, and then 8 Edw. VII. c. 54, s. 11, was enacted:—*Held*, plaintiff, the tenant, is entitled to a rebate, with a reference to ascertain same. *Hessey* v. *Quinn*, 13 O. W. R. 907, 18 O. L. R. 487.

Lease of part of building—*Damage to roof by storm—Injury to tenant's goods—Obligation to repair.*]—The plaintiff was tenant under the defendant of the "dwelling portion" of a building, the remainder of which was occupied by the defendant as a shop. During a storm a skylight was blown from a neighbouring building and struck the roof of the defendant's building and injured it. The plaintiff notified the defendant, who gave an order on a builder for the repair of the roof, but before this could be done the weather conditions became such that the repairs could not be effected, and, later on, water from rain and from the melting of a heavy accumulation of snow on the roof, came through and damaged the plaintiff's property:—*Held*, that the defendant was under no obligation to repair the roof which would make him responsible in damages, and that his promise to have the injuries made good was without consideration to support it and was not binding. *Betcher* v. *Hagell*, 38 N. S. R. 517, 1 E. L. R. 20.

Lessor boarding with lessee.]—Action for board. Defendant contended that plaintiff agreed to accept the supplies in the house in payment of board:—*Held*, that defendant's statement correct. *Finley* v. *Miller*, 7 E. L. R. 103.

Lodger's goods — *Action for damages—Pleading—Cause of action.*]—In an action for damages for the alleged wrongful distress of a piano, the property of the plaintiff, the statement of claim set out that the plaintiff was a lodger; that her property was seized and illegally removed, for which she claimed compensation under the provisions of R. S. N. S. c. 172, s. 15, that the property seized and removed was only returned under order of the Judge of a County Court:—*Held*, *per* Townshend, J., that, as the whole of s. 15 was necessarily made a part of the statement of claim, its provisions, read in connection with the other facts alleged, disclosed a good cause of action. *Per* Meagher, J., that, as the cause had been fully tried out, and no hardship could result, the cause should be treated as if the pleadings were correct, although there were defects on both sides. *Per* Ritchie, J., that the statement of claim disclosed no cause of action, and that the appeal should therefore be allowed and the action dismissed, although it appeared that the defendant had no defence to the cause of action proved at the trial, but not disclosed by the statement of claim. *Gray* v. *Harris*, 35 N. S. R. 519.

Monthly tenancy — *Surrender—Relinquishment and acceptance of possession.*]—Action for rent. The facts of this case shew a surrender by operation of law. Action dismissed. *Rumball* v. *Hoskins*, 11 W. L. R. 250.

Motion for injunction restraining landlord—*Disputed question of fact—Rent, when due—Notice—Rent not payable at time certain—"Just and convenient"—Judicature Act, c. 58 (9)—Replevin—Motion dismissed—Costs.*]—Tenant moved for an injunction restraining landlord from proceeding with distress levied for rent, claimed to be due, and sale of tenant's goods. There was no written lease. Three questions were raised: (1) that the rent did not fall due until the

end of the year in April next; (2) that no notice of cause of taking had been given; (3) that upon landlord's own shewing the rent was not payable "at a time certain" and so there could be no distress.—Middleton, J., *held*, that the first question depended upon a disputed question of fact which could not now be determined; that the second ground could be remedied by the landlord, and, that the third ground rested upon a legal proposition by no means clear or indisputable; that under the circumstances it would clearly not be "just and convenient" to grant an injunction and deprive the landlord of his security, if in the end he turn out to be right, unless some other equally good security was substituted; that replevin would be cheaper, more just and more convenient remedy. Motion dismissed. Costs to landlord in any event. *Neal* v. *Rogers* (1910), 17 O. W. R. 1070, 2 O. W. N. 507.

Notice by third party *that he is the owner of a chattel in the possession of the tenant — Registered letter — Proof—Opposition to distress. C. P. 606, C. C. 1207, 1622.*]—It is not necessary that the notice given to a landlord by a third party should be given to him personally; a notice by registered letter left at his domicil is sufficient. Books of the post office are official books kept by public officials, and constitute a proof in writing as required by s. 1207 C. C.; they form a foundation of proof in writing which permits the sender of the registered letter to prove by witnesses the contents of that letter. *Montpetit* v. *Bellemare* (1909), 10 Que. P. R. 340.

Notice provided for by Art. 1622 C. C., to withdraw the goods of a third person from the landlord's privilege, should be in writing, but the proof of the "knowledge acquired" by the landlord of the property rights of third person, referred to in the same article, may be made by witnesses. In either case, the notice and the "knowledge acquired" must refer to definite movable effects and distinct from the others. *Ouimet* v. *Heirs of Greene & Willis*, 37 Que. S. C. 136, followed. *Gosselin* v. *Morin & Ethier* (1910), 38 Que. S. C. 385.

Payment in kind—*Act of bailiff.*]—A distress for rent may lawfully be made where the tenant makes default under a lease providing that, in lieu of a money payment, he is to deliver to the landlord all the wheat grown upon the premises as soon as it should be threshed, and that the landlord should sell it and retain one-half the proceeds for himself and pay over the balance to the tenant. *Thompson* v. *Marsh*, 2 O. S. 389, and *Nowery* v. *Connolly*, 29 U. C. R. 39, followed. The distress in this case was made more than six months after, but under a warrant given to the bailiff four weeks before the expiration of the tenancy, and there was no direct evidence that the landlord was aware of the illegal act of his bailiff in seizing at the time he did; but he learned of the fact of seizure after it had been made and before the sale, which he allowed to go on without making any enquiry, so far as the evidence shewed, and afterwards accepted the proceeds of the sale:—*Held*, that the proper finding of fact was that the landlord either ratified the bailiff's illegal act with knowledge of the circumstances, or meant to take upon himself without enquiry the risk of any irregularity the bailiff might have committed, and to adopt all the bailiff's acts; and, following *Lewis* v. *Read*, 13 M. & W. 834, that the landlord was liable for the damages suffered by the tenant. *Bick* v. *Winkler*, 19 C. L. T. 339, Man. L. R. 624.

Prohibition to sub-let—*Damages suffered by sub-tenant through fault of principal lessee—Responsibility of landlord towards sub-tenant.*]—In the lease of a building belonging to defendant it was provided that the roof should be kept clear of snow by the lessee and that the lessee could not sub-let without the consent of the lessor. A part of the building was sub-let without the lessor's consent, and the sub-tenant sub-let to another, also without the consent of the lessor. The roof having collapsed from the weight of snow upon it, the tenant of the sub-tenant sued the principal lessor to recover damages to his goods caused by the collapse, alleging that it was free from any contractual relation to the defendant (the principal lessor), and that it could recover damages from him irrespective of his lease with the principal lessee:—*Held*, confirming the judgment of the Superior Court by which the action had been dismissed, that the plaintiff had derived its title from the principal lessee and could have no greater title than the latter against the principal lessor. *Brantford Carriage Co.* v. *Evans*, 16 R. de J. 240.

Promissory note for rent—*Suspension of remedy — Accommodation — Burden of proof.*]—Where a promissory note was given and accepted for rent due:—*Held*, that the landlord's remedy by distress was suspended during the currency of the note. *Per* Meagher, J., that the burden of shewing that the note was given for his accommodation, and not for the rent, was upon the defendant by whom the defence was set up. *Colpitts* v. *McCullough*, 32 N. S. R. 502.

Reduction of rent—*Repairs to be made by tenant — Obligation of landlord to repair ancerally—Knowledge by tenant of condition of premises.*]—A clause in a lease whereby the tenant, in consideration of a reduction in the rent, undertakes to make repairs to the inside of the premises, must be interpreted strictly and against the landlord. Such an undertaking will not dispense the landlord from the obligation imposed on him by law to make gross repairs and to maintain the demised premises in a habitable state and fit for the purpose for which they were let. —The knowledge of the tenant of the bad condition of the premises at the time of letting cannot be set up as a defence to the demand for such repairs as the landlord is bound to make. *O'Connor* v. *Flint*, 33 Que. S. C. 491.

Removal of goods — *Following—Replevin—Owner—Depositary.*]—The privilege of the landlord ceases after the lapse of 8 days from the removal of goods from the demised premises, and that is so even where the tenant, not being the owner of such goods, has pledged them to the landlord; and the true owner may replevy them from the landlord. —2. In this case a merchant with whom the goods had been deposited was to be considered

as a depositary of the goods, and could claim from the owner the value of such deposit. *Emmans* v. *Savage*, 24 Que. S. C. 104.

Removal of goods — *Fraud — Illegal distress — Pretended sale—Title to goods—Counterclaim—New trial.*] — A landlord is not justified in distraining goods which had been removed off the demised premises before the rent accrued due, though had the rent been due the removal would have been fraudulent; and the tenant is not precluded from setting up his title to the goods because of a pretended sale of them, the effect of which was to vest the possession, but not the property in the goods, in the alleged purchaser.—To an action for illegal distress brought in a County Court the defendant counterclaimed for rent due, but such counterclaim not having been tried, the action was remitted back to the County Court, to be there dealt with, and regard there to be had to the finding of this Court upon the rights of the parties. *Whitelock* v. *Cook*, 20 C. L. T. 171, 31 O. R. 463.

Renewal lease — *Arbitration.*]—An appeal from an award was dismissed, the Court not being able to say that the arbitrator was wrong in not providing for the reimbursement in whole or in part of the lessee for the buildings on the lease. It is not improper in fixing a rental to take into consideration the potential value of the property. *Re Denison* v. *Foster*, 12 O. W. R. 1095, 1106, 18 O. L. R. 478.

Rent—Claim for indemnity — Agreement between tenant and bank — Disposal of business — Authority of agent of bank — Assumption of liabilities — Implied obligation to pay rent — Transferees of lease — Power of bank to carry on business — Implied obligation — Third parties. *Peterborough Hydraulic Co.* v. *McAllister*, 10 O. W. R. 694.

Rent — Conveyance of land—Reservation of "life interest" — Grantee taking possession — Occupation rent — Release—Evidence — Rights of executors of grantor — Payment of debts. *Robertson* v. *Robertson*, 10 O. W. R. 968.

Rent — *Saisie-gagerie—Removal of tenant's goods — Action against party receiving goods.*] — When movables attached by *saisie-gagerie* in an action for rent by the landlord are removed into premises belonging to a third party, a second action will not lie to bring such party into the suit and to preserve the privilege of the plaintiff as against him. It is useless for such purposes, and if brought will be dismissed as such. *Simard* v. *Champagne*, 30 Que. S. C. 505.

Rent payable in grain—Agreement to pay half of grain grown on farm—Alteration of lease — Dispute as to shares—Replevin —Costs. *Richey* v. *Rear* (Man.), 5 W. L. R. 420.

Sale of goods distrained—*2 W. & M. ch. 5, sec. 2—Appraisal—Oath of Appraisers —Illegal sale—Damages.*]—The right to sell goods distrained for rent did not exist at common law, but was given by the statute 2 W. & M. ch. 5, sec. 2; and it must be exercised, if at all, upon the terms the statute imposes. The tenant is allowed 5 days after distress within which he may replevy; at the expiration of that time, or within a reasonable time thereafter, and before sale, the goods must be appraised by sworn appraisers; the oath can be administered by the officer conducting the proceedings. Where damage has occurred, the tenant is entitled to recover the real value of the goods, *i.e.*, their full value to him, less the rent and expenses. —*Held*, in the circumstances of this case, that the tenant had a right of action and was entitled to $250 damages. *Dewar* v. *Clements* (1910), 15 W. L. R. 341, 20 Man. L. R. 212.

Sale of property — *Notification to tenant—Action for rent—Filing of deed of sale with declaration—Inscription in law—C. P. 196; C. C. 1571.*]—*Held*, in an action for rent by the transferee of the original lessor, it is not necessary that service of the assignment and delivery of a copy of it should be made to the debtor before commencing said action (following *Bk. of Toronto* v. *The St. Lawrence Fire Ins. Co.*, 87 L. T. R. 462).—But said deed of sale must be set forth in the declaration and a copy thereof filed therewith (*Muller* v. *Leviston*, 7 Q. P. R. 17, distinguished). *Desy* v. *Dumont* (1910), 12 Que. P. R. 94.

Second distress — *Appraisement — Appraisers not sworn.*]—After a distress for a month's rent, it is not illegal to make another distress for the next month's rent, although it was due and in arrear at the time of the first distress. Under 11 Geo. II. c. 19, s. 19, the want of the sworn appraisement required by 2 W. & M., sess. 1, c. 5, is only an irregularity, and the tenant can only recover such special damage as he can show to have resulted from it. *Lucas* v. *Tarleton*, 3 H. & N. 116, and *Rodgers* v. *Parker*, 18 C. B. 112, followed. *McDonald* v. *Fraser*, 24 C. L. T. 101, 14 Man. L. R. 582.

Seizing the effects of third party—*Opposition—Notice to the landlord—Proof.*] —No special form is prescribed as to the manner of warning a landlord that a chattel placed on the demised premises does not belong to the tenant. It is sufficient if the bailor has been warned in sufficient time that this chattel belongs to a third party. The knowledge of the landlord himself that the notification of the right to property which is mentioned in s. 1622 C. C., is simple facts, proof of which may be made by any manner of proof, not only in obtaining a written acknowledgment of the bailor, or by a letter sent to the bailor, but by oral testimony and even presumptions. *Ouimet* v. *Green & Wilkie* (1909), 10 Que. P. R. 416.

Seizure under chattel mortgages — *Tenant mortgagor alleged nothing due —Sale without proper advertising—Account—Reference by trial Judge to take—Report—Appeal —Findings of Referee not supported—Report varied materially—Costs.*] — Middleton, J., held, that the mortgages stood as security for the amounts for which they were given, less payments on account:—That the mortgagees were quite within their rights when they distrained:—That the sale here, so far as the articles sold by private sale (other than the

growing crops), was reasonably prudent:—That the auction sale was not adequately advertised, but the Master had charged the mortgagee not with what might have been expected to be realised at a duly advertised sale, but with the highest value suggested by the mortgagor, which was too great. Damages assessed at $200, leaving a balance due plaintiff, $205.76.—Plaintiff not allowed any costs because of his improper and unfounded charges of fraud and forgery, and also because of the bringing forward of such charges at so late a stage. — Defendant being in the wrong could not have any costs of action, but was allowed $80 costs of appeal.—Judgment for plaintiff against both defendants for $215.76. Repairs, $109, were allowed plaintiff with hesitation. *Neal* v. *Rogers* (1911), 19 O. W. R. 132, 2 O. W. N. 1107.

Seizure under execution — *Interpleader.*]—Where goods are seized under execution on leasehold premises and are claimed by a third party, who establishes his title thereto, the 8 Anne c. 14 does not entitle the landlord to be paid rent by the sheriff. Where, however, goods seized by the sheriff were claimed by a third party, and under an interpleader order were sold and the proceeds paid into Court pending the trial of an issue as to the ownership of the goods, and the trial of a second issue had been directed between the landlord and the execution creditor as to the landlord's right to the rent claimed and the claimants in the first issue consented to the landlord's claim being satisfied, even if they should be successful in the issue, the landlord was held entitled to be paid out of the fund in Court the arrears of rent not exceeding one year's rent, without awaiting the decision of the issue as to the ownership of the goods. *Robinson* v. *McIntosh*, 4 Terr. L. R. 102.

Sublease—*Right of lessee against sublessee—Reversion by estoppel—Payment of rent.*]—The common law right of distress for rent in arrear can only be exercised by the owner of the reversion, which must be vested in him at the time of the distress.—*Staveley* v. *Allcock*, 16 Q. B. 636, and *Smith* v. *Torr*, 3 F. & F. 905, followed.—A tenant, therefore, who makes a sublease of the property for the whole of his term, without reserving to himself any right of distress, cannot distrain for rent in arrear due under the sublease, as he has parted with the reversion.—The payment of rent under the sublease does not operate as an estoppel so as to confer a right of distress for subsequent arrears of rent which otherwise does not exist.—*Hazeldine* v. *Heaton*, Cab. & El. 40, followed. *O'Connor* v. *Peltier*, 8 W. L. R. 576, 18 Man. L. R. 91.

Supply of power and light—*Price—Remedy.*]—*Semble*, that when a room in a factory is let, with supply of necessary power and light, the landlord's privilege does not exist as regards the price of this supply. *Thurston* v. *Hughes*, 16 Que. S. C. 472.

Suspension of remedy — Promissory note — Rent of chattels — Abatement of claim — Illegal distress — Excessive distress —Detention of chattels—Damages—Counterclaim. *Armstrong* v. *Sherlock*, 9 O. W. R. 118.

Tariff — *Action in ejectment — Yearly rental determining class of action—Court determining class of action—Court stamps—C. P. 554, 1152—Advocates' tariff, No. 10.*]—In an action for the cancellation of a lease, the consideration price of which is $252 a year, the fact that no rent is asked, but only $50 damages, does not prevent the class of the action to be regulated by the value of rentals for the year during which the action was taken, i.e., in the present case, of the third class. If Court fees have been paid as in a fourth-class action, the winning party will be ordered to affix in the various proceedings filed by him such increase of stamps as the tariff requires. *Gilbert* v. *Rowen* (1909), 10 Que. P. R. 358.

Tenant may maintain an action against his landlord, for damages suffered by the collapse of a building, from defects in construction on two grounds: (1) for breach of covenant for quiet enjoyment, and (2) under Art. 1055 C. C. Under (1) the landlord owes damages which were or could have been foreseen at the time the lease was signed under Art. 1074 C. C., and under (2) he owes damages which are immediately or directly caused by the collapse, provided the action is brought within two years. The action may be based on both grounds simultaneously or upon either of them. *Cranger* v. *Muir* (1909), 38 Que. S. C. 68.

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4. FIXTURES.

Building erected by lessee — *Right to remove — Sale of land by licitation — Claim of purchaser to building — Right of action by lessee.*]—A building erected by the lessee of a lot of land under an agreement with the lessor by which he has the right to remove it at the expiration of the lease, does not become a part of the lot. A sale by licitation of the latter, even though described in the proceedings as "a lot, etc., with the building thereon," does not pass the ownership of the one so erected to the purchaser, and the lessee has an action to recover its value from him. *Gaudet* v. *Marsan dit Lapierre*, 33 Que. S. C. 37.

Chattels left on premises by tenant —Abandonment — Fixtures — Detinue — Overholding tenant — Notice to quit—*Bona fide* belief in right to retain possession — Double the yearly value of premises—Breach of covenant to repair — Taxes — Judgment in previous action — Reasons for — Evidence. *Dundas* v. *Osment* (N.W.T.), 4 W. L. R. 116, 6 W. L. R. 86.

Expiry of term — Ejectment—Right to remove machinery—Trade fixtures—Wooden buildings — Compensation for buildings not removed—Provisions of lease. *Cartwright* v. *Herring*, 3 O. W. R. 511.

Hay cut by lessee of farm—*Substances intended for manure.*]—Hay cut on a farm by lessee is movable property and belongs to him; it is not a "substance intended for manure," and in no wise immovable by destination. *Masse* v. *Chatier* (1910), 38 Que. S. C. 258.

Heating apparatus put in by tenant —*Annexation to freehold—Surrender of lease —Acceptance of new lease — Waste.*]—The defendants leased premises from the plaintiffs and put hot water apparatus in the building. Before the lease expired, a dispute arose which resulted in the defendants surrendering their lease and executing a new one. Subsequently the defendants sublet the premises and removed the heating apparatus: —*Held*, that, as the defendants had not removed the heating apparatus when they surrendered the first lease, the apparatus became by virtue of the surrender the property of the plaintiffs; and the defendants in accepting a new lease with this apparatus in the building, had thereby recognised the plaintiff's right to it.—An action for waste can be maintained during the currency of a lease for the purpose of determining whether the removal of articles annexed to the freehold is warranted.—Heating apparatus put in by the tenant should be regarded as a permanent portion of the building and not a removable fixture. *Cullen* v. *McPherson*, 40 N. S. R. 241.

Rights of landlord over fixtures in the demised premises.]—The lessor who in the exercise of his right of pledge seizes and sells the fixtures of the demised premises and having bought them at the sale sells them to a third party who leaves them on the premises, does not retain his right to seize these fixtures for rent falling due after the sale. Therefore, he cannot seize them in a suit against the tenant, and the buyer has a right to replevin to contest and annul a seizure brought about in this way. *Pontbriand Co.* v. *Ficny*, 36 Que. S. C. 25.

Temporary structure erected by tenant — Removal—Oral agreement with landlord — Sale of revision. *Butterworth* v. *Ketchum*, 3 O. W. R. 844.

Vault doors placed by tenant on demised premises — *Annexation to freehold —Removal — Waste—Damages.*] — In 1886 the landlord of the defendants constructed a vault in the premises occupied by them, the defendants supplying a steel lining and a bank vault door. On the 1st April, 1890, the defendants leased another portion of the same building from the same landlord for 10 years from that date, a vault being built there by the landlord, and the defendants bringing to it the same door. The lease was made in pursuance of the then Short Forms of Leases Act, and contained no reference to fixtures, but had the covenants by the tenant to repair and leave in good repair. During the currency of the lease the landlord sold and conveyed the premises. On the 10th November, 1899, the defendants obtained a new lease from the owner for 5 years from the 1st April, 1899, made pursuant to the statute, which contained the clause "provided that the lessee may remove his fixtures." On the 10th November, 1904, the owner granted the defendants another lease, made in pursuance of the statute, for 18 months from the 1st April, 1905, with the same clause as to fixtures, and during its currency the defendants removed the door:— *Held*, that under the above provisoes the defendants were not restricted in their right of removal to those fixtures placed subsequent to the dates of the last two demises, and that they were entitled to remove the door. *Crankhite* v. *Imperial Bank*, 8 O. W. R. 18, 9 O. W. R. 326, 14 O. L. R. 270.

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5. INJURY TO TENANT.

Covenant not to sublet—*Breach—Damages of sub-tenant — Demand for improbation.* —1. A tenant who sublets premises in breach of a covenant with the owner not to do so without his consent, is liable for the damages sustained by the sub-tenant who is expelled at the suit of the owner.—2. A demand for improbation can only be made when it is relevant, and will be rejected if the "*faux*" complained of does not affect the issue between the parties. *Hanleyson* v. *Dozois*, 28 Que. S. C. 400.

Defects in demised premises — *Liability.*]—Where the tenant suffers personal injuries resulting from the giving way of a portion of the structure leased, the fault is not contractual but delictual, and the lessor is responsible therefor without having been put in default, even where the defect was not apparent, and was unknown to either proprietor or tenant. *Vineberg* v. *Foster*, 24 Que. S. C. 258.

Defects in premises — *Apparent defects.*]—A landlord is not responsible to his tenant for damages for injuries sustained on account of defects in the demised premises which were apparent and existed at the time of the execution of the lease. *Cartier* v. *Durocher*, 22 Que. S. C. 255.

Demise of part of building — *Defective condition of other part.*]—The plaintiff was tenant of a store on the ground floor of a building owned by the defendant, and sued for damages to her goods caused by rain water entering an unglazed fanlight over a door at the end of a hall extending from the head of a stairway leading to the second floor of the building. The water, flowing over the floor above the plaintiff's store, came through the ceiling, and caused plaster to fall which damaged the plaintiff's goods. The defect complained of existed at the time of the demise to the plaintiff:—*Held*, following *Humphrey* v. *Wait*, 22 C. P. 580; *Colebeck* v. *Girdlers' Co.*, 1 Q. B. D. 234, and *Carstairs* v. *Taylor*, L. R. 6 Ex. 217, that the defendant was not liable. *Miller* v. *Hancock*, [1893] 2 Q. B. 177, distinguished. A tenant taking part of a building, in other parts of which are defects likely to result in damage to him, should examine the premises and contract for the removal of such defects as are apparent, otherwise he will have no remedy afterwards against the landlord for damages caused by such defects. *Rogers* v. *Sorell*, 23 C. L. T. 247, 14 Man. L. R. 450.

Disturbance of enjoyment—*Escape of water from adjoining premises.*]—A landlord is liable to his tenant for injuries done to the tenant's goods arising from the fact of thieves having entered an adjoining dwelling-house belonging to the landlord and there upset a cistern, which caused water to escape into the house leased to the tenant, such act not being a simple trespass committed by a third person, within the meaning of Art.

1616, C.C., but a substantive act which modified the enjoyment in a manner prejudicial to the tenant. *Brisker* v. *Larue*, 23 Que. S. C. 447.

Disturbance of tenant's enjoyment—*Wrongful acts of neighbour — Liability of landlord.*]—A lessor is liable for a disturbance in the enjoyment of his lessee arising from the acts of a neighbour performed in the exercise of his proprietary rights. So, when the owner of property contiguous to the leased premises builds a *mitoyen* wall, and in doing so cuts off means of access to them, shuts off light openings, and by sinking foundations puts a strain on the frame-work of the building, opening cracks and fissures therein through which rain gets in, the lessor who allows the performance of such acts, becomes liable to a reduction of rental proportionate to the loss of enjoyment of the lessee, and further to pay damages for deterioration of his goods. Judgment in *Saint-Onge* v. *Gauthier*, 27 Que. S. C. 232, affirmed. *Gauthier* v. *Saint-Onge*, 15 Que. K. B. 264.

Disturbance of tenant's possession—*Trouble de droit—Trespass—Crown lands.*]—The cutting of hay, and hunting, upon leased property, by a third party not pretending to have any right upon the property leased, but merely asserting that the land on which he cut hay and hunted was not part of the property leased, is not a trouble *de droit*, but a mere trespass, against which, in the terms of Art. 1616, C.C., the lessor is not obliged to warrant the lessee.—2. The pretension of a third party that he had acquired a right by prescription to cut hay on the leased property, which pretension was never brought to the notice of the Crown, lessor, by a legal proceeding or otherwise, and which was manifestly untenable as regards property of the Crown, would not constitute a trouble *de droit* under Art. 616, C.C. *Fitzpatrick* v. *Lavallée*, 25 Que. S. C. 296.

From civic corporation—*Foreshore or water lots—Damaging erections—Legislative authority — Injunctions.*]—Plaintiff leased a water lot from the city of St. John on which a wharf had been erected. Defendants leased an adjoining water lot, and plaintiffs now sought to restrain defendants from proceeding with the building of a wharf thereon:—*Held*, that plaintiffs were entitled to an injunction restraining defendants from obstructing their access to their wharf. The right of access to one's property by water or by land is governed by the same principle. *Seely* v. *Kerr*, 7 E. L. R. 123, 4 N. B. Eq. 184, 261.

Lease — *Repairs — Part destruction of premises—Rent during reconstruction — Collapse—Hidden defects—Liability.*]—A clause in a lease "that indispensable repairs shall be performed without reduction of rent, damages, or compensation," does not apply to the reconstruction of the premises leased, when partly destroyed so as to render them unfit for the purposes of the lease and to compel the lessee to vacate them. In such a case, the latter is relieved from the obligation to pay rent during the period of reconstruction. —2. The lessor is liable for the damages sustained by the lessee by the collapse of the premises leased, caused by bad construction and defective materials, even though such defects were hidden and could not have been ascertained by any ordinary examination of the building. *Central Agency Limited* v. *Les Religieuses, etc., de L'Hotel Dieu de Montréal*, 27 Que. S. C. 281.

Lease and hire of things—*Enjoyment by the lessee — Disturbance caused by the lessor—Cancellation of the lease—Damages C. C. 1612.*]—When a tenant lives in the same premises as the landlord, but in a lower flat and when, owing to the noise made by the landlord and by the disorderly, bad and scandalous conduct of the landlord's wife, the tenant is deprived of the peaceable enjoyment of the leased premises, he has a right to ask for the cancellation of the lease and for the damages he has suffered. *Masse* v. *Brunelle* (1909), 16 R. L. n. s. 270.

Lease of farm and cattle—*Ownership of hay grown on leased farm—Movables and immovables—Rights of lessee's judgment creditors—C. C. 378, 379.*]—When the deed of lease contains no provisions to the contrary, hay, grown upon the leased farm, belongs to the lessee; the lessor cannot, in law, be considered as the owner of such hay. The judgment creditors of the lessee may cause such hay to be seized and sold in due course of law, although the lessor contends that he is the owner of the cattle leased, that the hay is for the use of such leased cattle, and that it is the custom to feed the cattle during the winter with the hay grown upon the farm on which it is cut. *Masse* v. *Chartier* (1910), 16 R. de J. 427.

Repair of premises—*Injury to tenant.*]—The lessee is not obliged to notify the lessor of the need of repairs to the leased premises, which the lessor is obliged to make. It is the duty of the proprietor to inspect his own property from time to time, and ascertain what repairs are necessary. He is, therefore, although not notified of any defects, responsible in damages for an accident which happened to the tenant in consequence of the weakness of a railing on the leased premises. *Troude* v. *Meldrum*, 21 Que. S. C. 75.

Repairs—*Landlord exceeding time specified for doing—Damages—Measure of—Contemplation of parties at time lease was made.*]—A tenant can claim from the landlord, who has exceeded the time specified in the lease for making repairs, only such damages as result directly from non-compliance with the conditions of the lease, and which might have been foreseen at the time it was granted. As a consequence, if he did not know that the premises had been leased for a place of business, the owner could not foresee that he might be called upon to pay any other damages than those resulting from the lease of an ordinary dwelling-house; and, therefore, he cannot be held responsible in damages which arise from the fact that the tenant has been prevented from carrying on the trade of a tailor whilst the repairs were effected at a place leased for the purpose of a residence only. *Léveillé* v. *Pigeon*, 26 Que. S. C. 73.

Threatened disturbance — *Injunction —Damages.*]—A tenant threatened with disturbance of his enjoyment of the demised premises by reason of works of construction instituted by the owner has a right to an interlocutory injunction to stop them, besides his remedy in damages, if injury should arise. *Haycock* v. *Pa...d*, 27 Que. S. C. 464.

6. Lien of Landlord.

Landlord's lien — *Restriction of upon movables — Effect of third parties in the leased premises — C. C. 1622.*]—The landlord's lien upon the effects of third parties and found in the leased premises, is effective only to the extent of the sums which have become due by the lessee prior to the notification given to the lessor of such property rights, or to the day only, and not longer, upon which the lessor acquires knowledge of such rights of third parties. *Allard* v. *Maillet & Archambault* (1910), 16 R. de J. 483.

Lien of landlord — *Contract—Security —Diminishment — Rent.*]—The lien of the landlord who leases a farm is a security given by contract, within the meaning of Art. 1092, C. C. Consequently, a farmer who removes from the farm leased, crops growing thereon, loses, by diminishing the security, the benefit of the term which he could have for payment of the rent. *Egglefield* v. *Babeu*, 28 Que. S. C. 382.

Notice of rights of third person — *Assigns of landlord.*]—If notice to the landlord of the rights of property of third persons in the goods upon the demised premises affects a subsequent purchaser of the freehold, it is not so with regard to mere knowledge of the fact acquired by the landlord. Therefore, such purchaser may enforce his lien upon the goods in the possession of the tenant, notwithstanding the knowledge which his grantor had of the rights of third persons. *Re Boldue*, 19 Que. S. C. 524.

Privilege of landlord — *Removal of tenant's goods — Claim of landlord against third person removing — Right of action— Possession — Title.*] — As possession of property presumes a good title, one who claims chattels or a right to chattels against the person in possession must allege and prove, besides his own right, defects in the possession and title of the possessor.—2. A landlord who claims damages occasioned by the fault of the defendants, who have deprived him of the privilege which he possessed as such by removing the goods which were subject to his privilege, does not thereby claim the goods themselves, nor his rights with regard to the goods, nor a right of pledge; a judgment maintaining an inscription in law on this ground will be reversed, and proof *avant faire droit* will be ordered. *Lallemand* v. *Larue*, 10 Que. P. R. 118.

Proceeds of sale of tavern license— *Assignment for creditors — Costs — Priorities.*]—The proceeds of the sale of a tavern license (sold upon an assignment for the benefit of creditors) are not subject to the lien of a landlord. 2. The only costs which have priority over special liens are those incurred in the interest of privileged creditors and for the preservation of their lien. Therefore, in the case of an assignment for the benefit of creditors, the costs of the assignment and of the administration and liquidation of the insolvent estate have not priority over the claim of a landlord, but it is otherwise with the costs of the sale of the articles subject to his lien, of the inventory of such articles, and of the distribution of the proceeds of the sale. *Poulin* v. *St. Germain*, 11 Que. K. B. 353.

Saisie gagerie—*Motion to dismiss action —Sale of demised premises — Remedy for rent.*]—A motion to dismiss the action and declare the *saisie-gagerie* illegal, because the plaintiff is no longer owner of the premises, will be rejected; even if the plaintiff has no lien on the furniture, that is no reason for dismissing the action. *Shippel* v. *Sayan*, 7 Que. P. R. 429.

Sub-lease—*House used for prostitution— Liability of sub-tenant to principal landlord.*]—The sub-tenant of a house under a lease made to him by the principal lessee for purposes of prostitution is only, as regards the landlord, a third person whose goods are on the premises by his consent (Art. 1622, C. C.), and such goods are subject to the landlord's lien for rent and damages by reason of the breach of the obligations of the principal lease.—A sub-tenant who rents a house from the principal lessee for purposes of prostitution commits a tort for which he is responsible to the owner in damages. *Montmarquette* v. *Berman*, 29 Que. S. C. 193.

Tenant assigned for benefit of creditors—*Tenant's goods destroyed by fire after assignment — Substitution of insurance moneys for goods in hands of assignee — R. S. Q. (1897) c. 170, s. 3½ — Preferential lien of landlord.*]—Plaintiff was landlord of premises occupied by one Mitchell, just before the day when $626.38 was due for rent, of which $300 had accrued within one year prior thereto. Mitchell made an assignment to defendant for benefit of creditors. On 2nd November, 1908, defendant, as assignee, entered into possession, and on 4th November, 1907, the premises and goods thereon were totally destroyed by fire, and defendant received $6,450 for insurance thereon. Plaintiff claimed to rank on this insurance money in the hands of the defendant for $626.38, and as a preferred creditor for $300 of it. Defendant admitted the claim to rank with other creditors for the $626.38, but did not admit the "preferential lien" for the $300. At the hearing Boyd, C., *held*, 14 O. W. R. 207, that plaintiff was entitled to rank as a preferred creditor for the $300. On appeal the Divisional Court reversed Boyd, C., holding that plaintiff must, in respect of his debt, rank rateably with other unsecured creditors. *Miller* v. *Tew* (1909), 14 O. W. R. 1173, 1 O. W. N. 269, 20 O. L. R. 77.

Threatened removal of tenant's goods — *Saisie-conservatoire.*]—A landlord, in order to assure his lien, may obtain a *saisie-conservatoire* to bring under the supervision of the Court the chattels which the tenant has placed upon the demised premises, and which he intends to carry away; and this especially where no damages are claimed. *Lefebvre* v. *Piton*, 9 Que. P. R. 119.

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7. Lodgers—*See* Innkeepers.

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8. Overholding Tenants.

Acceptance of rent—Creation of tenancy from year to year—Notice to quit — Forfeiture for non-payment of rent. *Re Hardisty and Bishopric* (N.W.T.), 2 W. L. R. 21.

Application for possession—*Affidavit—Amendment.*] — On an application by a landlord against his tenant for an order for possession, the applicant was refused leave to amend the allegations of his affidavit upon which the originating summons was issued. *Smith* v. *Macfarlane* (No. 1), 5 Terr. L. R. 491.

Claim for double yearly value — Counterclaim in tenant's action—Lease for one year terminable on one month's notice. *Dundas* v. *Osmont* (N.W.T.), 1 W. L. R. 363.

"Colour of right."] — An agreement dated the 4th May, 1900, was entered into whereby L. acknowledged that he was a weekly tenant of the premises in question to H., and agreed that his lease might be terminated at any time by "the party of the first part" (evidently an error for "the party of the second part") or by J. O. or J. A. M. A., whom L. acknowledged to be the agents for that purpose of the party "of the first part," meaning H. At that time the property was vested in H., but he was merely a trustee for the railway company. Afterwards the property was conveyed to the company. At the time the notice to quit was served L. was tenant of the premises to the company as landlords under the terms of the agreement of the 4th May, 1900. Notice to quit was served on L. on the 29th June, 1903, and demand of possession was served upon him on the 15th July following. The tenant attempted to prove an understanding with S. A., one of the agents of the landlords, by which he should be permitted to remain on the premises until the company should build on the land. It was urged that the tenant had a colour of right to the possession of the premises, and that his right could not be tried on this application:—*Held*, that the tenant occupied the premises in question under a lease from week to week, that it was duly terminated by the landlord, and that the tenant continued to overhold without colour of right after written demand of possession by the landlord. Order to issue for writ of possession. No costs. Whether there is colour of right or not, and what constitutes colour of right, are matters of law to be determined by the Judge: *Wright* v. *Mattison*, 59 U. S. R. 50. To constitute a colour of right there must be some *bonâ fide* question of right to be tried: *Price* v. *Guinane*, 16 O. R. 264. The tenant had not shewn any claim which should be construed as a colour of right. *Re Can. Pac. Rw. Co. & Lechtzier*, 23 C. L. T. 339.

Colour of right—*Indefinite promise.*]—In answer to a summary proceeding under the Landlords and Tenants Act, R. S. N. 1902, c. 93, to recover possession of the premises in question, which were held under a written lease creating a tenancy from week to week, the tenant gave evidence tending to shew that agents of the landlords had, prior to and at the time of the execution of the lease, agreed and promised orally that the tenant would not be required to give up possession until the landlords would build on the land. This was denied by one of the agents, and the tenant admitted that that agent had refused to put such a term in the lease, although requested to do so:—*Held*, that the alleged promise, if proved, was of too indefinite a character to support the contention of the tenant that he was not holding over without colour of right. *Price* v. *Guinane*, 16 O. R. 264, *Gilbert* v. *Doyle*, 24 C. P. 71, and *Wright* v. *Mattison*, 59 U. S. R. 50, followed. *Re Canadian Pacific Rw. Co. & Lechtzier*, 23 C. L. T. 339, 14 Man. L. R. 566.

Demand — *Notice — Copies.*]—In proceeding for an order for possession under the Overholding Tenants Act, R. S. M. c. 112, the demand in writing served by the landlord under s. 3 was unsigned, but was otherwise sufficient in form. When it was served, its purport was verbally explained to the tenants, and they were told that it was from the landlord's agent, and one of them then went to see the latter about it:—*Held*, sufficient. *Morgan* v. *Leach*, 10 M. & W. 558, followed. At the hearing it was objected that the copies served with the notice of the application, as required by s. 5, were not annexed to the notice.—*Held*, that delivery of the copies with the notice was probably sufficient; but at any rate the objection should have been taken as a preliminary objection. *Re Sutherland & Portigal*, 19 C. L. T. 257, 12 Man. L. R. 543.

Demand for possession—*Uncertainty—Evidence of overholding — Writ of possession.*]—An application was made by the landlord for a writ of possession against a tenant under the Overholding Tenants Act, R. S. N. S. 1900 c. 174, based on a demand for possession, served on the tenant on the 9th March, 1904, as follows:—"Your lease of the premises expired on March 1st last. You are hereby notified to deliver up said premises to me forthwith." The tenant had held under a lease by deed dated in the year 1901 for a term of three years, but, owing to erasures and alterations in the indenture, there was some doubt as to whether or not the tenancy terminated on the 1st March, 1904, or the 1st May, 1904. Before service of the demand the landlord had, on the 1st February, 1904, given to the tenant a three months' notice in writing to quit (not called for by lease) on the 1st May, 1904. On hearing it was contended that no evidence had been given that the tenant had refused after the service on the 9th March, 1904, of the above demand in writing, to go out of possession:—*Held*, that the written demand for possession was bad for uncertainty, and in all the circumstances, following *Re Magann and Bonner*, 28 O. R. 37, and *Re Snure and Davis*, 4 O. L. R. 82, as the case was not one clearly coming within the true intent and meaning of the Act, the application should be refused. *Re Myers & Murrans*, 24 C. L. T. 186.

Ejectment — *Delay to remove from the demised premises.*]—It is permitted in an action of ejectment to allege that more than three days have passed since the term of the lease and that the defendant is still occupying the demised premises. The fact to conclude whether a writ of ejectment or a writ of possession is the proper proceeding cannot give place to an inscription in law. *S. Carsley Co.* v. *Scroggie* (1909), 10 Que. P. R. 415.

Ejectment — *Statute of Limitations—Tenancy at will converted into tenancy at sufferance — Construction of statute.*]—The defendant was a tenant at will until 1834, when his tenancy was determined by a demand of possession and became a tenancy at sufferance. The Statute of Limitations was passed in 1837, and the question arose on the construction of the statute, as to whether a tenancy at will created and converted into a tenancy at sufferance before the passing of the Act would be a bar under it, provided the tenancy at will and the tenancy at sufferance taken together have continued for 21 years, without payment of rent or acknowledgment of title: — *Held*, Peters, J., that such tenancies taken together would be a bar. *Colville* v. *Martin* (1853), 1 P. E. I. R. 83.

Expiry of lease—Creation of new tenancy — Increased rent — Presumption — Intention of parties. *Winnipeg Land & Mortgage Corporation* v. *Witcher* (Man.), 1 W. L. R. 551.

Failure to give possession — *Holding over of previous tenant.*]—The fact that the previous tenant refused to vacate the premises at the expiration of his lease, and that legal proceedings were necessary to effect his ejection, does not relieve the lessor from a claim for damages by the lessee who was prevented from getting possession at the date stipulated in the lease. *Lanciere* v. *Vinet*, 25 Que. S. C. 338.

Forcible entry—*Costs.*]—In an action for damages for forcibly and unlawfully entering the premises occupied by the plaintiff, as tenant of the defendant, and ejecting the plaintiff therefrom, the trial Judge found that, although the defendant had technically violated the plaintiff's right of possession, the plaintiff was retaining possession in violation of good faith, and that her evidence as to the circumstances and manner of her removal was untrue:—*Held*, that the trial Judge was justified (following *Rice* v. *Ditmars*, 21 N. S. R. 140), in depriving the plaintiff of costs. *Russell* v. *Murray*, 34 N. S. R. 548.

Holding over after expiration of tenancy for a year—*Implied tenancy from year to year—Rebuttal of.*]—A letter from the landlord posted to the tenant before the expiration of a lease for a year, proposing that after its expiration the tenant should hold from month to month, is not sufficient, if the letter is not received by the tenant, to displace the tenancy from year to year, which arises by implication from the tenant's holding over and paying rent after the expiration of his term. *Gass* v. *McCammon* (1904), 6 Terr. L. R. 96.

Lease — *Improvements — Appraisement.*]—Appeal from judgment of the Supreme Court of New Brunswick to Supreme Court of Canada, dismissed. Action for ejectment brought by lessor since expiration of term to recover possession from lessee. The lessor, by bringing ejectment, has concluded himself from setting up his mistake as a ground for withdrawing from the position he had assumed. The Court will not interfere with the deliberate decision of the provincial Court as to the question of procedure unless there was a departure from the requirement of substantial justice. The lessee cannot, in this action, obtain the cross relief sought, namely, the setting aside of the award and directing a re-appraisement. *Porter* v. *Purdy*, 6 E. L. R. 440.

Monthly payments of rent — *Notice to quit — Right of appeal.*]—The respondents became tenants of the appellant for a period of 11 months, for which they were to pay rent "at the rate of $400 per year." They paid the rent monthly. After the expiration of the term, they continued in possession, paying monthly rent. On the 9th March, 1896, they gave the appellant notice that they would quit the premises on the 30th April following. They paid rent up to that date, when they quitted the premises in pursuance of their notice. No arrangement was made as to the terms upon which the respondents were to continue after the expiry of the term. The action was brought for $66.66 rent for the months of May and June:—*Held*, that the tenancy was a tenancy from month to month, and was properly terminated by the notice to quit.—*Held*, that the matter in question related "to the taking of an annual or other rent," and that consequently an appeal lay without leave. *Eastman* v. *Richards*, 3 Terr. L. R. 73.

Negotiation for new tenancy — *Tenancy at will — Notice to quit—Demand of possession — Jurisdiction of County Court Judge.*]—Upon a review of proceedings taken under the Overholding Tenants Act, R. S. O. 1897 c. 171:—*Held*, that the evidence sustained the finding of the County Court Judge that no completed agreement for a new lease was ever made, but that the tenant held over expecting an agreement would be arrived at. The tenant, overholding after the 1st March, did so with the consent of the landlord pending negotiations. When the negotiations came to an end, the landlord, on the 19th March, served a notice requiring the tenant to give up possession on the 23rd March. Upon the tenant's failure to give up possession on that day, the landlord took proceedings under the Act without further demand of possession:—*Held*, that the tenant was after the 1st March, a tenant at will; the notice had the effect of extending his right of occupation till the 23rd March; and a demand of possession after that date was necessary to give the County Court Judge jurisdiction under s. 3 of the Act. *In re Grant & Robertson*, 24 C. L. T. 366, 8 O. L. R. 267, 3 O. W. R. 846.

Notice of hearing — *Affidavit—Prohibition — Waiver.*]—On an application under the Overholding Tenants Act by a landlord for possession, a copy of the affidavit filed on the application was not served on the tenant, as directed by s. 4 of the Act. Counsel appeared for the tenant on the return of the application and took this objection, and the application was adjourned to enable a copy of the affidavit to be served. After such service the application was proceeded with, and counsel for the tenant examined and cross-examined witnesses and argued the case, when an order for possession was made:—*Held*, that the failure to serve a copy of the affidavit was an irregularity which could be and had been waived; and prohibition

against the enforcement of the order for possession was refused. *Re Dewar & Dumas*, 24 C. L. T. 360, 8 O. L. R. 141, 4 O. W. R. 110.

Oral lease — *Notice to quit — Month's notice — Tacit continuation — Rights and remedies of overholding tenant — Defect in demised premises — Presumption of fault.*]— Notice to quit is necessary to put an end to an oral lease, even where the term of it is certain.—2. This notice to quit must be a month's notice where the rent is payable monthly.—3. The notice to quit or of the continuation of the lease must be express and formal. Where it is conditional, it is of no force until it is accepted as such.—4. A letter from the landlord to the tenant giving him permission to remain in the demised premises, in consideration of an increased rent, written within eight days from the expiration of the lease, is a sufficient notice to prevent a tacit continuation of the lease.—5. A person who continues to occupy the demised premises after the expiration of the lease has not the rights of a tenant and cannot exercise the remedies of a tenant.—6. When it appears that a chimney has no fault of construction, there is a presumption, if it smokes, that the cause of the smoke is attributable to the tenant who uses it. *Canada Newspaper Syndicate* v. *Gardner*, 32 Que. S. C. 452.

Order for possession — *Review by Court — Evidence — Breach of covenant in lease — Notice specifying.*] — Under the Overholding Tenants Act, R. S. O. 1897 c. 171, two things must concur to justify the summary interference of the County Court Judge; the tenant must wrongfully refuse to go out of possession, and it must appear to the Judge that the case is clearly one coming under the purview of the Act. It is only the proceedings and evidence before the Judge, sent up pursuant to the *certiorari*, at which the High Court may look for the purpose of determining what is to be decided under s. 6 of the Act. Where there was nothing in the evidence to shew that the tenant had violated the provision of the lease for breach of which the landlord claimed the right to re-enter, the Court set aside the order of the County Court Judge commanding the sheriff to place the landlord in possession. *Per Boyd*, C.:— The whole proceeding was nugatory from the outset for the want of a proper notice specifying the breach complained of, as required by s. 13 of the Landlord and Tenants Act, R. S. O. 1897 c. 170, which is applicable to summary proceedings under the Overholding Tenants Act. *Re Snure & Davis*, 22 C. L. T. 234, 4 O. L. R. 82, 1 O. W. R. 379.

Overholding — *Deed — Loan—Security —Reconveyance — Possession of tenant — Jurisdiction — Condition — Notice—Waiver —N. S. Overholding Tenants' Act.*]—Application by landlord under the Overholding Tenants' Act. Defendant gave an absolute conveyance of certain property to plaintiff. Later defendant claimed that this conveyance was intended to be a mortgage:—*Held*, that it was not a mortgage and that defendant remained in possession as a tenant at will, and landlord had right to possession. County Court Judge has jurisdiction to determine the rights of the parties in an application under the above Act. *Girroir* v. *Ronan*, 7 E. L. R. 153.

Overholding — *Lease—Breach of condition — Notice — Waiver — N. S. Overholding Tenants' Act.*]—Action under Overholding Tenants' Act:—*Held*, that as landlord not aware when rent paid that tenant had ceased to work for plaintiff, there was no waiver of the forfeiture. Order of possession granted. *Dominion Coal Co.* v. *Taylor*, 7 E. L. R. 199.

Overholding — *Notice to quit—Waiver by subsequent acceptance of rent—Evidence —Procedure — N. S. Overholding Tenants' Act.*]—Under a special lease if the defendant quit work, then on demand he would give up possession of the plaintiff's house. Holding over is wrongful notwithstanding defendant never refused to give up possession. There was no waiver of a forfeiture by taking rent, as plaintiff unaware of the breach. Order for possession granted. *Dominion Coal Co.* v. *McLeod*, 7 E. L. R. 20.

Overholding—*Writ of possession—Notice to quit — Certiorari — Practice—Waiver.*] —Application for an order directing a County Court Judge to send up for review proceedings under N. S. Overholding Tenants Act, refused, as none of the reasons in support were substantial or sufficient. *Dominion Coal Co.* v. *McInnes*, 7 E. L. R. 508.

Overholding tenant — *Creation of new tenancy — Increased rent — Notice.*] — When a tenant holds over after the expiration of the term, and nothing is agreed on as to the terms of the new holding, that new holding is not of necessity to be on the same terms as the former, but the landlord may be awarded an increased rent if there are circumstances to shew that such was expected of him, and that such expectation was known to and not repudiated by the tenant.—*Elgar* v. *Watson*, 1 Car. & M. 494, followed.—In such a case the tenant was notified in writing within a month that the rent would be increased after another month, and paid two months' rent at the increased rate, without objection:—*Held*, that she was liable for rent at such increased rate for the remaining months of her occupancy, without deciding whether a new tenancy from year to year had been created or not. *Winnipeg Land and Mortgage Corporation* v. *Witcher*, 15 Man. L. R. 423, 1 W. L. R. 551.

Overholding tenant — *Notice to quit—Length of.*]—A tenant who occupies a lodging by tacit holding over after the expiry of a lease, in which the rent was payable monthly, has a right to only one month's notice to quit from his landlord. *Comte* v. *Gissing*, 28 Que. S. C. 497.

Overholding Tenants' Act—*Expiry of term — Dispute as to extension—Conflicting evidence.*]—The Judge of the County Court of Brant made an order directing the applicants here to give up possession of certain premises. On application to restore the tenants it was *held*, that the County Court Judge is competent to try and determine a question of fact, viz., the expiry of the lease, where

there is conflicting evidence. Application dismissed. *Re Graham & Yeardley* (1909), 14 O. W. R. 30.

Overholding Tenants' Act—*R. S. O. 1897, c. 170, s. 13—Non-payment of rent — Forfeiture of lease — Application for possession.*] — Landlord applied for possession of premises occupied by overholding tenants. Tenants were in possession under a lease at $30 per month, but paid no rent, and refused to give up possession, one tenant contending that she conveyed the property in question to landlord as agent of a bank for her husband's indebtedness, without any consideration and without independent advice:—*Held*, that tenant had given two mortgages upon the premises which were not paid, and that the landlord had acquired title through assignment of them and was therefore in a position to grant a lease even if he had not received the conveyance from tenant of her interest. Landlord granted the usual order for possession with costs of his application. *Longhi* v. *Sanson*, 46 U. C. R. 448, followed. *Cronyn* v. *Jenkins* (1910), 16 O. W. R. 369.

Overholding Tenants' Act, R. S. O. (1897), c. 171, s. 3—*Expiry of term — Necessity for demand of possession—Jurisdiction of County Court Judge to determine disputed questions of fact.*]—*Held*, that after a tenancy has been determined, it is necessary that a demand of possession be made to give the County Court Judge jurisdiction under the Overholding Tenants Act, R. S. O. (1897), c. 171.—*Held*, also, that it is within the jurisdiction of the County Court Judge, under that Act, to try and determine a question of fact, where the testimony is conflicting, and his decision will not be interfered with.—*Re Graham & Yardley*, 14 O. W. R. 30, and *Re Grant & Robertson*, 8 O. L. R. 297, 3 O. W. R. 896, followed. *Fee* v. *Adams* (1910), 16 O. W. R. 103.

Right of re-entry — Rent — Set-off—"Clearly." *Re Hooker and Malcolm*, 2 O. W. R. 49.

Right to terminate lease — Notice to quit—Difficult questions of law—Refusal of *certiorari*. *Re Clark & Kellett*, 1 O. W. R. 577.

Summary Ejectment Act — *Purchaser in default — Tenant at will.*]—W. went into possession of a lot of land under an instrument in writing whereby it was agreed that the purchase money was to be paid in four equal instalments in 6, 12, 18 and 24 months. It was also agreed that W. was to be tenant at will, and that he should remain in possession until default in the payment of any of the instalments:—*Held*, that W. was not a tenant at will, or a tenant for a fixed term, so as to be subject to the provisions of the Summary Ejectment Act, C. S. N. B. c. 83, or amending Acts. *Winslow* v. *Nugent*, 36 N. B. R. 356.

Summary procedure for ejectment—*Mesne* profits — Costs. *Re Fuller & Cuthbert* (Y.T.), 6 W. L. R. 717.

Summary proceeding — *Forfeiture for breach of covenant.*]—This was an application by way of summary proceedings under ss. 11-17 of the Landlords and Tenants Act, R. S. M. 1902 c. 93, as amended by 3 & 4 Edw. VII. c. 29, ss. 1, 2, to recover possession of a hall let to the defendants for five years from the 1st November, 1901, at a rental of $15 per month. The lease was in writing under seal, and the lessees by it covenanted that they would not permit the hall to be used for the purposes of dancing, except to lodges renting the hall, and that any breach of that covenant should at once at the option of the lessor operate as a forfeiture of the lease. The lessees having rented the hall to five young men not connected with any lodge for the holding of a dance, the lessor gave them a notice declaring the lease to be forfeited and demanded possession:—*Held*, following *Moore* v. *Gillies*, 28 O. R. 358, that, under the statute as amended, the Judge can now try the right of the tenant to hold over, and that the defendants had forfeited the lease, and that a writ of possession should be issued in the landlord's favour. *Re Ryan & Turner*, 24 C. L. T. 255, 14 Man. L. R. 624.

Summary proceeding — *Monthly tenancy—Notice to quit.*]—1. Where a lease expressly provides that the tenancy created by it shall be a monthly tenancy, the fact that it also provides what rent shall be paid for each of 16 future months, and more for some months than for others, will not enlarge the rights of the tenant in any way, and the landlord may terminate the tenancy at the expiration of any month by giving a month's notice.—2. A notice to quit signed by one of two owners of the property with the approval of the other, such approval being known to the tenant, will be sufficient, although not expressed to be on behalf of any one except the person giving it. *Aslin* v. *Summerscell*, 1 B. & Ad. 135, followed.—3. To put an end to a tenancy at the end of May, a notice served on 30th April is good, although it be erroneously dated 1st May.—4. A notice to quit on or before the anniversary of the commencement of the tenancy is good: *Sidebotham* v. *Holland*, [1895] 1 Q. B. 378; although a notice to quit on the last day of the tenancy would also be good. *Re Burrows & Mickleson*, 24 C. L. T. 326, 14 Man. L. R. 739.

Summary proceeding by landlord to obtain possession—*Jurisdiction of County Court Judge—Dispute as to length of term—Application for review.*]—Motion by William Howard, the tenant, for an order under s. 6 of the Overholding Tenants Act, directing the senior Judge of the County Court to send the proceedings, evidence, and exhibits in this matter to the High Court under his hand, and for an order staying all proceedings therein. The application by the landlord, James Lumbers, to the County Court Judge was to recover from the tenant the possession of a shop and dwelling above the shop. It was alleged, the tenant was wrongfully holding possession:—*Held*, that under s. 3, s.-s. 2, of the Act, R. S. O. 1897, c. 171, the Judge is to "enquire and determine whether the person complained of was tenant to the complainant for a term or period which has expired, . . . and whether the tenant does wrongfully refuse to go out of possession, having no right to continue in possession, or how otherwise." The dispute being

as to whether the tenancy was for 3 years or for 5 years, the learned County Court Judge was, on the authority of *Moore* v. *Gillies*, 28 O. R. 358, justified in holding that he had jurisdiction to try the right. Having regard to the evidence and the judgment of the learned County Court Judge, this is not a case in which a *certiorari* should issue, and the motion will therefore be dismissed with costs. *Re Lumbers & Howard*, 5 O. W. R. 721, 772, 9 O. L. R. 681.

Summary proceeding to recover possession — Originating summons—Jurisdiction of local Judge—District Courts Act, s. 42—Practice—Rule 469 — Relationship of landlord and tenant—Agreement for assignment of reversion to person assuming to proceed as landlord—No transfer of title—Right of tenant to remain in possession—Payment for improvements — Option of purchase. *Porter* v. *Rooney* (Alta.), 8 W. L. R. 289.

Tenancy for a year—*Holding over after expiration of—Implied tenancy from year to year—Rebuttal.*]—A letter from the landlord posted to the tenant before the expiration of a lease for a year, proposing that after its expiration the tenant should hold from month to month, is not sufficient, if the letter is not received by the tenant, to displace the tenancy from year to year which arises by implication from the tenant's holding over and paying rent after the expiration of his term. *Gass* v. *McCammon*, 6 Terr. L. R. 98.

Tenant continuing in possession after expiry of lease—*Negotiations for new lease — Notice of intention to quit — Tenancy at will.*]—Plaintiff brought action for $240, balance claimed for rent of a room in St. George Mansions, Toronto. At trial judgment was given plaintiff for amount claimed and costs. Divisional Court on appeal *held*, that the defendants by having continued in possession, pending negotiations for a new lease, did not become a yearly tenant, but only a tenant at will, and having given one month's notice of his intention to quit, was not liable for any further rent. Appeal allowed and action dismissed with costs. *Idington* v. *Douglas*, 6 O. L. R. 266, followed. *St. George Mansions* v. *King* (1910), 15 O. W. R. 427, 1 O. W. N. 300.

Writ of possession — *Prohibition to County Judge and sheriff — Certiorari.*] — After an order has been made on the landlord's application under the Overholding Tenants Act for the issue of a writ of possession, but before the writ has been issued, the tenant applied for an order for the removal of the proceedings into the High Court and for prohibition to the Judge of the County Court and the sheriff:—*Held*, *per* Street, J., that proceedings under the Overholding Tenants Act can be removed into the High Court only when s. 6 of that Act applies; that that section does not apply until a writ of possession has been issued; and therefore that the applicant was not entitled to relief. *Per* Britton, J., that whether s. 6 is exclusive or not, it at least amply protects the tenant's rights, and that the applicant was not entitled to relief either under that section or under the general jurisdiction of the Court. *Re Warbrick* v. *Rutherford*, 23 C. L. T. 326, 6 O. L. R. 430, 2 O. W. R. 999, 961.

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9. Rescission or Forfeiture of Lease.

Absence of water supply — *Right to enjoyment of premises.*]—A landlord who lets a lodging furnished with apparatus, pipes, taps, water-closets, etc., in connection with waterworks, is bound to afford the tenant a constant supply of water. A lack of water in such conditions constitutes on the landlord's part a violation of the obligation to afford full enjoyment of the demised premises, and is a ground in favour of the tenant for an action to cancel the lease. *McKillop* v. *Tapley*, 32 Que. S. C. 380.

Breach of provision against subletting — *Necessity for action—Discretion of Court — Termination of sub-lease.*]—The violation of the provision against sub-letting contained in a lease does not of itself avoid the lease; it has the effect of a resolutory condition, and is ground for an action for cancellation; in such an action the Court has a discretion to grant or refuse the relief where the lessor's rights are not affected, *e.g.*, where the sub-lease ceased before the action for cancellation was brought. *Brunet* v. *Goldwater*, 33 Que. S. C. 240.

Delay in giving possession—*Days of grace — Cancellation of lease—Damages — Saisie-gagerie.*]—The lessee of a house has the right to take possession on the first day of the term for which it is let, but subject to the three days of grace allowed by usage to the occupant to remove his belongings. Therefore, a mere dispute arising on the first day between the lessor occupying the demised premises and the brother of the lessee, who wishes to have access to the upper floor, is not a refusal to deliver possession, and will not suffice as a ground, in favour of the lessee, without other *mise en demeure*, for an action for cancellation of the lease.—The lessor who, in these circumstances, vacates the house on the second day and sends the key to the lessee, has a remedy by way of action for damages against the lessee where he refuses to enter and hires other premises, and also the remedy of *saisie-gagerie* to seize the chattels of the lessee placed in one part of the house. *Landry* v. *Lafortune*, 33 Que. S. C. 126.

Disrepair of premises—Defective heating—Right to cancel lease. *Vennat* v. *Ship*, 5 E. L. R. 381.

Grounds for cancellation—*Change in demised premises—Installation of machinery —Danger of fire.*]—A lessee who undertakes in the lease to make no change and to do no act of destruction in the demised premises, without the express permission in writing of the lessor, gives the lessor cause for cancelling the lease: (1) by installing a machine heated by gas and moved by an electric motor which produces a vibration; (2) by making an opening in the roof and passing an escape-pipe through it, such opening having the effect (the roof being double) of raising the temperature in winter, in the

intermediate space, and thus forming ice upon the exterior roof; (3) by increasing the risk of fire, and, therefore, raising the rate of insurance premium. The lessee cannot successfully invoke a clause in the lease which obliges him to pay such excess of premium; the additional risk of fire supplies by itself a ground for cancellation sufficient for the lessor. *Volois* v. *Marceau*, 17 Que. K. B. 31.

Judgment for cancellation — *Error—Repudiation — Tacit continuation.*]—There cannot be tacit continuation of a lease, the cancellation of which has been judicially declared. The lessor, who obtained the judgment, is estopped from alleging that it was rendered in error and that he repudiated it as soon as he was aware of it. There resulted from it for the lessee a modification of his relations with the lessor, which the latter cannot remove by a simple immaterial manifestation of his election.—Judgment in 32 Que. S. C. 236, affirmed. *Wallace* v. *Honan*, 17 Que. K. B. 289.

Judgment for cancellation—*Summary ejectment.*]—The remedy by way of action of ejectment in summary form is open to a landlord against a tenant who continues to occupy the premises more than three days after a judgment for cancellation of the lease. *Wallace* v. *Honan*, 34 Que. S. C. 28.

Landlord agreed to obtain sub-tenant — *Premises vacant — Landlord let premises temporarily — Letting by landlord not eviction—No termination of lease by landlord.*]—Plaintiff tenants leased part of a building from defendant for one year and after a time vacated the premises. Plaintiffs requested defendant to secure a sub-tenant for them. Defendant put up a "To let" notice. Defendant, desiring to alter his adjoining building, had a cobbler move his bench, etc., into plaintiffs' premises, on the understanding that the "To Let" notice should remain in the window, and that the cobbler would remove at any time that defendant should let the premises. Plaintiffs brought action for a declaration that defendant had terminated their lease by putting the cobbler in possession, and that they were no longer liable for rent. Defendant counterclaimed for rent and interest. Teetzel, J., *held*, that what the landlord had done did not amount to a termination of the lease. Action dismissed and judgment entered for defendant on his counterclaim. *Micklethorough* v. *Strathy* (1910), 16 O. W. R. 265, 21 O. L. R. 259.

Lease — Cancellation — *Surrender—Termination of lease.*]—Action to recover the value of seed wheat and seed oats supplied by plaintiffs to defendant pursuant to the terms of a lease. Counterclaim for value of work done by defendant for plaintiffs:—*Held*, that as the lease had not been terminated until some time after action brought, there had been no breach committed by defendant of the covenant to return the oats in question. Defendant's counterclaim allowed for work done, but claim for tillage disallowed as no provision therefor in lease. *Ellis* v. *Fox*, 11 W. L. R. 87.

Lease — *Improvident contract — Misrepresentation—Fraud.*]—Plaintiff sought to set aside a lease made by her to defendants on the ground that it had been procured by fraud and misrepresentation, and failing that, asking for a rectification:—*Held*, that the plaintiff understood what she was doing in making the lease in question. By consent the words "or more" were struck out from the covenant for "renewal for a further term of five years or more," otherwise action dismissed. *Robinson* v. *Estabrooks*, 7 E. L. R. 131, 4 N. B. Eq. 168.

Lease — *Rescission—Effect of sub-lease—Action for possession by landlord against sub-tenant.*]—The voluntary cancellation by the parties, for inability of the tenant to pay the rent, or of a lease with a stipulation that failure to pay rent should dissolve it, extinguishes a sub-lease of part of the premises, notwithstanding the fulfilment of his obligations by the sub-tenant; and an action will lie against the latter, in favour of the lessor, to recover possession of the part sub-leased. *Duncan Co.* v. *Bridge*, 14 Que. K. B. 135.

Lease — *Rescission—Premises uninhabitable—Smoke and smell—Evidence.*]—A lessee has an action to rescind the lease of a flat which is uninhabitable by reason of smoke and obnoxious odours. Evidence of the existence of smoke and obnoxious odours in it during a stated period, is not sufficiently rebutted by proof that it was free from both, immediately before and after the period in question, and that the building of which it forms part was well constructed with all modern improvements. Nor is it an answer to the action to say that the smoke and bad odours complained of came from neighbouring chimneys, while windows were opened, or from two flats underneath, and that the landlord is not responsible for the acts of neighbours or of co-lessees in the building. *Beardmore* v. *Bellevue Land Co.*, 15 Que. K. B. 43.

Lease—*Rights of lessee—Failure of lessor to make repairs—Rescission of lease.*]—When a lessor, after due notification (*mise en demeure*), fails to make necessary repairs, the lessee may, by action, declare his option to obtain a rescission of the lease, and recover judgment accordingly. *Vennat* v. *Fischelship*, 34 Que. S. C. 529.

Lease of building as hotel — *Lessee ceasing to conduct as hotel—Rival establishment — Cancellation of lease — Damages.*]—The obligation of the lessee to use the premises rented only for the purposes for which they are leased, is violated by a person who, having rented a house as an hotel and lodging-house, ceases to conduct it as an hotel, in order to conduct an hotel in another building, 200 feet away. The lessor may, in consequence, demand the cancellation of the lease and damages. *Caron* v. *Lamarche*, 17 Que. K. B. 495.

Lease of farm—*Share of produce—Partnership — Maladministration by tenant — Negligence — Remedy.*] — A lease of a farm for a share of its produce and an undertaking by the lessee to pay the lessor one-half the value of the stock and agricultural implements on it, partakes of the nature of a

partnership, and is essentially a contract *bonæ fidei*. In adjudicating upon a demand by the lessor based upon charges of neglect and of maladministration by the lessee, the Court has a full discretionary power, in its appreciation of the facts, to declare whether the case comes within any of the provisions of Art. 1624, C. C., as to rescission.—While the failure of the lessee to carry out the stipulations of the lease entitles the lessor to ask for its rescission when it is of a grievous character, the Civil Code provides another remedy for acts of negligence or omissions which are involuntary rather than the result of incapacity or of a refusal to perform the obligations of the lease. *Meunier dit Lagacé* v. *Laurin*, 30 Que. S. C. 68.

Lease of house—*Impossibility of peaceable enjoyment—House formerly occupied as brothel.*]—An action by a lessee will lie to rescind the lease of a dwelling previously occupied as a brothel and in close proximity to two other houses the property of the lessor actually leased and occupied for similar purposes, in consequence of which the lessee and his family are molested, insulted and troubled by frequenters of such resorts, in their enjoyment of the premises leased. *Levin* v. *Lalonde*, 30 Que. S. C. 481.

Lessee's rights — *Legal disturbance—Work done on a middle wall—Action for diminution of rent — Sub-letting.*]—Inconvenience caused by lessee by work being done to a middle wall by adjoining proprietor is a legal disturbance which gives him the right to have the lease cancelled, or the rent reduced, but does not extend to recovery of damages. Where there is a sub-letting it is the rent due under the principal lease which is reduced, without considering the rent derived from sub-tenant. *Lanctot* v. *Bocck* (1910), 38 Que. S. C. 228.

Non-payment of rent—*Cancellation—Damages—Rent to accrue—Rent received under new lease.*]—Default in payment of a single gale of rent affords ground for an action on the part of the landlord for cancellation of the lease.—2. A landlord suing for the cancellation of the lease has a right to recover from the tenant as damages the rent which will accrue for the time which has still to run under the lease which is cancelled, on condition of accounting for rents received under a new lease during such period. *Guardian Assce. Co.* v. *Humphrey*, 33 Que. S. C. 393.

Non-payment of rent—Ejectment—Demand of possession, no necessity for, where rent overdue—Refusal of landlord to accept rent for one month—Waiver of tender for subsequent months—Distress for rent after action brought—Waiver of forfeiture—Costs of action—Appeal. *Fenny* v. *Casson*, 12 O. W. R. 404, 722.

Non-payment of rent—*Relief against forfeiture — Oral arrangement — Option to purchase — Restoration with lease — Rule 976—Costs—Supreme Court Act, R. C., s. 20* (7).]—The plaintiff, a lessee, and the defendant, as lessor, on the 1st January, 1906, entered into a lease for a term of five years, at a rental of $70 per month, in advance, with a proviso for forfeiture and reentry after 15 days' default in payment of rent, together with an exclusive option of purchase on terms named. The plaintiff, being absent in December, 1906, and up to the 23rd January, 1907, inadvertently allowed the rent for January to fall into arrear, but, on the latter date, tendered the defendant, through her solicitor, she herself being inaccessible, the rent for January and February, and also offered to defray any costs incurred. The defendant had in the meantime, through her bailiff, taken and retained possession. There was evidence of an oral arrangement that in the event of the plaintiff's absence at any time the forfeiture clause for non-payment in advance would not be enforced; — *Held*, following *Newbolt* v. *Bingham*, 72 L. T. N. S. 852, that, no third party interests having intervened, the plaintiff was entitled to relief against forfeiture, both as to the term and the option, and that, the case coming within Rule 976 of the Supreme Court Rules, 1906, the plaintiff should also get the costs of the action.—Observations on the effect of s. 20, s.-s. 7, Supreme Court Act.—Decision of Hunter, C.J., 6 W. L. R. 501, affirmed. *Huntting* v. *MacAdam*, 8 W. L. R. 214, 13 B. C. R. 426.

Relief against forfeiture — Non-payment of rent excused by oral assurance—Authority of landlady's husband — Grounds against relief—Mental incompetence—Knowledge of tenant—Evidence—Costs. *Huntting* v. *MacAdam* (B.C.), 6 W. L. R. 501.

Rent and damages—Abortive contract to sub-let. *Dacier* v. *Marcotte*, 3 E. L. R. 418.

Rent and damages—*Loss of tenancy.*]—The lessor of premises leased for a special business (*e.g.*, as a barber shop) who brings suit with attachment in reception, for rent due and to rescind the lease, has a further right to recover by the same action the damages arising from the likelihood of the premises remaining unoccupied for a length of time. *Darwent* v. *Montbriant*, 31 Que. S. C. 54, 2 E. L. R. 549.

Rule nisi for new trial need not set out grounds — *Estoppel—Death of landlord terminates tenancy at will—Grounds not taken at trial—Costs.*] — Joseph Green laid off part of his farm in building lots and streets, all delineated on a plan. In 1854 he gave defendant a lease of a lot which purported to be bounded on the east by one of the new streets, called Cedar Street, and in 1856 gave him a deed of the same land. Defendant had encroached some twenty feet on Cedar Street, though not taking more than the area of his lot, and the action was to recover possession of the part of Cedar Street. On the trial defendant gave evidence to shew that Joseph Green had gone to the place with him and pointed out the land, and that he had built on the land so pointed out. It also appeared that Joseph Green, after giving the lease, having found out that defendant had built on Cedar Street, went and told him so, and that on another occasion he offered defendant £10 to move back, adding that if defendant did not do so he (Green) must, and finally when defendant had neglected to move he told him that he (defendant) must move at his own expense. Joseph Green after-

wards died, having devised his lands to the lessors of the plaintiff. Defendant contended that he was a tenant at will, and entitled to demand of possession before ejectment, which had not been given. For the plaintiffs it was contended that Joseph Green's acts and declarations were in themselves a determination of the tenancy. At the trial the Judge told the jury that if they found Joseph Green had gone down and pointed out the land, as contended by defendant, that his subsequent acts and declarations were not sufficient to terminate the tenancy at will, and their verdict ought to be for defendant, and the jury so found. Plaintiff moved to set aside the verdict and for a new trial on the ground of misdirection, and also on the ground, not taken at the trial, that the tenancy at will was determined by Joseph Green's death:—*Held*, Hensley, J., that the direction to the jury was right.—That Joseph Green's death was a termination of the tenancy, and a new trial must be granted on that ground, but not having been taken at the trial, plaintiff must pay the costs of the first trial, and each party must pay their owa costs of the present rule, etc. *Green* v. *Higgins* (1873), 1 P. E. I. R. 466.

Sub-letting.]—The purchaser of a house who makes a new lease, with a clause prohibiting sub-letting, with the tenant actually occupying it, cannot obtain the cancellation of the lease by reason of the sub-letting of the premises by the tenant to a third person under a former lease. *Venner* v. *Thienel*, 37 Que. S. C. 80.

Unauthorised alteration of premises —Arts. 1624, 1626, C. C.—Construction of lease. *Valois* v. *Marceau*, 4 E. L. R. 176.

Uninhabitable premises — House infested with vermin — Damages to tenant. *Middleton* v. *Allard*, *Allard* v. *Middleton*, 3 E. L. R. 144.

Uninhabitable premises — *Injury by fire — Pleading — Damages.*] — A tenant, being sued by his landlord for rescission of the lease and for damages, may properly plead that the demised premises have become uninhabitable on account of a fire happening before the institution of the action. *Lander* v. *Hammond*, 8 Que. P. R. 408.

Uninhabitable premises—Lessee's right to water supply by lessor. *McKillop* v. *Tapley*, 4 E. L. R. 89.

Unsanitary condition of premises—Right to cancel lease. *Desormeaux* v. *Gratson*, 5 E. L. R. 384.

Unsanitary premises — Resiliation of lease *Ecclesiastical* v. *Vanier*, (Que. 1907) 4 E. L. R. 94.

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10. Rights and Liabilities Apart from Contract.

Injury to property arising from negligence of tenant — Action against landlord of tort-feasor—Art. 1053, Quebec Civil Code — Liability. *Thurston* v. *Dawson*, 4 E. L. R. 168.

Injury to wife of tenant—*Bad condition of demised premises — Form of action —Summary procedure — Amendment—Exception to form — Wife separate as to property — Husband joined as plaintiff — Misjoinder — Exception to form—Pleading —Declaration — Necessary allegations.*]—An action will not be dismissed upon exception to the form because, being brought by the wife of the tenant against the landlord to recover damages for injuries received by reason of a fall caused by the bad condition of the demised premises, the action should have been brought in a summary way and made returnable in two days, such irregularity not being without remedy. — Adding the husband as a plaintiff with his wife, separate as to property, does not make the writ of summons void, but may afford ground for an exception to the form for misjoinder.—It is not necessary to allege by virtue of what the plaintiff is separate as to property from her husband.—An action against the landlord for damages caused by the bad state of the demised premises will be dismissed upon exception to the form, if it does not appear that it arises from the fault of the defendant and in what respect he is responsible for the injury caused. *Rano* v. *Miller*, 8 Que. P. R. 329.

Insurance premium—*Change in use of building.*]—An action brought by a tenant against his landlord for the recovery of the excess of an insurance premium paid by him, when, in the course of the year for which such insurance was effected, he changed the destination of the building, and gave proper notice of such change. *Benard* v. *Prefontaine*, 6 Que. P. R. 327.

Jurisdiction — *Costs — C. P. 172, 549, 1152.*]—If in an action between lessor and lessee, the plaintiff asks that some repairs be made, or that he may be authorised to make such repairs, and that, at all events, the defendant be condemned to pay him the sum of $75 as damages already suffered, the Superior Court has no jurisdiction *ratione materiæ*, and the Circuit Court is the proper Court to take cognizance of the case. Each party will pay his own costs in review. *Lapierre* v. *Marcotte* (1900), 10 Que. P. R. 435.

Lease of dwelling house — *Ostensibly for residence—In reality to place children suffering from diphtheria — Action for damages — Evidence.*] — Divisional Court *held*, that defendant was liable to plaintiff for $240 and costs, as damages, caused by defendant obtaining plaintiff's house, ostensibly for a residence, but in reality to place his children, suffering from diphtheria, to prevent his hotel from being placarded. The damages allowed were for what it cost plaintiff to re-paper, re-paint and otherwise put her house in proper condition. *McCuaig* v. *Lalonde* (1911), 18 O. W. R. 759, 2 O. W. N. 791, 23 O. L. R. 312.

Settled Estates Act — *R. S. O. 1897 c. 71 — Tenant for years — Liability for permissive waste — Covenants in lease —*

Construction.]—*Held*, after detailed review of the cases, that *Yellowly* v. *Gower*, 11 Ex. 274, which decided that a tenant for years is liable for permissive waste, was rightly decided, and that its authority has not been impugned or affected by any subsequent case or displaced by the provisions of the Judicature Act.—*Held*, also, that the provisions in the lease in question in this case whereby the covenants to repair and to repair according to notice were qualified by the exceptions in the covenant to leave the premises in good repair, namely, "reasonable wear and tear and damage by fire or tempest," had not the effect of relieving the tenant from any liability which but for them he would have been subject to for permissive waste. Such exceptions are to be construed as exempting from damage which is the result of accident, not from damage which is the result of negligence. *Taylor* v. *Taylor*, L. R. 20 Eq. 297, specially considered.—*Semble*, a person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, is entitled to exercise the power of leasing conferred by s. 42 of R. S. O. 1897 c. 71.—Judgment of Boyd, C., 7 O. W. R. 834, affirmed. *Morris* v. *Cairncross*, 9 O. W. R. 918, 14 O. L. R. 544.

Title by possession — *Statute of Limitations — Encroachment by tenant — Renewal lease.*]—On appeal it was held that where tenant has encroached without landlord's consent upon the latter's property not demised to tenant, such possession is not adverse and he must deliver it up at expiration of term or pay for its continued use and occupation. The tenant has no equitable right to have such property included in the renewal lease of the premises which were actually demised to him. He is confined to what the covenant in the lease actually gave him. *Toronto* v. *Ward*, 13 O. W. R. 312.

Trespass to demised premises—*Action by tenant — Assertion of title by defendant — Landlord brought in en garantie.*]—Where a tenant has sued a third person, in this case one of the other tenants of the same property, for a trespass, and the third person pleads that the tenant has not the right of enjoyment which he claims under his lease, but that he (the defendant) alone has such right, the tenant may call upon his landlord to defend him against this contention of the defendant. *Hamilton* v. *Royal Land Co.*, 24 Que. S. C. 411.

II. Termination of Tenancy.

Action by landlord for possession and for use and occupation—Evidence established—Tenancy from year to year — Not determined by notice to quit—Statute of Limitations has no application — Plaintiff's claim dismissed with costs — Defendant proved $350.80 on counterclaim—Judgment accordingly with costs. *O'Connell* v. *Kelly* (1911), 18 O. W. R. 918, 2 O. W. N. 923.

Agreement for lease — *Option for renewal of lease—Option of purchase—Sale of fee—Assignment by lessee—Rights of assignee to compel renewal of lease—Notice of acceptance of renewal—Equitable jurisdiction of Court—32 Henry VIII., c. 34, applicable —Counterclaim for declaration of assignee's right.*]—An action by plaintiff to recover possession of lands and for *mesne* profits. Mitchell, the owner in fee of the property in question, entered into an agreement with one, Pearce, to let the same to Pearce for five years from September 1st, 1905, to be used as a drug store and dwelling, and agreed that he would, at the end of the five years, give the said lessee the option of a further term of five years, and the lessor further agreed that in case of sale he would give the said lessee the first option to purchase. Pearce accepted this and entered into possession. In July, 1907, Mitchell sold and conveyed the property to the plaintiff. Before doing so, however, he offered the land to Pearce, but Pearce refused to buy. Pearce, in August, 1907, assigned all his interest in the agreement to one Smuck, and he in October, assigned all his interest in the property to the defendant, who entered and paid rent to the plaintiff until the end of August, 1910. On the last day of August, 1910, the defendants wrote the plaintiff: "We hereby give you notice that we accept the lease for a further term of five years as provided in the said lease." On 1st September, 1910, the plaintiff demanded possession, which was refused. Plaintiff then brought this action.—Riddell, J., *held*, that as defendants were before a Court having equitable jurisdiction, it should be considered as though the lease had actually been made, in which case 32 Henry VIII., c. 34, would apply: That plaintiff failed and the action should be dismissed with costs. Counterclaim by defendants for a declaration of their right to a further term of five years allowed with costs. *Manchester Bridge Co.* v. *Coombs*, [1901] 2 Ch. 608, followed. *Rogers* v. *National Drug & Chemical Co.* (1911), 18 O. W. R. 686, 2 O. W. N. 763, O. L. R.

Cancellation of lease.]—The sole default on the part of one or other of the parties to the lease to discharge his obligations, does not of itself and of right have for effect the cancellation of a contract in such a way as to give the injured party an acquired right to such cancellation; the cancellation of a contract for non-execution of its obligations is a judicial power, and, consequently, a matter within the discretion of the Court which, according to the facts of the case, either affirms or dissolves the contract, and may allow further delay to permit defendant to discharge his obligations, and this even when the contract is clearly regular and well-founded; the dissolution of a contract is a serious step which can only be taken for good reasons, clearly established, and the burden of proof resting upon the plaintiff, the defendant should have the benefit of any doubt. *Stagg* v. *Frigon* (1910), 17 R. L. n. s. 49.

Days of grace — *Computation — Holidays.*]—The period of three days allowed to a tenant to give up possession, according to Art. 1089, C. P., is a delay in procedure which is extended to the juridical day following, if it expires on a Sunday or a holiday. *Beaudry* v. *Harrigan*, 5 Que. P. R. 99.

Landlord agreed to obtain sub-tenant—*Premises vacant—Landlord let prem-*

ises temporarily — Letting by landlord not eviction — No termination of lease by landlord.] — Plaintiffs, tenants, leased part of a building from defendant for one year and after a time vacated the premises. Plaintiffs requested defendant to secure a sub-tenant for them. Defendant put up a "To let" notice. Defendant desiring to alter his adjoining building, had a cobbler move his bench, etc., into plaintiffs' premises, on the understanding that the "To let" notice should remain in the window, and that the cobbler would remove at any time that defendant should let the premises.—Plaintiffs brought action for a declaration that defendant had terminated their lease by putting the cobbler in possession, without plaintiffs' consent, and that they were no longer liable for rent. Defendant counterclaimed for rent and interest. —Teetzel, J., *held* (16 O. W. R. 265, 21 O. L. R. 259, 1 O. W. N. 846), that what the landlord had done did not amount to a termination of the lease. Action dismissed and judgment entered for defendant on his counterclaim. — Divisional Court affirmed above judgment. *Micklethwaite* v. *Strathy* (1911), 18 O. W. R. 266, 2 O. W. N. 537, 23 O. L. R. 33.

Lease by life tenant—*Death of—Expiry of lease.*]—The lease of a farm made by an usufructuary for a term of years expires at his death, but if it occurs after a year of the term has begun, the lessee has the right to continue his enjoyment to the end of that year. Hence, when the death of the usufructuary lessor takes place in May, when the hay crop is standing, the lessee having the enjoyment of the farm till the first of November following, has the right to cut the crop in the interval, and thus make it his own. *Peckham* v. *Parizeau* (1910), 39 Que. S. C. 9.

Lessor's privilege.] — No particular manner or form of the "notification" required by Art. 1622 C. C. (as amended by 61 Vict. c. 14, Que.) having been prescribed by law, it may be proved, as any other fact, by written or oral evidence or even by presumption. *Ouimet* v. *Heirs Green & Willis*, 37 Que. S. C. 136.

Notice to quit the premises leased within three days—*Interpretation—C. P. 1089.*]—If a lessee, after having received a notice in the following words: "The houses having been leased from the 1st July, next, we take the liberty of notifying you to leave the house before that date," leaves the premises within three days, he is discharged from all rent he might have owed at the time, the notice fulfilling all the requirements of Art. 1089 C. P. *Ponthriand Co.* v. *Chateauvert* (1910), 11 Que. P. R. 242.

Termination of lease — Agreement of tenant to purchase demised premises — Merger — Intention — Onus — Action for rent. *Dayman* v. *Macdonald* (Sask.), 7 W. L. R. 296.

Time—*Computation—Non-juridical day.*] —Article 8, C. P., which says that the day upon which a thing ought to be done being a non-juridical day, the thing may be done with the same effect on the next following juridical day, does not apply to the three days which the landlord may give to the tenant, by virtue of Art. 1089, C. P. C.; to leave the demised premises, therefore, when the last day is non-juridical, the tenant cannot delay his removal to the next day. *Beaudry* v. *Hannigan* 23 Que. S. C. 252, 5 Que. P. R. 366.

Time—*Holiday.*]—Where the last of the three days which follow a notice to quit given by a landlord under Art. 1089, C. P. C., is a Sunday or holiday, it is not reckoned, and the tenant has the following day to abandon the demised premises. *Beaudry* v. *Harrigan*, 19 Que. S. C. 421.

Verbal lease—*Dispute as to duration—Action to terminate—Statute of Frauds—Evidence—Onus.*] — Action to terminate a verbal lease by plaintiffs to defendants. Plaintiffs alleged that the lease was from year to year. Defendants contended that the lease was for the same term as plaintiff's lease, plaintiff being lessee and defendants sub-tenants. Statute of Frauds was not pleaded but plaintiff asked leave to amend and set it up.—Falconbridge, C.J.K.B., *held*, that without any agreement being proved, the circumstances of the holding would constitute a tenancy from year to year and the notice to quit relied upon by plaintiff would be good: That it was not necessary to allow the amendment to decide the case as the onus was on defendants to prove their agreement and in this they had failed. Judgment for plaintiff for immediate possession and for $50 per month for occupation rent since 1st May, 1910. *Galbraith* v. *Connell Anthracite Mining Co.* (1911), 18 O. W. R. 393, 2 O. W. N. 615.

Waiver.]—A lease at a yearly rent payable in even portions, in advance, on the first day of each and every month, contained a provision entitling the landlord to give the tenant three months' notice to quit in case the landlord received an offer to purchase which he was willing to accept. On the 22nd August the landlord gave the tenant notice to quit three months thereafter. On the 2nd November the applicant, the original landlord's successor in title, accepted the rent due in advance the previous day, for the whole of the month of November, though the time limited by the notice to quit would expire on the 22nd November:—*Held*, that the notice to quit was waived.—*Held*, also, that the acceptance on the 3rd December of a cheque for that month's rent, although it was not presented for payment, would also be a waiver. A notice to quit in pursuance of such a special provision may be given for any broken period of the term, and need not expire at the end of a month of the tenancy. *Smith* v. *MacFarlane* (No. 2), 5 Terr. L. R. 508.

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12. Miscellaneous Cases.

Work done on demised premises—*Materials furnished to tenant — Liability of landlord.*] — A person who furnishes materials to a tenant for additions or improvements to the house upon the demised premises, has no right to bring an action against the owner to recover payment for such materials. *Delisle* v. *Marier*, 23 Que. S. C. 521.

LARCENY.

See CRIMINAL LAW—EXTRADITION.

LATENT DEFECTS.

See VENDOR AND PURCHASER.

LAW SOCIETY.

Alberta.] — Application by solicitor for reinstatement as a member of Alberta Law Society adjourned until next sittings, as Law Society had not sufficient time for examination into merits of the case. *Re Hicks*, 9 W. L. R. 255.

Barrister and solicitor—*Admission of one from another province — Term of service — Legal Professions Act.*] — To come within the exception in s.-s. 5 of s. 37 of the Legal Professions Act, it is not necessary that the applicant should have been a graduate at the time he commenced to study law, or that his term of study or service was shortened because he was a graduate. An applicant who obtained his degree after call of admission would come within the exception. *Calder* v. *Law Society of British Columbia*, 9 B. C. R. 76.

Barrister and solicitor — *University graduate — Legal Professions Act.*]—The applicant matriculated at the University of Dalhousie, Halifax, Nova Scotia, in August, 1892, and an LL.B. degree was conferred on him by the University on the 23rd April, 1895; in March, 1892, he began to study law and signed articles in Nova Scotia, and on the 2nd April, 1895, he was called and admitted there. Subsequently to his call and admission, he was employed two years in the office of a Halifax firm of barristers and solicitors. The term of service under articles in Nova Scotia for call and admission is ordinarily four years, but in case of a college graduate it is three years. In British Columbia, a graduate, in order to have his law course shortened, must be a graduate at the time he commenced to study law:—*Held*, *per* McColl, C.J., that the fact that the applicant was graduated after he was called in Nova Scotia precluded the circumstance of his being a graduate from having shortened his term of study.—*Quære*, whether the plaintiff would have succeeded if he had graduated before the 2nd April, 1895. *Re King & Law Society of British Columbia*, 22 C. L. T. 154, 8 B. C. R. 356.

British Columbia — *Powers of—Legal Professions Act — Rules of society — Call to the bar — Power to exact fee before examination.*]—Plaintiff applied for a *mandamus* to compel the Benchers of the above society to examine into his fitness to be called to the British Columbia Bar, but without payment first of $100 fee upon such examination:—*Held*, that the society has no power to exact such a fee under the above Act. *Hovell* v. *Law Society*, 10 W. L. R. 18.

See SOLICITOR.

LAW STAMPS.

See COSTS.

LEASE.

See LANDLORD AND TENANT.

LEAVE TO APPEAL.

See APPEAL — COMPANY—COSTS—EXECUTION.

LEGACY.

See ACCOUNT — CONTRACT—EXECUTORS AND ADMINISTRATORS — INFANT — JUDGMENT — SUBSTITUTION — WILL.

LEGAL PROFESSION ORDINANCE.

See LAW SOCIETY—SOLICITOR.

LEGAL TENDER.

Dominion notes held not to be legal tender. *Kelly* v. *Sullivan* (1875), 2 P. E. I. R. 34.

LEGATEE.

See DISTRIBUTION OF ESTATES.

LEGISLATIVE ASSEMBLY.

See CONSTITUTIONAL LAW — CROWN — MANDAMUS—TRIAL.

LEGISLATURE.

See CONSTITUTIONAL LAW.

LEGITIMACY.

See DISTRIBUTION OF ESTATES—EVIDENCE—MARRIAGE.

LESION.

See INFANT—INSURANCE.

LETTERS OF ADMINISTRATION.

See EXECUTORS AND ADMINISTRATORS — MASTER AND SERVANT—PLEADING.

LIBEL.

See CONTEMPT OF COURT — COSTS—COURTS —CRIMINAL LAW — DEFAMATION — PARTICULARS — PARTIES — PLEADING —VENUE.

LICENSE.

Billiard and Pool — *See* MUNICIPAL CORPORATIONS.

Dog—*See* MUNICIPAL CORPORATIONS.

Liquor—*See* INTOXICATING LIQUORS.

Marriage—*See* HUSBAND AND WIFE.

Pedlar's—*See* MUNICIPAL CORPORATIONS.

Building sewers in licensor's property—Revocation of license—Licensee not entitled to set up powers of expropriation not originally acted on. *Dartmouth* v. *Dartmouth Rolling Mills*, 1 E. L. R. 194.

Permit to cut hay—*Profit à prendre.*]—Defendant received a permit to cut hay on certain lands, provisional on its cancellation by sale or lease. The owners, while permit in force, granted plaintiff a grazing lease over the northern half of the lands:—*Held*, that defendant's permit was not cancelled. There must be a sale or lease of the whole land before cancellation operates. *Decock* v. *Barrager*, 10 W. L. R. 709.

Privilege of posting bills on walls—*Contract — Construction — Seal — Sale of premises—Revocation of license — Contract by grantee with another bill poster—Damages.*]—An agreement was entered into between the owner of a house and the plaintiffs, an advertising company, whereby the owner, therein called the lessor, agreed to sell, and the plaintiffs, called the lessees, agreed to take, for a term of five years, all the advertising privileges on a wall of the house, at the yearly rental of $5 with the right of cancellation to the lessees on one month's notice, should the location become valueless for advertising purposes, either from buildings or other causes. The document was not sealed, but the word "seal" was printed opposite the owner's signature. The plaintiffs painted an advertisement on one of the walls. In 1908 the owner sold the house, giving the purchaser a conveyance thereof and stating that the plaintiff's right was merely from year to year, and that the rent was paid up to January, 1909, when the plaintiff's rights ceased. The purchaser, after January, 1909, made a contract with the defendants, another advertising firm, for the right to paint on the wall, and they, thereupon, painted out the plaintiff's advertisement, painting thereon one of their own, which the plaintiffs painted out, repainting their own, and brought an action against the defendants for damages, etc.: — *Held*, that the action was not maintainable; that the agreement made with the plaintiffs amounted merely to a revocable license, which was revoked by the sale and conveyance to the purchaser. *Kerrison* v. *Smith*, [1897] 2 Q. B. 445, followed; *Wood* v. *Leadbitter* (1845), 13 M. & W. 838; *Lowe* v. *Adams*, [1901] 2 Ch. 598, and *London County Council* v. *Dundas*, [1904] P. 1, referred to and discussed. — *Quære*, whether an acknowledgment by the purchaser of the plaintiffs' rights would enable an action to be brought against her. *Connor-Ruddy Co.* v. *Robinson-Whyte Co.* (1909), 19 O. L. R. 133, 14 O. W. R. 284.

LICENSE COMMISSIONERS.

See INTOXICATING LIQUORS.

LICENSE FEE.

See ASSESSMENT AND TAXES.

LICITATION.

False bidding — *Resale — Conditions and charges.*]—The resale for false bidding in a case of licitation must take place subject to the same conditions and the same charges as those which had been fixed prior to the first sale, in the absence of special reasons for a change in the conditions. *Bergevin* v. *Tracey*, 9 Que. P. R. 400.

See LANDLORD AND TENANT — PARTITION—TRUSTS AND TRUSTEES—WILL.

LIEN CONTRACT.

See SALE OF GOODS.

LIEN NOTES.

See CHATTEL MORTGAGES AND BILLS OF SALE.

LIENS.

Charge on land — *Beneficial ownership —Parol trust — Mortgage—Priorities—Voluntary conveyances.*] — The defendant, who had been for some years in possession of a farm purchased by his father with the intention of giving it to him, purchased a machine from the manufacturers, giving his notes therefor, and at the same time executed a document (which was registered) in which it was stated that the land had been so "willed" to him that he had a good title thereto, and would not further incumber it, and he thereby charged it with the payment of the notes. The father subsequently conveyed the land to the defendant, but upon the condition of his executing a mortgage, which he did to certain persons who had advanced moneys to him. The defendant, on the ground that the land had been conveyed to him on an alleged trust for his family, conveyed it to his wife, the consideration being $1 and love and affection, and the wife, for the like consideration, conveyed it to an infant son:—*Held*, that the charge in favour

of the manufacturers was enforceable against the defendant and those claiming under him, by the assignee of the manufacturers, but was subject to the mortgage, and the evidence displacing any trust in favour of the defendant's family, the conveyances by the defendant and his wife must be treated as merely voluntary and subject to the plaintiff's charge. *Abell* v. *Middleton*, 2 O. L. R. 209.

Charge on land — *Unregistered documents — Land held temporarily by debtor as trustee — Subsequent conveyance to person entitled—Notice.*]—J. R., one of the defendants, owned a half section of land which she conveyed to her son, the defendant A. G. R., who mortgaged it to a loan company. While the title was so vested in A. G. R., he purchased a threshing machine and engine from the plaintiff's agent, and signed an unregistered document charging the land for the price, on which this action was brought. Later on A. G. R. mortgaged the half section to another loan company; he paid off the first mortgage and reconveyed the land to J. R. for an expressed consideration of $100; that conveyance was registered. After the reconveyance to J. R. this action was brought for payment by A. G. R. of the balance due on the machine and to have it declared that under the unregistered document the plaintiffs had a charge on the half section for the unpaid purchase-money due them for the machines; that J. R. knew of the plaintiffs' lien under the document signed by A. G. R.; and that the conveyance from the latter to her should be set aside and the land sold to satisfy the plaintiffs' claim. The defence set up that A. G. R. was under 21 when he executed the unregistered document in the plaintiffs' favour, that the conveyance from J. R. to A. G. R. was given voluntarily to enable him to raise the money under the first mortgage that he put on it, and on the condition that, when so required by J. R., he would reconvey to her, and that the reconveyance complained of was made pursuant to that understanding and on the actual payment of $100 which A. G. R. exacted before he would reconvey: — *Held*, on the evidence, that the allegation that A. G. R. was under 21 when he executed the unregistered document, was not proved; also, that J. R. conveyed to her son A. G. R. to enable him to put on the first mortgage and in trust to reconvey to her after so doing; and that she was entitled to the reconveyance from him. Judgment against A. G. R. for the debt, but action dismissed as against J. R. with a declaration that the plaintiffs had no claim on the land. *Fairchild* v. *Ray*, 24 C. L. T. 281.

Goods of lodger—*Money due for medical services.*]—The right of retention of the movable effects of a lodger can only be exercised by the persons specially mentioned in Art. 1816 (a), C. C.—2. One who has made himself responsible to a physician for professional services rendered to a lodger, has not a right of retention of the effects of the latter for the value of such services. *Goulet* v. *Brunelle*, 5 Que. P. R. 223.

Husband and wife — *Expenses of last illness of wife—Lien of physician on property of husband — Registration — Priorities.*] — A physician has no lien upon the goods of the husband for his charges in respect to the last illness of the wife.—2. A lien the subject of registration does not rank by its registration until after real rights already registered. *Phaneuf* v. *Godin*, 10 Que. K. B. 450.

Improvements — *Seeding — Harvest.*] —Money spent on work and seeding of land does not constitute a disbursement for improvements within the meaning of Art. 2072, C. C.; the special lien for the expense of such work exists only when the land is sold before harvest. *Carignan* v. *Gilbert*, 7 Que. P. R. 364.

Livery stable keeper's lien on horse for keep—*Stable Keepers Act, R. S. M. 1902, c. 159, ss. 2, 3—Hotel Keepers Act, R. S. M. 1902, c. 75 — Theft.*] — A livery stable keeper has no lien on a horse for its stabling and keep as against the real owner, when the horse was stolen and placed with him by the thief. Section 2 of the Stable Keepers Act, R. S. M. 1902, c. 159, which gives a livery stable keeper a lien on animals for stabling and feeding them, and the same rights and privileges for exercising and enforcing such lien . . . as hotel keepers may have or possess in virtue of the Hotel Keepers Act, R. S. M. 1902, c. 75, does not give the livery stable keeper the same right of lien which a hotel keeper has at common law in respect of goods or animals left in his charge by a guest who may have stolen the same, as the latter Act in its terms gives only a lien on the property of persons who may be indebted to the hotel k eper for board or lodging, whatever may be his rights independently of the Act. *Harding* v. *Johnston*, 18 Man. L. R. 625, 10 W. L. R. 712.

Manufacturer's lien — *Agreement — Lumber — Advances.*] — By agreement by which E. agreed to sell a specified quantity of lumber to be manufactured by him, to M., it was provided that the latter should have a lien thereon and upon the logs for the same for all advances on account made by him. Advances were made under the agreement, when S. assigned for the benefit of his creditors. None of the lumber had then been manufactured, and while E. had in stream or in booms his season's cut of logs, none had been set apart in order to carry out the agreement:—*Held*, that M. had not a lien upon the logs for his advances. *Randolph* v. *Randolph*, 4 E. L. R. 17, 3 N. B. Eq. 576.

Manufacturer's lien — *Construction of part of article—Lien on whole.*]—A carriage builder, who constructs a stationary top for an express waggon and fastens the same with bolts and nuts, has a lien on the whole structure, waggon and top, for the price of building the top. *Hardisty* v. *Carnell*, 40 N. S. R. 214.

Manufacturer's lien — *Logs sawn — Possession.*]—McK. entered into an agreement with M. to saw logs for the latter, and accordingly McK. set up his saw mill on the land of M. One portion of the lumber when sawn was removed from the mill by McK.'s men, and piled near it on M.'s land. McK. subsequently moved his mill to the land of a third person, on whose land M. had ob-

tained permission to have the lumber piled, and, after another portion of the lumber was sawn on this land, it was piled near McK.'s mill, on this land. McK. subsequently claimed a lien on all the logs sawn by him:—*Held*, that McK. had not sufficient possession of the lumber to be entitled to a declaration of lien. *McKenzie* v. *Mattinson, Mattinson* v. *McKenzie*, 40 N. S. R. 346.

Mechanics' liens — *See* MECHANICS' LIENS.

Physician's lien — *Last illness — Hypothec — Registration — Priorities.*]—The lien upon immovables in favour of a physician for his professional charges for attendance upon a person in his last illness is preferred to hypothecary claims, without regard to the date of registration of one or other. The formality of registration is with a view to the publicity of the lien, and not the ascertainment of its rank by order of date. As long as it is registered within the time prescribed, the general rule of preference of liens over hypotheca is applicable. *Duval* v. *Grant*, 33 Que. S. C. 320.

Possession of part of manufactured article — Repairs — Loan. *Jefferson* v. *Melsaac*, 40 N. S. R. 469*n*.

Railway employee — *Manual labour — Wages — Arrears — Time — Computation.*]—A person employed by a railway company at work to keep the track open is a railway employee engaged in manual labour within the meaning of Art. 2009, No. 9, C. C.—2. The privilege given upon immovables in the above article is for arrears not exceeding three months, as specified in regard to the like privilege on movables in Art. 2005.—3. The term of three months aforesaid is computed and runs back from the date of the seizure of the immovables. *Morse* v. *Levis County Rw. Co.*, 28 Que. S. C. 178.

Railway employees — *Manual labour — Wages — Motormen, conductors, and carters — Seizure of tramway — Date of.*] — The motormen and conductors of the electric tramways and carters who carry materials, remove snow, etc., for the purposes of the operation of the tramways, are railway employees performing manual work, within the meaning of Art. 2009, C. C. Such employees have a lien upon the tramway and its branches for their wages for three entire months, without regard to the date of the seizure or sale which has been made of the tramway. Judgment in 28 Que. S. C. 178, reversed. *Paquet* v. *New York Trust Co.*, 15 Que. K. B. 179.

Repair of ship — Possessory lien — Parting with possession — What amounts to — Floating ships on navigable waters — Caretaker for owner. *Hackett* v. *Coghill*, 2 O. W. R. 1077, 3 O. W. R. 827.

Repairs on launch—*Lien for storage—Launch sold on condition—Right of purchaser to incur lien—Liability of vendor to pay liens on re-taking possession—Costs.*]—Mackie gave certain promissory notes in payment of a launch and engine. The notes contained the condition that the right of ownership in the property should remain vested in the vendors until paid for in full. Mackie had the defendants make certain repairs on the launch and engine amounting to $9. He took the launch away and shortly after had defendant make further repairs thereon amounting to $24.24, when defendants requested Mackie to take the launch away and pay for the repairs $33.24. This Mackie failed to do, and defendants notified him that they would charge him $3 per month storage until defendant's claim was paid in full. Plaintiffs as assignees of original vendors sought to recover possession of their property. Defendants claimed a lien for $95.72, made up of $33.24 for repairs and balance for storage:—*Held*, that defendants lost their lien for the first repair, by allowing Mackie to take the launch out of defendant's possession. *Hartley* v. *Hitchcock*, 1 Stark 408, followed. That defendant had a valid lien for the second repairs, as Mackie was entitled to possession of the launch and as such was entitled to take it with him and have necessary repairs made when out of order. *Singer M'fg Co.* v. *London & S. W. Rw. Co.*, [1894] 1 Q. B. 833, and *Keene* v. *Thomas*, [1905] 1 K. B. 136 21 T. L. R. 2, followed. *Barton* v. *Baughan*, 6 C. & P. 674, distinguished. That the defendants held the launch as security for their account, not for the benefit of Mackie, therefore they acquired no lien for storage, as there can be no lien for storage except upon contract expressed or implied. *Somes* v. *British Empire*, 8 H. L. C. 337; *King* v. *Humphrey*, 2 Macl. & Y. 173, and *Bruce* v. *Everson*, 1 C. & E. 18, followed. That no costs should be allowed either party as the success in the action was divided. *Kendall* v. *Fitzgerald*, 21 U. C. R. 585, followed. *Canadian Gas Power* v. *Schofield* (1910), 15 O. W. R. 847.

Salary of commercial traveller — *Employer's goods.*]—A commercial traveller whose services are not required in the store, shop, or workshop in which his employer's goods are contained, has no privilege on the same for his salary. *Kent* v. *Rosenstein*, 28 Que. S. C. 95.

Servant's lien for wages — *Saisie-conservatoire of goods subject to lien—Proof of probable prejudice.*]—There is no provision of the law which gives a clerk the right "*de plano*" to attach the movable possessions of his employer on which he has a lien for his salary, without proving acts on the part of the employer which are likely to prejudice his lien. *Gladu* v. *Hurtubise*, 10 Que. P. R. 272.

Stumpage lien — *Manufacturer of lumber — Contract — Sale — Pledge.*]—The plaintiff, who was manufacturing lumber, agreed with the defendant that the lumber should be subject to the lien of the defendant for stumpage. The agreement, in effect, was the same as a common law lien, with this addition, that, as between the plaintiff and defendant, the lien existed whether the defendant was in possession of the lumber or not. The defendant sold a portion of the lumber and delivered it to the purchasers, and, subsequently, the plaintiff, in disregard of the defendant's lien, sold to a third party the remainder of the lumber. The plaintiff contended that the defendant by the wrong-

ful sale of part of the lumber destroyed his claim for stumpage and his lien, and was not entitled to recover anything:—*Held*, that, although by the sale the defendant lost his lien upon the property sold, his other rights under the contract remained unaffected, and his lien for his whole claim could be asserted upon the remainder of the property.—Distinction between "lien" and "pledge" pointed out. *Steeves* v. *Cowie*, 40 N. S. R. 401.

Threshers' Lien Act, 1908—*Non-compliance with—Notices—Attempt to take grain after sixty days — Expenses — Contract to thresh—Non-completion of work—Divisible contract—Recovery for work actually done—Counterclaim—Damages for non-completion—Pleading—Special damages—General damages—Interest—Demand — Notice — Judicature Act, 1907, s. 37 (2)—Rate of interest.*]—In October, 1909, the plaintiff entered into a contract to thresh the defendant's grain, consisting of wheat and oats, at 9 cents per bushel for wheat and 7 cents for oats. On the 10th November the plaintiff began the threshing and continued till the 17th, when his men declined to go on, and he was obliged to leave the threshing unfinished, although it might have been completed on that day if the work had been continued. The plaintiff never completed the work, and the defendant failed to secure any one else to complete it, though he endeavoured to do so, and, in consequence, the grain was not threshed. On the 22nd November the plaintiff sent the defendant a statement of the grain threshed, shewing the sum of $439.10 to be due. On this statement there was a written notice that "8 per cent. will be charged from the 1st of December until paid," and a printed notice that the defendant's grain would "be held by thresher's lien until payment of this account in full." A few days after this, the plaintiff sent a letter to the defendant demanding payment. On the 11th December the parties met, and the plaintiff offered to accept $400. The defendant agreed to this, and said he would settle the account on the following Wednesday. He did not do so, but on the 21st December he paid the plaintiff $100 "part pay on threshing account." On the 28th December the sheriff, at the instance of the plaintiff, served a notice on the defendant, under the Ordinance respecting Threshers' Liens, claiming a lien on the grain. On the 18th January, 1910, pursuant to notice given to the defendant, the plaintiff went with teams to the defendant's place to take the grain, but the defendant would not permit him to take it; and on the following day the sheriff, at the instance of the plaintiff, went with teams to take the grain, but was also unsuccessful:—*Held*, that the plaintiff was entitled to the amount claimed for threshing; the contract was not an indivisible one, and payment by the defendant was not intended to be conditional upon the threshing of all the crop. But the plaintiff was under obligation to complete the threshing; he contracted to do so; and, having failed, he must suffer the consequences. As the defendant claimed only general damages by his counterclaim, evidence of special damages was inadmissible; and the amount to be allowed for general damages was that fixed by the parties themselves on the 11th December, viz., $39.10.—*Held*, also, that the plaintiff, by his account rendered, notice as to interest, and letter demanding payment, had complied with subsec. 2 of sec. 37 of the Judicature Act, 1907, and was entitled to interest from the 1st December, 1909; but at the rate of 5 per cent. only: R. S. C. 1906 c. 120, s. 3.—*Held*, also, that the plaintiff was not entitled to a declaration that he had a lien on the grain; whatever lien he had, under the Threshers' Lien Act, 1908, s. 1, expired after the lapse of 60 days from the completion of the threshing. The statute, being in derogation of the common law, must be strictly complied with. Neither the sending of the notice on the 22nd November, claiming a lien, nor the serving of the notice by the sheriff on the 28th December, was a compliance with the Act. There must be an actual "taking" of the grain within the 60 days. The mere statement that the plaintiff "hereby takes" the grain is not sufficient.—*Held*, also, that the expenses of the plaintiff's and the sheriff's trips to the defendant's place after the expiration of the 60 days could not be allowed against the defendant. *Elsom* v. *Ellis* (1911), 16 W. L. R. 373, Sask. L. R.

Thresher's lien on grain — *Measurements — Weights and Measures Act — Illegality — "Dealing."*] — The defendant contracted with the plaintiff to thresh his grain at a price per bushel. The quantity threshed was not measured with a Dominion standard measure, or weighed, but was subsequently ascertained by the defendant by cubic measurement:—*Held*, that so measuring the grain was not a "dealing" within the meaning of s. 21 of the Weights and Measures Act, which could relate back and render the contract void, and that the defendant was not therefore disentitled to a lien under the Threshers' Lien Ordinance. *Macdonald* v. *Carrigal*, 9 Man. L. R. 284, and *Manitoba Electric and Gas Light Co.* v. *Gerrie*, 4 Man. L. R. 210, considered. Judgment of Wetmore, J., 22 C. L. T. 345, reversed. *Conn* v. *Fitzgerald*, 5 Terr. L. R. 346.

Thresher's lien on grain — *Price of threshing other grain — Seizure of excessive quantity — Notice of claim of lien.*] — A thresher cannot, under the Threshers' Lien Act, 57 V. c. 36, maintain a lien on grain for the threshing of which he has been paid, to recover the price of a subsequent unpaid threshing. The plaintiff, by his notice put up on the granary, asserted his claim to a lien upon all the grain contained in it, which was worth about $86; but the Court found that the amount of the claim for threshing for which he could, under the Act, at the time of the posting of the notice, enforce a lien on such grain, if the proper steps were taken, was only about $25:—*Held*, that the quantity of grain which the plaintiff attempted to retain was unreasonably large for the amount owing, and that, under s. 2 of the Act, he had forfeited his right of retention of any of it. *Simpson* v. *Oakes*, 23 C. L. T. 54, 14 Man. L. R. 282.

Threshers' Lien Ordinance — *Assignment of earnings of machine — Seizure by assignees of grain threshed for third person — Nothing payable for threshing at time of seizure — Excessive seizure—Threshers' Employees Act, 1909 — Illegal seizure*

and trespass — Damages.]—The plaintiff's grain on his farm was seized by the defendant, purporting to be assignees of C., who had threshed the grain for the plaintiff, and who was, as the defendants alleged, entitled to a lien on the grain under the Threshers' Lien Ordinance. At the time of the seizure only $38.80 was owing by the plaintiff to C., and that sum was, by agreement between the plaintiff and C., not then payable. The alleged assignment to the defendants was after this agreement. It was a general assignment of all earnings of a threshing machine used by C. in threshing the plaintiff's grain:—*Held*, that the defendants had no legal right to make the entry and seizure; and, the defendants' seizure being for $190, it was, at all events, for an excessive amount, and illegal.—There is no authority under the Ordinance to seize any quantity of grain and claim a lien thereon without ascertaining positively the amount owing and also the quantity of grain seized.—*Quære*, whether a thresher's lien could be considered as assigned by virtue of a general assignment of earnings.—*Semble*, also, that the seizure was illegal by reason of the provisions of the Threshers' Employees Act, 1909.—*Held*, also, that the plaintiff was entitled to substantial damages; the annoyance caused to him and the injury to his credit and reputation by the seizure were to be considered. *Semple* v. *Sawyer-Massey Co.* (1910), 13 W. L. R. 428.

Threshers' Lien Ordinance — *Contract — Construction — Contract performed in part — Right to payment for part performed.*]—The defendant agreed to thresh the plaintiff's whole crop of grain. The contract was oral, and there was no specific provision that the payment was to be conditional upon the threshing of the whole crop. The defendant threshed only part of it, and, not having been paid for what he did, seized the plaintiff's grain when he was marketing it, asserting a lien under the Threshers' Lien Act, R. S. M. 1902, c. 167:—*Held*, that the defendant was justified under the statute in making the seizure; upon the proper construction of the contract, the promise of one party (not the performance) was the consideration for the promise of the other, and payment was not intended to be conditional upon the threshing of the whole crop. — Judgment of Locke, Co.C.J., reversed. *Hollingsworth* v. *Lacharitie* (1910), 13 W. L. R. 492.

Woodman's lien — *Actions to enforce —Time for filing liens — "Last day's labour or services" — Termination of engagement — Hiring by month — Hiring by day —Personal judgment for wages — Set-off.*] —*Held*, that plaintiffs did not file their liens within 30 days after actual work ceased. *Heaney* v. *Lobley*, 11 W. L. R. 545.

Woodman's lien — *Collusion — Fraud —Appeal — Attachment — Demand—Service — Sheriff's fees.*]—In proceedings under the Woodman's Lien Act, 1894, an order allowing the claimants' lien will be set aside if the evidence discloses an attempt on the part of the claimants acting in collusion with the defendant to defraud the owners, notwithstanding that the Judge in the Court below has found that the evidence established the claimants' lien. Under s. 6 of the Act there must be a demand of the specific amount due before the issue of the attachment. Where attachments for three claims are served by the sheriff at the same time and place, the sheriff is entitled to full fees, including mileage, on each writ. *Murchie* v. *Fraser*, 36 N. B. R. 161.

Woodmen's lien — Enforcement — Agreement to give time — Waiver—Condition. *Munroe* v. *Cameron* (Y.T.), 6 W. L. R. 703.

Woodman's lien — *Enforcement — Saisie-conservatoire.*] — One who cuts and piles wood pursuant to a contract for getting it out, has a lien on the wood for the price of his work under Art. 1994c, C. C.—A creditor who has a lien on a movable may, in general, cause it to be seized by way of *saisie-conservatoire* to assure the exercise of his right. *Ross* v. *Saint-Onge*, 14 Que. K. B. 478.

Woodman's lien — *Lien of married woman for wages as cook — Contract with husband — Married Women's Property Act —Woodmen's Lien Act.*]—A contract by a married woman with her husband to cook in the lumber woods for a crew of men whom her husband had engaged to get lumber for a third person, under an agreement at a fixed price per thousand, off the land of the third person, who was to furnish the supplies, is not a valid contract under the Married Women's Property Act, C. S. N. B. 1903 c. 78, and can not be enforced as a lien under the Woodmen's Lien Act, C. S. N. B. 1903 c. 148. *Patterson* v. *Bowmaster*, 37 N. B. R. 4.

Woodman's lien — *Lumber.*]—By the Woodman's Lien for Wages Act, B. C., no lien is given to saw-mill men, but only to those engaged in getting timber out of the forest. *Davidson* v. *Frayne*, 9 B. C. R. 369.

Woodman's lien — *Notice—Necessity for.*]—The notice which a woodman must give to a contractor in order to be able to maintain his lien upon the wood which he has cut, is not necessary when such contractor has recognized in writing the debt due to the woodman, and has given him an order for payment upon the owner of the wood. *Harvey* v. *Harvey*, 19 Que. S. C. 153.

Woodman's lien — *Notice of lien — Effect—Owner of limits.*]—A person who has done work for the jobber of a lumberman, and given the notice required by Art. 1994c, C. C., is a creditor of the latter. *Rhéaume* v. *Batiscan River Lumber Co.*, 23 Que. S. C. 71.

Woodmen's lien — *Notice to owner— Saisie-conservatoire.*]—In the case of the lien given by Art. 1992 c, C. C., a woodcutter who works for a contractor cannot, before the owner of the wood has received the prescribed notice, issue a writ of *saisie-conservatoire* by virtue of his lien.—That lien having no legal existence before the owner of the wood receives the prescribed

notice, the seizure of the wood is premature, illegal, and void. *Houle* v. *Couture*, 8 Que. P. R. 398.

Woodman's lien — *Statute — Limitation to wage-earners — Exclusion of contractors — Insolvency — Time for filing of lien — Saisie-conservatoire — Identification of property — Property passing.*] — The plaintiff, a sub-contractor under the defendant, made a certain number of ties during the winter of 1901-2. The defendant had these ties made for one S. The plaintiff, not having been paid, issued a writ of *saisie-conservatoire* against the defendant, and seized all the wood which the defendant had in hand for S., which wood was in a boom upon a river, without making S. a party. The latter intervened and contested the seizure:—*Held*, that the statute which creates a lien constitutes an exception to the common law and must receive a strict interpretation; it is for the person asserting the lien to establish that it exists by reason of the special statute creating it. 2. The lien given by Art. 1994 (c), C. C., applies only to wood-cutters or labourers and extends only to the payment of their wages, and does not apply to contractors or sub-contractors in respect of payment of their contract price or advances or disbursements made by them. 3. One who, under a contract or sub-contract, cuts wood upon his own property, converts it by his work into ties, logs, etc., and delivers it to the person with whom he has contracted, cannot claim in respect of this wood the lien given by Art. 1994 (c), even when the value of the wood is trifling. 4. In the case of insolvency, the lien of the vendor must be asserted within 30 days after the delivery of the wood; a *saisie-conservatoire* issued after the expiry of this time cannot be maintained. 5. The lien of the vendor can only be exercised when the goods sold remain in the possession of the purchaser in the same state, and when the identity can be stated in a clear and certain manner. 6. The affixing of the trade mark of dealers in wood upon logs which have been got out for them by contractors, is a sufficient taking of possession and a proof of the transfer of the property in the logs. *Dallaire* v. *Gauthier*, 24 Que. S. C. 495.

Woodman's lien — *Subject of lien — Hire of horse.*] — The lien given by Art. 1994c, C. C., is given only to a workman who has worked in getting out the wood, and he has it only for his wages; it is not given to one who is merely a creditor for the hire of a horse employed to cart the wood. *Rheaume* v. *Batiscan River Lumber Co.*, 23 Que. S. C. 166.

Woodmen's Lien Act — "*Logs and timber*" — *Contractor — Bona —Estoppel.*] —The appellant, under a contract in writing made by him with the respondent, for an agreed price per thousand, cut upon the land of the respondent a quantity of logs, and hauled them to a portable mill upon the land, where they were manufactured into deals, planks, &c. The work was performed in part by the appellant himself with his team, though there was no stipulation to that effect between the parties, but chiefly by labourers and teams, by the terms of the contract hired and paid by the appellant. A portion of the amount due to the appellant under the agreement being unpaid, he caused an attachment to be placed upon the above mentioned deals, planks, &c., claiming a lien thereupon by virtue of the Woodmen's Lien Act, 1894:—*Held*, that the words "logs and timber," as employed in s.-s. 1 of s. 2 of the Act, were not intended to include deals and other manufactured lumber; also, that the evidence shewed the appellant to be a contractor, and not within the class of persons for whose benefit, by s. 3, liens were established; also, per Hanington, J., that the respondent by giving a bond in order to secure the payment of the amount claimed if the lien should prove effectual, and thus obtaining a release of the deals, &c., attached, did not estop himself from disputing the validity of the lien. *Baxter* v. *Kennedy*, 35 N. B. R. 179.

Woodmen's Lien for Wages Act, R. S. B. C. 1897 c. 194, s. 3—"*Woodman*"—*Hire of horses.*]—The defendant hired a team of horses from the plaintiff for certain logging operations, and, on default of payment for the use of the horses, which were driven by a man employed by the defendant, the plaintiff filed a lien against the logs for the amount due:—*Held*, that the plaintiff was not a woodman within the meaning of the statute. *Muller* v. *Shibley*, 8 W. L. R. 42, 13 B. C. R. 343.

Woodmen's liens — *Action to enforce lien — Promissory note — Acceptance for wages — Suspension of lien and right of action during currency of note — Premature action—Woodmen's Lien Act.*]—On the day before the maturity of a promissory note accepted by the plaintiff from the defendants in payment for his services in getting out logs for the defendants, the plaintiff filed a lien under the Woodmen's Lien Act, and brought this action, in which he sought to enforce the lien and to recover a personal judgment against the defendants for the amount of wages for which the note was given:—*Held*, that the plaintiff, before the maturity of the note, had no cause of action either for wages or for the enforcement of the lien, and the action therefore failed. *Wilson* v. *Doble & Hartnell* (1910), 13 W. L. R. 290.

Woodmen's liens — *Lumberman's privilege — Conservatory attachment — Who can make the necessary affidavit and what it should contain — C. C. P. 955, C. C. 1994*, c.]—(Confirming Carroll, J.). 1. The affidavit required in the case of a lumberman who attaches the cut for wages due him, can be sworn to by the plaintiff, by the defendant or by any one else.—The affidavit should indicate 1. The amount of wages due; 2. Default or refusal to pay such wages; 3. The notice given the proprietor in conformity with Art. 1994c.; 4. The fact that the lumber cut and manufactured is still in the possession of the third party for whom the lumberman did the work. *Lebrun* v. *Baie des Chaleurs Mills Co.*, 11 Que. P. R. 15.

Woodmen's liens — *Time for filing — Woodman's Lien for Wages Ordinance — Last day falling on a "holiday" — Day of general mourning — Proclamation by Governor-General — Closing of offices — Inter-*

pretation Ordinance — Judicature Ordinance, Rule 554 — Personal judgment.] — Claims of lien under the Woodmen's Lien for Wages Ordinance were filed on the 21st May, 1910, the 20th May being the last day for effective filing under secs. 6 and 7 of the Ordinance. By sec. 21 of the Interpretation Ordinance, if the time limited by any Ordinance for any proceeding, or the doing of anything under its provisions, expires or falls upon a holiday, the time so limited shall be extended to and such thing may be done on the day next following:—*Held*, that the 20th May, being the day proclaimed by the Governor-General as a day of general mourning for King Edward VII., was not a "holiday" within the meaning of the Interpretation Ordinance nor of the Dominion Interpretation Act.—*Semble*, that, if it had been a holiday, the plaintiffs would have been entitled to maintain their liens by filing on the 21st.—*Held*, also, that Rule 554 of the Judicature Ordinance did not apply, because the reference in that rule to "Sunday or other day on which the offices are closed" means "or other day on which the offices are legally closed."—The plaintiffs' actions to enforce their liens were dismissed, but the plaintiffs were awarded personal judgments for the amounts claimed, under the amending Ordinance of 1909. *Peterson* v. *Drabeson, Soholt* v. *Drabeson* (1910), 15 W. L. R. 87.

LIEUTENANT-GOVERNOR IN COUNCIL.

See CLUB — COMPANY — MUNICIPAL CORPORATIONS — PARTIES—SCHOOLS—WAY.

LIFE ESTATE.

See DEED—WAY.

LIFE INSURANCE.

See INSURANCE.

LIFE OF JUDGMENT.

See RECEIVER.

LIFE RENT.

See ATTACHMENT OF DEBTS.

LIFE TENANT.

See SUBSTITUTION.

LIGHT.

See ARCHITECT — EASEMENT—INJUNCTION — VENDOR AND PURCHASER.

LIMITATION OF ACTIONS.

1. REAL PROPERTY LIMITATIONS, 2532.
2. OTHER CASES, 2556.

1. REAL PROPERTY LIMITATIONS.

Acquisition of title by possession—Tenancy—Assessment rolls — Rent—Ejectment. *Coulter* v. *Rockwell*, 6 O. W. R. 537.

Action for possession — *Damages for trespass — Injunction—Occupation by permission of owner—Payment of taxes—Road-work performed—Entry by owner—Lease—Evidence—Real Property Limitation Act—Allowance for taxes—Reference to Master—Costs.*]—Plaintiffs brought action for trespass and to have it declared that they were owners of the land in question, entitled to peaceable and quiet possession and for an injunction. Defendant set up a claim to the land by prescription.—Lloyd, C., *held*, that the acts of defendant upon and in reference to the land were in recognition of the right of true legal owner; that the occupation of defendant was not exclusive of owner, but by his sanction and permission, and the Statute of Limitations never began to run in defendant's favour. Injunction granted, and possession ordered to be given forthwith. Damages assessed at $50, and costs allowed plaintiffs. *Dom. Improv. & Devel. Co.* v. *Lally* (1910), 17 O. W. R. 151; 2 O. W. N. 155.

Acts of ownership—*Evidence.*]—Co. C. Judge *held*, that plaintiff was owner of certain lands in question and granted injunction restraining further trespass by defendant but refused plaintiff damages for trespass and ordered each party to pay their own costs. Both parties appealed. — Divisional Court *held*, that as the evidence did not clearly shew in what manner the plaintiff received her title, the above judgment should be varied by striking out that part which declared plaintiff owner of the land, and in lieu thereof there should be inserted a clause to the effect that the plaintiff was entitled to possession thereof as against the defendant. — Both appeals dismissed with costs. *Cosbey* v. *Detlor* (1911), 18 O. W. R. 479, 2 O. W. N. 698.

Acts of possession — *Portion of land uncultivated and unfenced—Portion cultivated and fenced—Sufficiency of possession—Land Titles Act, s. 44—Effect of certificate of title—Imperial Limitations Act, 1874.*]—The action was to recover possession of land. The defendant pleaded that he was in possession, but did not specially plead the Statute of Limitations; — *Held*, that Marginal Rule 254 of the English Judicature Acts is in force in Alberta, there being no Alberta Rule covering the same subject, and under that Rule it is not necessary to do anything more than plead possession to set up the statute.—Part of the land of which the plaintiff alleged that he was in possession (the south part) was cultivated when the defendant entered in 1883, and fenced in 1892, and he continued to plough and crop that part up to the time of the action and extended the area somewhat. The north part was

not under cultivation; the defendant said he kept it for pasture, and that there was still some brush upon it: he admitted that strangers' animals ran at large to pasture upon this part.—*Held*, as to the north part, that the acts of ownership and possession performed by the defendant were not sufficient to enable him to secure the protection of the Statute of Limitations.—*McConaghy* v. *Denmark*, 4 S. C. R. 609, *Sherren* v. *Pearson*, 14 S. C. R. 585, and *McIntyre* v. *Thompson*, 1 O. L. R. 163, followed.—*Held*, that the defendant's possession of the strip to the south was sufficient to enable him to take advantage of the statute if he was otherwise entitled to do so.—The plaintiffs were the registered owners of this strip by virtue of a certificate of title issued under the Land Titles Act in 1894, which was still the existing certificate of title. Section 44 of the Land Titles Act provides that every certificate of title granted under the Act shall, while in force, be conclusive evidence in all Courts, as against the Crown and all persons, that the person named therein is entitled to the land, subject to certain exceptions not important here. By s. 2 of c. 31 of the Consolidated Ordinances, 1898 (continued in force in Alberta by virtue of the Alberta Act), the provisions of the Real Property Limitation Act, 1874 (Imp.), are declared to be in force and to have been in force in the Territories since the passing of that Act. The Imperial Act provides that after its commencement, no person shall make an entry or distress, or bring an action or suit, to recover any land or rent but within twelve years next after the time at which the right shall have first accrued, etc. Section 9 of the same Act introduces the provisions of 3 & 4 Wm. IV. c. 27, s. 34 of which enacts that at the determination of the period limited by that Act to any person for making any entry or distress or bringing an action, the right and title of such person shall be extinguished:—*Held*, applying and following *Belize Estate and Produce Co.* v. *Quilter*, [1897] A. C. 367, that the Land Titles Act and Statute of Limitations stood together; and, the defendant having shewn possession of the south strip for more than 12 years, the plaintiff's action, brought after the expiry of the 12 years, failed. The Statute of Limitations is still effective, in a proper case, to protect the actual possession of a person who has been in continuous adverse possession of land for 12 years or more, even against a person who appears to be the registered owner of that land under the Land Titles Act.—*Quære*, whether s. 44 of the Land Titles Act overrides s. 34 of 3 & 4 Wm. IV. c. 27. That question did not arise, as the defendant did not claim a declaration that the plaintiff's title was extinguished.—*Held*, also, that, although the plaintiffs had succeeded as to the larger portion of the land, there were circumstances which disentitled them to costs against the defendant; and there should be no costs to either party. *Harris* v. *Keith*, 16 W. L. R. 455. Alta. L. R.

Agreement to purchase — Possession of wrong lot—Acquisition of title — Ejectment—Future action. *Ferguson* v. *McNulty*, 2 O. W. R. 657.

Boundary — *Absence of enclosure — Occasional acts of ownership — Evidence — Rejection.*]—In a question of boundary between two persons claiming under a paper title, where there has been no enclosure, occasional acts, which would be merely acts of trespass if done by one not the owner, do not operate to give a statutory title; and evidence of such acts offered by the defendant was in this case properly rejected. *Wason* v. *Douglas*, 21 C. L. T. 521.

Character of possession — Occupation of house as compensation for services. *Coulter* v. *Coulter*, 4 O. W. R. 65.

Colourable title — *Possession — Evidence.*]—The possession of a part of land claimed under colour of title is constructive possession of the whole, which may ripen into an indefeasible title, if open, exclusive, and continuous for the whole statutory period. Carrying on lumbering operations during successive winters with no acts of possession during the remainder of each year does not constitute continuous possession. And it is not exclusive where other persons lumbered on the land, continuously or at intervals, during any portion of such period. *Wood* v. *Leblanc*, 24 C. L. T. 266, 34 S. C. R. 627.

Conditions surrounding possession —*Precariousness—Actual possession.*]—It is not necessary, for the purpose of an action for repossession, that the possession by the plaintiff should contain all the elements prescribed by Art. 2193 C. C.; it is sufficient if the plaintiff establishes that he had actual possession and that he has been deprived of it by violence and trespass on defendant's part.—There is sufficient loss of possession when a boundary fence has been moved in such a way as to enclose part of the land in dispute. *Couture* v. *Brouillette* (1899), 37 Que. S. C. 521.

Constructive possession — *Acts of ownership—Colourable title.*]—McI. by his will devised sixty acres of land to his son, charged with the maintenance of his widow and daughter. Shortly afterwards the son with the widow and other heirs conveyed away four of the sixty acres, and nearly thirty years later they were deeded to McD. Under a judgment against the executors of McI., the sixty acres were sold by the sheriff, and fifty, including the said four, were conveyed by the purchaser to McI.'s son. The sheriff's sale was illegal under the Nova Scotia law. The son lived on the fifty acres for a time, and then went to the United States, leaving his mother and sister in occupation until he returned twenty years later. During this time he occasionally cut hay on the four acres, which was only partly enclosed, and let his cattle pasture on it. In an action for a declaration of title to the four acres:—*Held*, that the occupation by the son under colour of title of the fifty acres was not constructive possession of the four which he had conveyed away, and his alleged acts of ownership were merely intermittent acts of trespass. Judgment in *McDonald* v. *McIsaac*, 38 N. S. R. 163, affirmed. *McIsaac* v. *McDonald*, 37 S. C. R. 157.

Contract for sale of land—Covenant for good title—Breach — Action for—Dam-

ages—Money charged on land—Written contract—Parol variation—Evidence. *Wilson* v. *Graham* (Man.), 7 W. L. R. 278.

Conveyance of land — Security — Agreement — Default — Redemption—Sale —Possession. *Patterson* v. *Dart*, 8 O. W. R. 800, 10 O. W. R. 79, 11 O. W. R. 241.

Contract of sale or gift — *Action to set aside—Period of limitation.*] — The period of 10 years within which an action to set aside a contract of sale or gift, resulting from a binding agreement, must be begun, according to the terms of Arts. 816 and 1537, C. C., is absolute, and runs from the date of the instrument, without regard to the time agreed upon for payment of the price or performance of the obligations. *Galarneau* v. *Lefebvre*, 27 Que. S. C. 466.

Court of Equity — *Declaratory decree —Cloud on title—Injunction.*]—A Court of equity will not grant a decree confirming the title to land claimed by possession under the Statute of Limitations, nor restrain by injunction a person from selling land of another. *Miller* v. *Robertson*, 24 C. L. T. 205, 35 S. C. R. 80.

Covenant in mortgage — Principal—Acceleration of payment—Commencement of statutory period. *McFadden* v. *Brandon*, 2 O. W. R. 623, 6 O. L. R. 247.

Crown grant.]—Where defendant failed to establish adverse possession, he was allowed $1,016 for expenditure on the property and plaintiff was given judgment for $1,080 for *mesne* profits. *Angle* v. *Musgrave*, 7 E. L. R. 83, affirmed *Ib.* 457.

Description — *Possession beyond boundaries—Deed—Plan—Length of possession.*]—In June, 1868, by deed of gift, P. granted to his son F. an emplacement, described by metes and bounds, and stated to have thirty feet frontage, "*tel que le tout est actuellement et que l'acquereur dit bien connaitre*," declaring, in the deed, that the donation had actually been made in 1860, although no deed had been executed, and that since then F. had been in possession as owner:—*Held*, that the deed in 1868 operated as an interruption of prescription and limited the title to the thirty feet of frontage as therein described. A similar description in a deed of 1885, by F. to the plaintiff's wife, which made a reference to the number on a plan, thereby implying a greater width, left the true limits of emplacement subject to a determination according to the title held by the plaintiff's auteur, which granted only thirty feet of frontage; that, by the registered title, the plaintiff was charged with either actual or implied notice of this fact; and that, consequently, he had not, in good faith, possessed more than the thirty feet of frontage under this deed, and could not invoke an acquisitive prescription of title to the disputed six feet by ten years' possession thereunder; and further, that no augmentation of the lands originally granted could take place in consequence of the cadastral description of the emplacement in question. The words "*tel que le tout est actuellement et que l'acquereur ait bien connaitre*," used in the deed of gift, cannot be interpreted in contradiction of the special description that precedes them, and can only be construed as extending "*dans les limites ci-dessus décrites*." A prescriptive title to lands beyond the boundaries limited by the prescription in the deed of conveyance can only be acquired by thirty years' possession. *Chalifour* v. *Parent*, 21 C. L. T. 332, 31 S. C. R. 224.

Ejectment — Landlord and tenant — Payment of civic taxes—Occupant paying taxes on land for the owner by agreement—Payments construed as rent—Tenancy at will —New trial. *Sullivan* v. *Sweeney*, 4 E. L. R. 492.

Enclosing wild land — Occupancy — Knowledge. *Reynolds* v. *Trivett*, 2 O. W. R. 486, 3 O. W. R. 463.

Evidence as to right of property inadmissible—*Judicial admission — Acknowledgment on defendant's part of plaintiff's possession—C. P. 1045, 1066, C. C. 1245.*]—In deciding a possessory action the Judge should only consider the actual disturbance about which plaintiff complains; having but the fact of possession to determine, he should reject, as useless, all attempts to establish possession by evidence which, in the end, would merely prove ownership.—The Judge should give to plaintiff the benefit of defendant's admission and draft a judgment in which the plaintiff's possession is confirmed. —The mere acknowledgment of plaintiff's possession disposes of all other grounds of defence in a plea to a possessory action. *Paul* v. *Paul* (1910), 12 Que. P. R. 151.

Exchange of lands—*Change of boundary line—Executed agreement—Removal of fence — Enforcement against successors in title — Deed — Mistake in description.*] — The predecessors in title of the plaintiff and defendant, for the purpose of "squaring" their respective lots of land, entered into an oral agreement to make a change in the direction of the boundary line between them, and to exchange the triangular pieces of land lying between the old line and the new. The arrangement so entered into was completed by the erection of a new fence on the substituted line, and by the making of improvements. By an inadvertence in drawing the plaintiff's deed, the original instead of the amended description was followed:—*Held*, that both the plaintiff and defendant were bound by the arrangement entered into by their predecessors in title; that the defendant had acquired equitable rights which the Court would protect; and that, irrespective of the Statute of Limitations, the fact that, at the time of the conveyance to the plaintiff, the land claimed was in the adverse possession of another party, was sufficient to prevent her from recovering. *Holesworth* v. *Fitch*, 37 N. S. R. 143.

Gift of land — *Possession — Exclusive occupation for 20 years—Acts of ownership.*]—A gift of land by a father to his son, accompanied by actual delivery of possession, and followed by a continuous and exclusive possession by the son extending over a period of 20 years, confers a title upon the son under the Statute of Limitations, which will be bound by a judgment recovered against him, and will pass to the purchaser

at a sheriff's sale.—The operation of the statute will not be suspended by acts of the father, such as the pasturing of sheep and the occasional cutting of fire wood, where the acts are done with the assent of the son and not with the intention of interfering with the possession, or in the way of rental for the property. *Kaulbach* v. *Cook*, 39 N. S. R. 500.

Grant to uses — *Deed of appointment —Intervening adverse possession.*]—The purchaser of land in 1870 had it conveyed by the vendor to grantees named by him, to hold to such uses as the purchaser should by deed or will appoint, and, in default of and until appointment, to the use of the grantees. The purchaser put his mother in possession of the land, and she remained in possession till her death in 1878, her two daughters, the defendants, living with her, and they after her death continued in possession down to the time of the bringing of this action in 1897, no rent having been paid, nor any acknowledgement of title made. In 1892 the purchaser, in alleged exercise of the power, executed a deed of appointment in favour of his solicitor, who, on the following day, conveyed to him in fee simple. He died in 1894, having devised the land to the plaintiffs:—*Held*, that the grantees to uses took an estate in fee simple, which was barred before the execution of the deed of appointment, and that that deed did not give a new starting point to the statute, the estate appointed not being, within the meaning of the statute, a future estate coming into existence at the time of the exercise of the power. Judgment in 30 O. R. 504, 19 C. L. T. 169, reversed; Boyd, C., and Street, J., dissenting. *Thuresson* v. *Thuresson*, 21 C. L. T. 550, 2 O. L. R. 637.

Interruption of prescription—*Action —Want of jurisdiction—Transfer to another district.*]—There is no interruption of prescription by an action when the service of process is set aside; but the transfer of the action to another district for want of jurisdiction does not prevent the action being an interruption of prescription. *Grenier* v. *Connolly*, 7 Que. P. R. 184.

Interruptive acknowledgment — *Evidence.*]—The company claimed prescriptive title to a part of the bed of a small river on which D., the respondents' *auteur*, had been a riparian owner. D. had leased lands on the banks of the river to the company which, it was alleged, included the property in dispute. The only evidence as to interruption of prescription consisted of a letter by the company to D. enclosing a cheque in payment for "use of your interest in Cap Rouge River this year," with an endorsement by D. acknowledging receipt of the funds "with the understanding that the navigation of the river is not to be prevented":—*Held*, reversing the judgment appealed from 13 Ex. C. R. 116, Girouard and Idington, JJ., dissenting, that the memorandum was too vague to serve as an interruptive acknowledgment sufficient to defeat the title claimed by the company. *Cap Rouge Pier, Wharf & Dock Co.* v. *Duchesnay* (1910), 44 S. C. R. 130, 31 C. L. T. 257.

Land between two city houses—*Title by possession—Trespass—Acts of ownership —Real Property Limitation Act—Acts of encroachment.*]—An appeal from a judgment of Wentworth County Court, holding that plaintiff had acquired title by possession to the lands in dispute.—Divisional Court, *per* Mulock, C.J.Ex.D., *held*, that open, visible, exclusive, unequivocal in its nature, and continuous possession had to be established by the plaintiff to extinguish a paper title, under the Statute of Limitations, and failing in any one of these requisites, the plaintiff's claim failed.—*Per* Middleton, J.:—The possession must possess those characteristics which have been determined to be essential to a possession claimed by a squatter as against the true owner, isolated acts are not sufficient.—Appeal allowed, action dismissed with costs throughout. *Nixon* v. *Walsh* (1911), 19 O. W. R. 422, 2 O. W. N. 1218.

Landlord and tenant — *Limitation of Actions — Real Property Limitation Act — Tenant paying no rent — Payment of taxes —Insufficiency to prevent statute running— Mortgage — Costs — Counterclaim — Right of way.*]—The patent from the Crown granting the lands to defendant Finley issued on 5th August, 1870. Thereafter Finley built on the lands a row of 4 houses, one of which, that now in question, defendant Joyce entered into possession of about 1st November, 1875, as tenant of Finley, at a rental of $150 a year. . . . Joyce had been tenant of Finley in another house for some years. . . He had fallen much in arrear for the rent. . . . These arrears he seems to have been paying up for some years after his removal, but he never, unless by way of paying the taxes and water rates, which are collected as taxes in Ottawa, where the land was, paid any rent for the new house. The payment of taxes being compulsory, it was impossible to attribute their payment over so many years to a casual conversation of temporary arrangement, and could not operate so as to prevent the bar of the Statute of Limitations; see *McCowan* v. *Armstrong*, 3 O. L. R. at p. 107, 1 O. W. R. 28. The action as against Joyce dismissed in respect of the land set out in his statement of defence. *Brennan* v. *Finley*, 5 O. W. R. 251, 9 O. L. R. 131.

Mineral lands—Reservation in deed — Estoppel — Tenancy — Payment of taxes. *Dodge* v. *Smith*, 1 O. W. R. 46, 803, 2 O. W. R. 561.

Mortgage — *Covenants — Payment on account.* — Action for foreclosure:—*Held*, that a payment of $100 operated under s. 22 above as a bar to the Statute of Limitations. Foreclosure decree to go. *Robinson* v. *Robinson* (1900), 14 O. W. R. 155. Circumstances disclosed later having justified the reception of further evidence, the hearing was enlarged that such evidence might be taken by the trial Judge. *Ibid*, 14 O. W. R. 1000, 1 O. W. N. 185.

Mortgage — *Interest — Default — Acceleration.*]—Under a mortgage containing the statutory provision that in default of the payment of the interest the principal shall become payable, default in payment of interest has the effect of making the principal payable as if the time for payment had fully come, and a right of action therefor

then arises, and the Statute of Limitations then begins to run. Judgment of Street, J., 6 O. L. R. 247, 2 O. W. R. 623, affirmed. *McFadden* v. *Brandon*, 24 C. L. T. 393, 8 O. L. R. 610, 4 O. W. R. 349.

Mortgage — Interest — Lease — Overholding tenant—Tenancy from year to year —Redemption — Account — Costs. *McWilliam* v. *McWilliam*, 3 O. W. R. 239.

Mortgage — *Payment of insurance premium — Interest — Bond — Absentee.*]—J. G. borrowed money from C. in 1877, and gave as security therefor his own bond and a mortgage made by A. G. An action on the bond and for foreclosure and ejectment in respect of the mortgaged premises was begun in 1900. The last payment of interest on the bond and mortgage had been made in 1879, and no payment of principal was ever made. The insurance clause in the mortgage was in the usual terms, and concluded as follows: "And in default thereof that the said (mortgagee), his heirs, executors, administrators, and assigns, shall and may as required, effect, renew, and continue such insurance, and charge all payments made for or in respect thereof, with interest after the rate aforesaid, upon the said mortgaged premises." On the 5th September, 1883, B., the mortgagee's agent, paid to an insurance company $5, being the premium due on the 12th February, 1883, on a policy of fire insurance covering the premises, and charged the same to A. G., who in January, 1887, repaid it to B. There was no insurance on the property when this policy was taken out, nor was there any other insurance afterwards:—*Held*, that, when B. paid the $5, it became, under the terms of the mortgage, a part of the principal, and as such a charge on the land, and the subsequent payment by A. G. was a payment on account of principal, within twenty years, and it was not necessary for the mortgagee to do any act indicating an intention to add it to the principal. 2. That the plaintiffs were entitled to only six years' interest. 3. As C. was not in the province when the right of action accrued on the bond, he was entitled to the additional period allowed by s. 25 of R. S. N. S. c. 112 for one absent. *Cogswell* v. *Grant*, 21 C. L. T. 351.

Mortgage — *Payments on — Insurance premium — Entries in books—Acknowledgments in writing — Remedy on bond—Absentee.*]—A mortgage and bond given by G. to C. to secure the repayment of a sum of money were dated the 7th January, 1877. The last payment of interest was made in September, 1879. C. was absent from the province when the mortgage and bond were given, and did not return until 1880. The plaintiffs, as executors of C., on the 30th June, 1900, brought two actions: (1) to foreclose the mortgage and to recover the amount secured by the mortgage and bond; and (2) to obtain possession of the land. The only defence set up to both actions was that of the Statute of Limitations. Under one of the clauses of the mortgage the mortgagee was empowered to make payment of insurance premiums, in default of payment by the mortgagor, and "to charge such payments with interest at the rate aforesaid upon the mortgaged premises," but there was no provision, in terms, making the advance a part of the principal sum secured by the mortgage: —*Held*, that the effect of the provision was merely to make the advance a lien upon the land for its payment with interest, and was only in the nature of a further charge or additional mortgage. The repayment by the mortgagor of the amount advanced was not such a payment on account of the principal sum secured as would take the case out of the Statute of Limitations. An entry in the books of the solicitor for the mortgagee showing the payment of the amount advanced for insurance, and the subsequent repayment of the amount, was not sufficient evidence of an advance by and repayment to the mortgagee, such entries being consistent with the view that the solicitor advanced the money on his own account on the credit of the mortgagor. Renewal receipts for premiums of insurance, taken in connection with a clause in the policy making the loss, if any, payable to the mortgagee, were not acknowledgments in writing within s. 21 of the statute.—*Held*, also, following *Sutton* v. *Sutton*, 22 Ch. D. 511, and *Steward* v. *England*, [1895] 2 Ch. 820, that the limitation imposed by s. 21 of the Act applied as well to the remedy on the bond as to that under the mortgage against the land. *Cogswell* v. *Grant*, 21 C. L. T. 351, 34 N. S. R. 340.

Mortgage — Sale by mortgagees under power — Action by mortgagor to redeem— Possession — Legal estate — Notice of sale. *Campbell* v. *Imperial Loan Co.* (Man.), 6 W. L. R. 481.

Mortgage — *Trust — Possession — Tenant at will—Right of entry—Ejectment.*]—J. purchased and went into possession of the property in dispute in 1878; in 1879 he mortgaged it, and in 1880 conveyed the equity of redemption to B. without consideration. In 1887 (within 20 years of the commencement of this action), at the request of and for the benefit of J., the plaintiff paid and took an assignment of the mortgage, and B., also at the request of J., conveyed the equity of redemption to the plaintiff. J. and the defendant continued in possession down to the bringing of the action, and never paid any rent or anything on account of the mortgage: — *Held*, in an action of ejectment against the defendant, the successor in title of J., that the action was not barred by the Statute of Limitations, and the plaintiff was entitled to recover. *Stevens* v. *Jeffers*, 3 E. L. R. 471, 38 N. B. R. 233.

Mortgagee in possession — Acquisition of title—Vendor and purchaser. *Re Thomson & Stevenson*, 9 O. W. R. 625.

Mortgagee in possession for 10 years —Service of notice of sale on mortgagors after 10 years — Acknowledgment—Notice signed by agent — Redemption. *Shaw* v. *Coulter*, 5 O. W. R. 305, 6 O. W. R. 55.

Municipal corporations — *Cemetery —Deed of burial lot — Trespass—R. S. O. 1897, c. 223, s. 577.*]—The plaintiff was the widow of J., who was buried in lot 98, block 1, of the cemetery of the town of Palmerston, in 1884. The defendant municipality held the cemetery under ss.-ss. 8 and 9 of s. 490 of 46 V. c. 18 (O.), now R. S. O. 1897,

c. 223, s. 577. By deed, dated the 26th August, 1885, the defendant municipality conveyed to the plaintiff lot 98, habendum "to her and her heirs and assigns to and for her and their sole and only use forever." There were no other terms in the deed. In June, 1888, the defendant municipality caused the body to be removed from lot 98 and buried in some lot, now unknown, and sold lot 98 to the defendant H., whose deceased wife was buried in it on the 26th of that month, and the defendants, by deed dated the 19th June, 1888, similar in terms to that given to the plaintiff, conveyed the lot to H., who in June, 1889, erected a monument and put up an iron fence, both of which still remained. This action was brought for damages for trespass and removal of the body of the plaintiff's husband, for a declaration of title, and a *mandamus* to compel the defendants to remove the body of the wife of the defendant H. and to replace the body of J. At the trial, it having appeared impossible to discover the whereabouts of the body of the deceased J., the relief sought by *mandamus* was abandoned, the defendants undertaking to supply the plaintiff with another lot:—*Held*, assuming the deed to the plaintiff to be valid, and that it passed the fee, that the causes of action, were barred by the Statute of Limitations, the trespass having been committed more than six years before action, and the defendant H. having been in possession for more than ten years since his erection of the monument and the iron fence, which, within the authorities, were acts of ownership.—*Quære*, as to the validity of both deeds under the statute (R. S. O. c. 223), because they were simply conveyances in fee, without limitation or restriction, and therefore in violation of its provisions. *Stevenson* v. *Town of Palmerston & Hyndman*, 25 C. L. T. 147.

Nature of possession — *Acts of ownership.*]—The acts relied on in support of a claim to title by possession were that the claimant had sold the timber off the land in question; had afterwards cleared it, and had sowed and harvested one crop of wheat; had then for some years taken hay from it; and had then used it as pasture land. The land was not wholly enclosed, one end being bounded by a marsh, and through this marsh cattle could and did stray into it:—*Held*, that there had not been such possession as is necessary to bar the right of the true owner. *McIntyre* v. *Thompson*, 21 C. L. T. 109, 1 O. L. R. 163.

Nature of possession — Evidence—Exclusive possession. *Sims* v. *Seifert*, 3 O. W. R. 176.

Paper title undisputed — *Evidence — Real Property Limitation Act — Lease — Pleadings—Grant from Crown cures defects —Costs—17 O. W. R. 151, 2 O. W. N. 155.*] —Action for trespass, and to have it declared that plaintiffs were the owners of the land. —Boyd, C., at trial (1910), 17 O. W. R. 151, 2 O. W. N. 155, *held* that the acts of defendant upon and in reference to the land were in recognition of the right of true legal owner; that the occupation of defendant was not exclusive of owner, but by his sanction and permission, and the Statute of Limitations never began to run in defendant's favour. Injunction granted, and possession ordered to be given forthwith. Damages assessed at $50, and costs allowed plaintiffs.—Court of Appeal *held*, that in view of all the circumstances of the case, and of the fact that the paper title was not questioned, judgment of Boyd, C., affirmed.—*Per* Garrow, J.A., that even where the use of land originates in a trespass, the Statute of Limitations does not run unless the possession is actual, exclusive, continuous, open or visible and notorious.—*Per* Meredith, J.A.: That the expiry of a writing could not prevent a possession of like character by mutual consent from being continued as to start the Statute of Limitations to run. Points not raised in pleadings are not to be considered by the trial Judge or on appeal. A license and grant from the Crown before action brought cures defects. *Dominion Improvement & Development Co.* v. *Lally* (1911), 19 O. W. R. 462, 2 O. W. N. 1224.

Parent and child—*Tenancy at will—Right of entry—Commencement of statute—Caretakers—Entry by consent — Assessment —Agreement—Concealment of facts—Family arrangement — Will — Devise — Charge — Election—Mistake.*]—In 1879 the defendant was put by his father in possession of a farm of which the title was in the father, who said he had bought it for the son. The defendant continued in possession until his father's death in 1900, occupying for his own benefit, taking the profits, paying no rent, and giving no acknowledgment of title; he also made improvements at his own expense. There was no evidence that the defendant was a caretaker or servant:—*Held*, that the father's title was extinguished before his death by the Real Property Limitation Act. The defendant became upon his entry a tenant at will, and that tenancy never having in fact been determined, the father's right of entry first accrued at the expiration of one year, when the defendant became a tenant at sufferance. The effect of s. 5 s.s. 7, of R. S. O. c. 133, is that it is for the purposes of the statute only that the tenancy at will is to be deemed determined at the expiration of a year. But there was no entry by the father sufficient to prevent the running of the statute; a visit to the son, not being against his consent, would not be such an entry. The assessment of both father and son in 1882, at the request of the son, as freeholders of the farm, was not evidence of a new tenancy at will. *Doe d. Bennett* v. *Turner*, 7 M. & W. 226, distinguished. An agreement made a few days after the death of the father between the devisees and legatees under his will, whereby the defendant admitted that the father was the owner of the farm, and agreed to abide by the will, which devised the farm to him charged with a large sum, was not under the circumstances set out in the case, even when viewed as a family arrangement, binding on the defendant. *Fane* v. *Fane*, L. R. 20 Eq. 698, applied and followed.—*Held*, also, that if there was any election by the defendant to take under the will, it was made under a mistake as to the defendant's rights; and besides, if the agreement fell, what the defendant did which was relied on as being an election, being a part of the same transaction, must fall with it. *McCowan* v. *Armstrong*, 22 C. L. T. 55, 3 O. L. R. 100.

Possession — *Both parties claiming title by—Findings of jury.*] — Where each party

is seeking to make a title to land by possession, the Court will not interfere with the findings of the jury unless the verdict is one which, the whole of the evidence being reasonably viewed, could not properly have been found. *Wood* v. *Le Blanc*, 36 N. B. R. 47.

Possession — *Extinctive prescription—Declaration of title—Adverse possession of portion of building — Injunction.*]—The title of an owner of a building to certain rooms therein may be extinguished by possession for the statutory period.—In a two-storey wooden structure, the only entrance to the upstairs portion was from the street door on to a small landing and up to the stairs. The plaintiff had occupied the upper floor as a workshop since 1889, paying no rent, and he and his customers had also used the landing and staircase for access thereto. He had not slept on the premises, and in summer he usually closed up his workshop on Saturday, returning on Monday, and once went to New York for three weeks, leaving his goods on the premises and his brother in charge:—*Held*, that there had not been any abandonment by the plaintiff at any time, and he had had a continuous and peaceable adverse possession as against the owners by paper title of the building, which had extinguished their title to the upper floor as well as to the landing and staircase.—The owners notified the plaintiff that they intended to remove the structure supporting the part of the building occupied by him, and the plaintiff brought this action for a declaration of ownership as to that part, and for an injunction:—*Held*, that the plaintiff should be left where the statute had placed him, and it was not a case in which to give him a declaration of ownership; but that he had a right as against the defendants to the possession and enjoyment of the portions of the building mentioned, with which the defendants could not interfere, and was entitled to the injunction. *Iredale* v. *Loudon*, 8 O. W. R. 963, 14 O. L. R. 17.—An appeal from the above decision of Mabee, J., was allowed by the Court of Appeal and action dismissed and counterclaim allowed with costs.—*Held*, that it is very doubtful if the Statute of Limitations is applicable to possession of an upper room or flat in a building, but at any rate the plaintiff was not entitled to annex to what he might acquire by force of the statute any further right or implied obligation of support; and it is doubtful if he could acquire easement of support even by a possession of 20 years. *Iredale* v. *Loudon*, 10 O. W. R. 725, 15 O. L. R. 286.

Possession — *Title.*] — In 1821 M. obtained a grant of land from the Crown, and in 1823 permitted his eldest son to enter into possession. The latter built and lived on the land and cultivated a large portion of it for more than ten years, when he removed to a place a few miles distant, after which he pastured cattle on it and put up fences from time to time. His father died before he left the land. In 1870 he deeded the land to his four sons, who sold it in 1873, and by different conveyances the title passed to P. in 1884. In 1896 the descendants of the younger children of M. gave a deed to B., who proceeded to cut timber from it. In an action of trespass by P.:—*Held*, that the jury at the trial were justified in finding that the eldest son of M. had the sole and exclusive possession of the land for 20 years before 1870, and that his possession had ripened into title. If not, the deed to his sons in 1870 gave them exclusive possession, and, if they had not a perfect title then, they had twenty years after, in 1890. *Bentley* v. *Peppard*, 23 C. L. T. 212, 33 S. C. R. 444.

Possession as against mortgagee — *Foreclosure decree.*]—In an action for possession of land the plaintiff's title was derived under a sheriff's deed made under direction of the Court in foreclosure proceedings, and dated 23rd July, 1896. The defendant relied upon the Statute of Limitations, and gave evidence of more than twenty years' possession of the land in dispute without payment of rent or acknowledgment of title. It appearing that the defendant went into possession at a date subsequent to the date of the mortgage under which the plaintiff claimed:—*Held*, that the defendant could not acquire title by possession against the mortgagee so long as the mortgage was kept alive. It is enacted by the Statute of Limitations, R. S. N. S. 1900, c. 167, s. 23, that "any person entitled to or claiming under a mortgage of land may make an entry or bring an action to recover such land at any time within twenty years next after the last payment of the principal money or interest secured by such mortgage, although more than twenty years have elapsed since the time at which the right to make such entry or bring such action first accrued:"—*Held*, that the granting of the decree of foreclosure was an adjudication that, at that date, the mortgage was in force, and that, therefore, the plaintiff's title came under the provisions of the section quoted.—*Held*, also, that a third party could not, by a possession of twenty years, acquire title notwithstanding the provisions of the statute, and that plaintiff's title could not be defeated by defendant's possession, even although it were shewn to be of a more definite kind than was disclosed by the evidence. *Archibald* v. *Lawlor*, 35 N. S. R. 48.

Possession by mortgagor — *Devise of life interest by mortgagee to mortgagor — Election.*]—In 1862 J. M. conveyed land to W. by a deed which, although absolute in form, was intended to operate by way of mortgage, as security for a debt due from the grantor to the grantee. The last will of W., made seventeen years after the date of the deed, directed that the land in question should not be sold during the lifetime of M. M., the wife of J. M., and that if, at any time before the death of M. M., the grantor, J. M., should repay the amount of his indebtedness with interest, then the property should be reconveyed, &c. W. died in July, 1881, and M. M. died in February, 1903, having continued in possession of the land down to the time of her death:—*Held*, notwithstanding the clause in the will of W. restraining his executors from selling the land, that an action brought by the executors, after the death of M. M., to recover possession of the land, was barred by the Statute of Limitations. *Whitman* v. *Hiltz*, 39 N. S. R. 230, 1 E. L. R. 68.

Possession for 30 years—*Predecessors in title—Crown — Townsite — Reversion.*]—

A party who claims a title to property by 30 years' prescription can rely only on his own possession, or on his own and that of anterior possessors from whom he holds a valid title to the property in the nature of a demise.—When a piece of land is set apart or granted by the Crown as a site for a town, any part of it that becomes unfit or useless for the purpose (*e.g.*, by submersion), reverts to the Crown. Judgment in Q. R. 30 S. C. 143 reversed. *Chicoutimi Pulp Co.* v. *The King and Price*, 16 Que. K. B. 142.

Possession of Crown lands — *Bar to Crown after 60 years.*]—A person in possession of Crown lands under a license obtained for valuable consideration, may impose the invasion of his right by the Crown in the same manner as he could against any other person, and such a possession during more than sixty years is a complete bar to the claim of the Crown. Judgment of the Supreme Court of Newfoundland affirmed. *Atty.-Gen. for Nfld.* v. *Cuddihy* (1896), C. R. 1 A. C. 86.

Possession of Crown lands—*Nullum tempus occurrit regi.*]—When any portion of the public domain of the Crown is demised to a public corporation in trust, they hold it independently, and not as agents of the Crown. Hence, they have the power to alienate it, provided they do so in conformity with the purposes of the trust, and when thus fallen into the private domain, it is taken out of the operation of the rule *nullum tempus occurrit regi*, and the law of acquisition by positive prescription applies to it, as well as that of extinctive prescription, or limitation, by 10 years, of the right of action for rescission of the alienation. *Montreal Harbour Commissioners* v. *Record Foundry* (1909), 38 Que. S. C. 161.

Possession of land — Fiduciary relations between owner and persons in possession—Debt due by owner—Recovery of possession upon payment of debt—Equitable decree—Costs. *Gribbon* v. *King*, 7 O. W. R. 457.

Possession of widow of owner—Oral agreement for occupation of land in lieu of dower—Conduct of parties. *McGleddery* v. *McLellan*, 2 O. W. R. 1097.

Possession under agreement for purchase — *Tenancy at will — Payment of part of purchase money — Evidence — Entries in books of deceased person—Admission—Right of entry.*]—Payment of part of the purchase money by a person in possession of land under an agreement to purchase is a renewal of the tenancy at will, and the Statute of Limitations begins to run from such payment.—Entries in the handwriting of a deceased person in his books of account, made in the ordinary course of his business, are admissible under s. 38, c. 127, C. S. N. B. 1903, and the first entry being admitted to be a payment on account of a land purchase, the second was evidence of a payment on the same account on the 23rd of May, 1886. —Where an entry in the handwriting of a deceased person is *prima facie* against interest, it is admissible for all purposes, irrespective of its effect or value when received.—An oral admission by a person holding under an agreement to purchase, that he is holding as tenant at will to the vendor, will not prevent the statute running against such vendor. —As between the vendor and vendee in possession under an agreement to purchase, the vendor is substantially a mortgagee entitled to the rights and privileges secured to a mortgagee under s. 30 of c. 129 of C. S. N. B. 1903, and is also as a mortgagee within the exception provided by s. 8 of the statute, and the right of entry of the vendor and his representatives would not be extinguished for 20 years after the last payment of principal or interest. *Anderson* v. *Anderson*, 37 N. B. R. 432, 1 E. L. R. 443.

Possessor to hold in fee simple — *Rectified description in deed—Debt to grantees as tenants in common—Costs.*]—Sutherland, J., *held* that a tenant in common in exclusive possession of lands under a deed is entitled to the benefit of the Real Property Limitation Act, R. S. O. c. 133, s. 4, as against all others claiming under the said instruments. *Foisy* v. *Lord* (1911), 19 O. W. R. 390, 2 O. W. N. 1217.

Possessory action — *Admissions — C. C. 1245.*]—In arriving at a decision in a possessory action, the Judge should only consider the material fact of the disturbance of which the plaintiff complains; having but the actual fact of possession to determine, he should refuse to consider, as useless, means of proof which, in the end, would have for effect simply to establish possession.—The Judge should grant *acte* to plaintiff of the defendant's admission and by the conclusions of his judgment maintain the plaintiff's possession. — Recognition of the plaintiff's possession disposes of all the other means of defence raised against plaintiff's action. *Paul* v. *Paul* (1910), 16 R. de J. 432; 16 R. L. n. s. 373.

Possessory action — *Petitory.*]—There is ground for a petitory action when the possessor is simply disturbed in his possession without being deprived of it. The action for repossession lies when the possessor is deprived of his right by violence. Differing in this respect from the case of a petitory action, it is not necessary for the plaintiff in an action for repossession to have possession uniting all the requirements of the articles referred to below, it is sufficient to have actual and material possession, so long as it is peaceable and public. A petitory action having for its sole object either the putting an end to the disturbance or the repossession of the property, it is quite immaterial whether the possession has been in good or bad faith. Although the petitory action does not depend upon the titles the parties may have, nor upon their rights of ownership, still the Court may admit of their being filed as evidence to aid in establishing the fact of possession of the land in dispute. —C. P. 1064; C. C. 2192, 2193. *Couture* v. *Brunilette*, 16 R. L. n. s. 46.

Possessory action.]—Plaintiff claimed a five acre plot. Defendant set up a freehold and possessory title: — *Held*, on the facts, that plaintiff was entitled to plot. *Boudrot* v. *Morrison*, 7 E. L. R. 477.

Prescription — *Party invoking prescription by his own possession and that of anterior possessors — Grant of land by the*

Crown as a town site—Part that becomes unfit or useless for the purpose—Reversion.] —A party who claims a title to property by thirty years' prescription can rely only on his own possession or on his own and that of anterior possessors from whom he holds a valid title to the property in the nature of a demise. When a piece of land is set apart or granted by the Crown as a site for a town, any part of it that becomes unfit or useless for the purpose (*e.g.*, by submersion) reverts to the Crown. Judgment of the Court of King's Bench for Quebec (16 Que. K. B. 142), affirmed, judgment of L'Hon. Gagné, J.C.S. (30 Que. S. C. 293), set aside. *Price* v. *Chicoutimi Pulp Co.*, C. R. [1909] A. C. 359, 19 Que. K. B. 227.

Property substituted by deed anterior to the Code cannot be acquired by prescription as against an institute until from the date of the opening of the substitution. *Taillefer* v. *Langevin* (1910), 39 Que. S. C. 274.

Purchaser with title cannot plead prescription by ten years against an institute whose deed was registered when the purchaser acquired the property. *Taillefer* v. *Langevin* (1910), 39 Que. S. C. 274.

Railway lands — Possession—Damages —Costs. *McMahon* v. *Grand Trunk Rw. Co.*, 12 O. W. R. 324.

Real Property Limitation Act—Adverse possession — Evidence — Legal estate —Fences — Boundaries — Isolated acts of ownership — Series of trespasses — Acts not exclusive of true owner — Insufficiency. *Shunk* v. *Downey*, 13 O. W. R. 398.

Real Property Limitation Act — *Title by possession — Adverse possession.*] —Payment of taxes is not a payment of rent such as will prevent the statute running in favour of the person in possession of land. D., an employee of defendant, was allowed to take possession of some property in 1870, occupying in part payment for his services, and agreement to pay taxes. From 1874 D. was assessed as owner. About 1888 D. quit working for defendant, but remained in possession until his death in 1899, dying intestate and leaving an estate worth less than $1,000. D.'s widow remained in possession until 1902. Shortly after D.'s death she conveyed all her interest to the plaintiff:—*Held*, plaintiff's title good. *Bowman* v. *Watts*, 13 O. W. R. 481.

Recovery of land — *Mortgage — Possession — Payments — Agent — Novation —Extension of time.*]—In ejectment by a mortgagee against the widow of the mortgagor, it appeared that she had been in possession since his death in 1877, and had paid nothing on account of the mortgage since 1881. Payments had, however, been made upon a collateral mortgage over other lands, by a person who had purchased such lands from the mortgagee and the widow, up to 1897. But in 1887 this person made a new agreement with the mortgagee by which the time for payment of the balance then due was extended and the rate of interest reduced, without the knowledge or consent of the principal debtor:—*Held*, that the payments made by this person after the new bargain were not payments made by him as agent of the principal debtor, nor as one liable or entitled to pay off the mortgage debt secured by the principal mortgage, nor were they payments made on account of the principal debt. *Farmers' Loan & S. Co.* v. *Sprott*, 20 C. L. T. 165.

Registered title — Paper title—Ejectment. *Central Canada L. and S. Co.* v. *Porter*, 1 O. W. R. 482, 2 O. W. R. 137.

Right of way — *Railways — Crossing.*]—When a line of railway severs a farm, and no crossing is provided by the company, a right of way across the line may be acquired by the owner of the farm by prescription. A farm crossing provided by a railway company may be used by any person who after the severance becomes the owner of portions of the farm on both sides of the line of railway, and has a right of access to the crossing. A right of way may be acquired although the dominant tenement is not contiguous to the servient tenement. *Guthrie* v. *Can. Pac. Rw. Co.*, 20 C. L. T. 56, 27 A. R. 64.

Room in building — *Adverse possession — Incidental rights — Implied grant—License or easement.*] — Possession of an upper room in a building supported entirely by portions of the storey beneath may ripen into title thereto under the provisions of the Statute of Limitations.—L., one of several owners of land with a building thereon, sold his interest to a co-owner, and afterwards occupied a room in said building as tenant, for his business. The room was on the second storey, and inside the street door was a landing leading to a staircase, by which it was reached. L. had the only key provided for this street door, and always locked it, when leaving at night. He paid rent for the room at first, and then remained in possession without paying rent for 12 years. The annual tax bills for the whole premises were generally, during that period, left in the room he occupied, and were sent by him to the managing owner, who paid the amounts. In an action to restrain the owners from interfering with his possession of said room and its appurtenances:—*Held*, reversing the judgment of the Court of Appeal, 15 O. L. R. 286, 10 O. W. R. 725, and restoring with a modification that of the trial Judge, 14 O. L. R. 17, 8 O. W. R. 963, Idington and Maclennan, JJ., dissenting, that L. had acquired a title under the Statute of Limitations to said room and to so much of the structure as rested on the soil to which he had acquired title:—*Held*, per Davies, J., that he had also acquired a proprietary right to the staircase and the portions of the building supporting said room. — Per Fitzpatrick, C.J., and Duff, J., that the Statute of Limitations does not, as against the party dispossessed, annex to a title acquired by possession incidents resting on the implication of a grant. L. had, therefore, acquired no rights in the supports.—*Per* Idington and Maclennan, JJ., that the use of the landing and staircase was, at most, an easement, and must continue for 20 years to produce the statutory title, and to give title to the supports there would have to be actual possession, which was not the case here. *Iredale* v. *London*, 40 S. C. R. 313.

Statute of Limitations — *Absence from country without receiving rents, &c., not necessarily a discontinuance of possession—Presumption of continued residence in place of domicil.*]—W. W. owned the Retreat Farm. He left P. E. Island in 1805 leaving his son R. W., through whom plaintiff claimed in possession, and never returned. On 3rd May, 1806, W. W. conveyed to K., a resident of England, who in 1810 conveyed to D. R., who died in 1823, never having been on P. E. Island, and the farm became the property of D. S. R., who came to the Island in 1839. In 1842 he conveyed the farm to defendant, who entered into possession of part of it, but R. W. continued to reside on the remainder until the end of 1846, when he removed and subsequently died. T., sister to R. W., sought to recover the farm on the ground that he had acquired a title by possession: — *Held* (Peters, J.), that W. W. was in possession until May, 1806, when he conveyed to K., and the statute did not begin to run until then.—That K. being a resident abroad, the presumption is, in absence of evidence to the contrary, that he remained there and that the disability of absence was not removed and that, therefore, he or those claiming under him would not be barred until the lease of 40 years, and as O., entered in 1842, R. W. never acquired a title. *Tulloch* v. *Orr* (1885), 1 P. E. I. R. 108.

Successor by particular title, whose possession joined to that of his author, under a clear title to property, extends over a period of thirty years, acquires ownership by prescription, although the title of a possessor, anterior to the thirty years and from whom subsequent titles were derived, was a precarious one. Thus, when J. B. S. acquired only the usufructuary rights *(le droit d'usufruit)* to an immovable in 1867, but sold the property without reservation to N. S. in 1869, a subsequent purchaser under an equally clear title who possessed down to 1899, acquired ownership by prescription, merger of title having taken place. *Saint-Denis* v. *Trudeau* (1909), 18 Que. K. B. 434.

Tax sale — Purchase by owner—New root of title—Interruption of possession — Evidence of possession — Conflict. *Hurworth* v. *Clemmer*, 7 O. W. R. 505.

Tenancy—*Acquiring a new title—Acts inconsistent with the right of joint tenancy.*]— The universal legatee of a joint tenancy who has letter of administration of the goods registered along with a description of the real estate to guard his title, who from that date acted as the sole owner of the real estate for twelve years, administers it and receives all the fruits and pays all the charges and sells the timber cut and sells a part of the real estate, does so many acts inconsistent with the right of the original joint tenants and works in this way a conversion of title to such an extent as to acquire the exclusive beneficial possession of the real estate. Hence he has a cause of action against those who disturb him in his possession. *Danish* v. *Thibault* (1909), 36 Que. S. C. 213.

Tenant at will — *Devise for life to tenant upon condition.*]—A testator, dying in 1873, devised land of which his brother had been in possession since 1848 to his (the testator's) son after the death of his brother to whom he devised a life estate, "on condition that he neither sells nor rents the same without consent in writing of my son." The brother continued in possession, and on the 1st April, 1895, leased the land (without consent) for one year. The plaintiffs, claiming under the son, sought to recover possession from the devisee of the brother, by an action begun on the 29th May, 1905: —*Held*, that the brother, having openly set at naught the condition of the will, should not be presumed to have accepted the devise, and the Real Property Limitation Act was a bar to the action.—*Semble*, upon the evidence, that the brother went into possession as tenant at will, and that the statute had run in his favour before the death of the testator. — Judgment of Falconbridge, C.J., affirmed. *Cobean* v. *Elliott*, 11 O. L. R. 395, 7 O. W. R. 13, 495.

Tenants in common — *Death of co-tenant—Adverse possession by survivor.*]— Land was conveyed in fee to two brothers as tenants in common. One brother died on the 9th May, 1876, intestate, leaving him surviving his co-tenant, his mother, and three sisters, of whom the plaintiff was one. The mother died on the 5th September, 1876. The surviving brother had from the time of his brother's death until his own death on the 8th November, 1896, exclusive possession and use of the land, and the receipt of the rents and profits therefrom without accounting. He and his sisters lived together on premises situated elsewhere until his marriage in 1890. He always contributed to their support, but the contributions were not meant, and were not understood, to be a share to the sisters in the rents and profits of the land. In a suit commenced on the 21st September, 1899, by the plaintiff for the partition of the land: —*Held*, that the plaintiff's title was extinguished by C. S. N. B. c. 84, s. 13. *Ramsay* v. *Ramsay*, 21 C. L. T. 133, 2 N. B. Eq. 179.

Tenants in common — *Exclusive possession—Onus — Pleading—Partition—Occupation—Improvements.*] — In an action for damages for trespass to land, the defendant justified under his wife, who was alleged to be a tenant in common with the plaintiffs of the *locus*.—The land in question was originally granted to A. B., through whom both parties claimed. It was agreed that the only issue for trial was whether the title of the defendant's wife, as tenant in common, was barred by the Statute of Limitations: —*Held*, that the burden was on the plaintiffs of establishing exclusive possession of the common lands for a period of 20 years, and that, in the absence of such evidence, the defendant must succeed.—Where the defendant, by the erection of a house on the land held in common, exceeded his rights, taking possession of a piece of the land to the exclusion of plaintiffs and other tenants in common, but no claim as to this was set up in the pleadings or on the trial: —*Held*, that the defendant's possession could not be adjudicated upon in the action, but must be raised in partition proceedings, when the defendant could be protected as to his occupation and improvements. *Boudroit* v. *Sampson*, 3 E. L. R. 219, 41 N. S. R. 495.

Title — *Cancellation of deed — Cloud— Plan and survey—Acts of ownership—State of nature—Fences—Commencement of statutory period—Knowledge of true owner.*]— The plaintiff claimed cancellation of a deed as a cloud on his title to 14 acres of land, and an injunction and damages in respect of trespass:—*Held*, upon an examination of the defendant's title deeds, that they did not in fact convey the 14 acres, nor profess to do so, and the plaintiff was not entitled to cancellation of the deed. Upon the evidence, the plaintiff had established his proper title to the 14 acres, and had sufficiently proved the correctness of a survey and plan shewing that the 14 acres were outside the land covered by the defendant's title deeds. The 14 acres had never been built upon, or cleared, or cultivated, or resided upon. The defendant relied upon the building of a brush fence along the south limit in 1880, by his predecessor in title. At that time, the title was still in the heirs of the patentee, who had never taken possession:—*Held*, that the building of the fence was of no significance as an act of ownership. Being built on the land while it belonged to the heirs of the patentee, it became their property, and the plaintiff having become the owner, and having entered in 1888, before the statutory period had run, it became his property absolutely. Acts done since 1888, such as cutting and removing wood, and pasturing cattle, being intermittent and isolated, were merely occasional acts of trespass and insufficient to constitute possession of the kind required by the statute to bar the true owner. *Semble*, also, that the land being in a state of nature, and there being no evidence that the grantee of the Crown, or his heirs or assigns, had taken actual possession, by residing upon or cultivating any portion thereof, until the plaintiff acquired the title of the heirs in 1887, or that they or any of them had any knowledge before that date of the land having been in the actual possession of the defendant or of any one under whom he claimed, even if the defendant's acts amounted to possession, he could not claim to have acquired a title to it, for in such a case time runs from knowledge by the true owner of the entry on his land, and must have run for 20 years to bar his title. Judgment of Teetzel, J., 2 O. W. R. 486, reversed. *Reynolds* v. *Trivett*, 24 C. L. T. 305, 7 O. L. R. 623, 3 O. W. R. 463.

Title — *Conveyance of fee—Reservation of life estate — Possession — Ejectment — Evidence.*]—In October, 1853, D. conveyed to his father and two sisters 6 acres of land for their lives or the life of the survivor. A few days later he conveyed a block of land to M. in fee, "saving and excepting" thereout 6 acres for the life of the grantor's father and sisters, or that of the survivor, or until the marriage of the sisters, on the happening of said respective events, the 6 acres to be and remain the property of M., his heirs and assigns, under said deed. Three months later M. conveyed the block of land to R. M. in fee, and when the life estate terminated in 1903 the latter brought ejectment against the heirs of the life tenants, who claimed the 6 acres, on the ground that the deed to M. contained no grant of the same, and also because the life tenants had had adverse possession for more than 20 years:—*Held*, that, as the evidence shewed that the life tenants went into possession under R. M., the title of the latter could not be disputed, and the statute would not begin to run until the life estate terminated:—*Held, per* Idington, J., that R. M. under his deed and that to his grantor had the reversion to the fee in the 6 acres after the life estate terminated. The lease of the life estate was given to R. M. with the other title deeds on conveyance of the land to him, and it was received in evidence as an ancient document relating to the title and coming from proper custody. It was not executed by the lessees, and no counterpart was proved to be in existence:—*Held*, that it was properly admitted in evidence. *Dods* v. *McDonald*, 25 C. L. T. 117, 36 S. C. R. 231.

Title by adverse possession—*Declarations of occupant of land—Admissions—Evidence.*]—The declarations of one in adverse possession made on the premises while in occupation, importing a claim of a statutory title in himself, are admissible in an action of ejectment against his representatives to support the presumption of title from possession, whether they are against interest or not, and whether made before or after the statutory title accrued. *Rundle* v. *McNeil*, 38 N. B. R. 406, 4 E. L. R. 522.

Title by adverse possession—*Evidence —Claim of wife living with husband—Real Property Act—Issue—Amendment — Indulgence.*]—1. A party asserting a title to land by adverse possession should prove it most clearly, and, although there is no statutory requirement that the evidence of such party and members of his family must be corroborated, it would be unsafe, unless such evidence appears to be correct beyond reasonable doubt, to hold that a title by possession has been gained in the absence of strong additional evidence by disinterested witnesses.—2. When a husband and wife are living together, the possession of any property on which they are living or which is occupied by them must ordinarily be attributed to the husband as the head of the family, and the wife cannot acquire title to the property for herself by length of possession under the Real Property Limitation Act, R. S. M. 1902, c. 100.—3. Permission should not be given, even if the Judge has power to allow it, to amend an issue under the Real Property Act, R. S. M. 1902 c. 148, between a married woman claiming by such possession and the holder of the paper title, by setting up that her husband had acquired such title and given the plaintiff a quit-claim deed of the property, for no one claiming a title by length of adverse possession is entitled to any such indulgence from the Court.—*Sanders* v. *Sanders*, 19 Ch. D. 373, distinguished. *Calloway* v. *Platt*, 6 W. L. R. 467, 17 Man. L. R. 485.

Title by adverse possession—*Payment of insurance premium.*] — The plaintiff claimed a house and lot of land as devisee of S. M., who had occupied and used the property as his own for a period of upwards of thirty years. The defendant set up title under the will of M. M., to whom the property was mortgaged by G., the original owner, to secure repayment of the sum of $240, and to whom it was subsequently conveyed by G., by deed expressed to be made for the same consideration. The house on the property had been insured in

the name of M. M., but there was evidence of admission that his claim to the property was not as owner but for advances made by him:—*Held*, that, under the circumstances stated, and in the absence of evidence of any obligation on the part of S. M. to insure for the benefit of M. M., the payment by S. M., at one time during his occupancy, of a renewal insurance premium, whether to insure the house in his own name or that of M. M., was not an act inconsistent with his ownership, or with his right to insist that any claim of M. M. as mortgagee was barred.—*Cogswell* v. *Grant*, 34 N. S. R. 340, distinguished. *Matheson* v. *McPhee*, 42 N. S. R. 220.

Title by possession — Arrangement as to working land—Time of commencement of statutory period — Payment of rent — Onus—Actual payment—Gift of land—Evidence—Costs—Plaintiff relieved from liability—Right to recover costs against defendant—Lien for improvements. *Calverley* v. *Lamb*, 10 O. W. R. 279.

Title by possession — Evidence to establish—Corroboration—Husband and wife—Possession of husband—Acts of possession —Leases—Evidence of possession by tenants — Issue under Real Property Act — Amendment—Fences—Repairs—Payment of taxes. *Callaway* v. *Platt* (Man.), 6 W. L. R. 467.

Title by possession — Mother and children living together—Daughter claiming title—Landlord and tenant—Tenant disputing landlord's alleged possessory title. *Chisholm* v. *Norwood*, 2 E. L. R. 149.

Title by possession to undivided half of lot — *Husband and wife—Joint occupancy — Rights of husband surviving wife—Declaration of title—Rights of true owner.*]—On and after 1st March, 1872, defendant Beaque Ruport and one Adam Ruport were the owners as tenants in common of the south-west quarter of the lot, containing 50 acres, and Adam Ruport alone was in possession. He died on 30th March, 1872, having by his will devised his undivided half to his wife Caroline Ruport for life. He made no disposition of the remainder, and died without issue; consequently the remainder descended to his father, Levi Ruport. After Adam's death his widow continued in possession of the whole parcel. On 4th March, 1873, she intermarried with plaintiff, and they continued in sole possession until 24th December, 1887, when they conveyed the south half of the south-west quarter to defendant Beaque Ruport, who entered into possession thereof. Plaintiff and his wife continued in possession of the whole of the north-west quarter during their joint lives. On 3rd March, 1903, plaintiff's wife died without issue, and plaintiff has remained in possession of the whole. Levi Ruport died in the year 1885, leaving a will whereby he devised his undivided estate in remainder to defendant Beaque Ruport. Upon the death of plaintiff's wife, defendant Beaque Ruport became entitled, as devisee of his father, to the undivided one-half of which she was tenant for life, and he claimed that he was the owner of the other undivided half, notwithstanding the possession commencing with that of plaintiff's wife from 30th March, 1872, and continuing until her death on 3rd March, 1903:—*Held*, Mackennan and Maclaren, JJ.A., dissenting, that the plaintiff's marriage was after the coming into force of the Married Women's Property Act, 1872. His wife was in sole possession, and, as against defendant Beaque Ruport's undivided half, the Statute of Limitations had begun to run in her favour. The possession was in her and it was such as was capable of ripening into a title under the statute as against Beaque Ruport. It was an interest in real estate which was capable of transmission by will or by transfer *inter vivos*. As against everybody but Beaque Ruport she was the owner in fee. This interest in real estate was secured to her on her marriage by virtue of the 1st section of the Married Women's Property Act, 1872. She owned it at the time of her marriage, and it was hers to be held and enjoyed for her separate use free from any estate or claim of plaintiff. The marriage did not disturb her right or interest in the estate. Neither could her husband's possession, for she was in possession at the same time. The possession which she had begun against Beaque was continued by her notwithstanding her coverture. She made no assignment or transfer of her rights or interests or any part of them to plaintiff. Plaintiff could not become seised or entitled jointly with his wife, and thus acquire some of her rights, simply because they lived together on the land, any more than he could thus acquire her estate in other lands owned by her at the time of the marriage. But for the fact that there was a lawful marriage, the nature of plaintiff's possession resembles that of the person who had gone through the ceremony with the wife of plaintiff in *McArthur* v. *Egleson*, 43 U. C. R. 406, 3 A. R. 577. As against defendant Beaque Ruport, therefore, the possession was that of plaintiff's wife, and, if that possession ripened into a title, it was gained by the wife and during her lifetime. The plaintiff was not entitled to a declaration of title, but he could not be dispossessed by the defendant. *Myers* v. *Ruport*, 4 O. W. R. 365, 25 C. L. T. 8, 8 O. L. R. 668.

Title by possession to upper storey of building with outside landing and staircase — Declaratory judgment — Refusal of—Injunction restraining defendants from interfering with possession of portion of building—Easement. *Iredale* v. *London*, 8 O. W. R. 963.

Trespass — *Title by possession—Extent of—Evidence—Misdirection — New trial — Will—Copy—Proof of.*]—P. petitioned the Crown for a grant of land in the parish of Saint Martins, in the county of St. John, and on the 24th July, 1834, the Crown gave him a ticket of possession of a tract called lot B. of 200 acres, more or less, describing the tract as bounded on the north by the grant to Isaac and David Springstead, on the east by lot C., on the south by vacant land, and on the west by lot A. P. went into possession under the ticket of lot B. In 1837 the Crown granted to P. lot A., describing it by metes and bounds, and stating that it contained 300 acres, more or less. In 1838 the Crown, having ascertained that there were not 200 acres between lots A. and C., issued a grant of lot B. to P., describing

it by metes and bounds, and stating that it contained 154 acres, more or less. The plaintiff acquired the title to lot B. by *mesne* conveyances from P., referring to the grant and describing the lot by metes and bounds as therein described. In an action of trespass by the plaintiff against the defendant, the successor in title of lot A., where the question in dispute was the location of the eastern boundary of lot A. and the western boundary of lot B.:—*Held, per* Landry, Barker, and McLeod, JJ., that, as the title of the plaintiff was by conveyances describing the lot by metes and bounds as given in the grant, the possession of her predecessors in title under the ticket of possession, or otherwise outside of the bounds of the grant, would not enure to her benefit, and the ticket of possession was improperly received as evidence of either title or possession.—*Per* Tuck, C.J., and Hannington, J., that, as the plaintiff was claiming the land in dispute by continuous and exclusive possession for the statutory period, the ticket of possession was some evidence of the extent of the possession, and was properly received.—*Per* Tuck, C.J.:—A copy of a will certified by the deputy registrar of probate after the death of the registrar, and during a vacancy in the office, was properly received in evidence. *Ingram* v. *Brown*, 38 N. B. R. 256.

Unregistered deed — *Subsequent registered mortgage for value without notice—Right of entry—Registry Act—Real Property Limitation Act.*]—The defendant was owner in fee simple in possession of a farm, and being about to marry the co-defendant, desired to convey to him an undivided one-half share thereof, so that they might become tenants in common. She consulted a local unlicensed conveyancer, who prepared a conveyance to himself and a re-conveyance to the two defendants, as tenants in common. The conveyances were left with him for registration. He registered the conveyance to himself, but fraudulently omitted to register the re-conveyance. The defendants continued in possession, but the conveyancer without their knowledge, mortgaged their farm to the plaintiffs, who brought action to enforce their mortgage:—*Held*, that under the Registry Act (R. S. O. 1897, c. 136), the re-conveyance was void against the plaintiffs, who had advanced their money without notice.—*Held*, also, that the right of entry did not accrue until the mortgage was registered, and the Statute of Limitations (R. S. O. 1897, c. 133), was not a defence to the plaintiffs' claim, the writ having been issued within the period of the limitation. Judgment of the Supreme Court of Canada, 36 S. C. R. 455, and the Court of Appeal for Ontario, 9 O. L. R. 105, 5 O. W. R. 123, discharged; judgment of Sir John A. Boyd, C., at trial, restored. *McCarthy* v. *Tranouth*, C. R., [1908] A. C. 1, 77 L. J. P. C. 37, [1908] A. C. 60, 24 T. L. R. 105, 97 T. L. R. 853.

Wild land — *Boundary—Entry—Occupation—Evidence of possession—Survey.*]—In an action of trespass the dispute was as to the ownership of a strip of land about 53 links in width, which the plaintiff claimed as part of his lot, 16, and the defendants as part of theirs, 17, or if not, as having become theirs by the operation of the Statute of Limitations. Neither of the lots had ever been cleared or cultivated, and no fence separating them had ever been built. Both parties had cut timber, and that was the only use that had ever been made of either lot:—*Held*, that the statute did not apply; to render it applicable it would be necessary to shew, if not an entry and cultivation of some part of the land, at least an entry and actual occupation. *Semble*, that, even if the statute applied, there was not, upon the facts, that clear and unequivocal evidence of possession by the defendants of the strip in dispute which was necessary to bar the right of the true owner. *Davis* v. *Henderson*, 29 U. C. R. 344, distinguished. *Maris* v. *Mudie*, 7 A. R. 414, and other cases, considered:—*Held*, however, that the plaintiff's evidence of his title to the land in question as forming part of his lot was not sufficient to establish it. Proper method of ascertaining the true position of the dividing line between lots pointed out. *Huffman* v. *Rush*, 24 C. L. T. 217, 7 O. L. R. 346, 3 O. W. R. 43.

See Assessment and Taxes — Crown Lands—Deed—Dower—Fraudulent Conveyance — Husband and Wife — Land Titles Act — Landlord and Tenant — Mortgage—Pleading — Railway — Registry Laws—Tenants in Common—Trusts and Trustees—Vendor and Purchaser—Way.

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2. Other Cases.

Account — *Claim against estate of deceased person—Corroboration—Special agreement—Running account—Terms of credit—Demand—Fraud upon creditors—Pleading.*]—The plaintiff claimed from the executors of his father-in-law payment of a running account for work done and goods supplied to the testator from 1888 till his death in 1895. No demand for payment was ever made upon the deceased, nor was any account rendered until one was sent in to the defendants on the 16th May, 1895. This action was begun on the 4th May, 1901. The plaintiff and his wife gave evidence of an agreement with the deceased that the plaintiff should keep the account separate from his other accounts, that he should try, if possible, to get on without the money, and to leave it in the hands of the deceased, who said he would save it for the plaintiff and put it in a house for him or his wife. The plaintiff did keep the account in separate books, which were produced, as also the general books. A witness said that the deceased told him about a year and a half before his death that he had requested the plaintiff to keep the account between them in a little book at home, not in the regular day book, so that, if anything happened, the account would not go into the wholesale men, and that he intended to buy a house for the plaintiff's wife. Similar evidence, although less distinctly, was given by another witness:—*Held*, that there was sufficient corroboration of the plaintiff's statement:—*Held*, also, that the plaintiff was not obliged to prove a definite term for which credit was given: the agreement was in effect one that the testator was to hold the money at least until the plaintiff demanded it; and, as there was no demand before the 16th May, 1895, the action was in time:—*Held*, also, that the agreement was not one which offended against the

law relating to frauds upon creditors; and the defendants were not in a position to raise such a question, not having pleaded it. *Day* v. *Day*, 17 A. R. 157. *Wilson* v. *Howe*, 24 C. L. T. 137, 5 O. L. R. 323, 1 O. W. R. 272, 2 O. W. R. 52.

Account — *Co-owners of land—Partnership—Principal and agent—Trustee—Outlay on land—Rents.*]—The plaintiff sold a half interest in land to the defendant, and they agreed to build houses thereon at their joint cost and to raise part of the money for the purpose by mortgages upon the property, and to contribute the remainder in equal shares. The houses were completed and rented in 1891; the defendant, who was on the spot, the plaintiff living in another province, collected the rents on joint account, and paid out of them the interest on the mortgages and the taxes and other outlays upon the property, sending accounts from time to time to the plaintiff. The plaintiff, alleging that the defendant did not contribute his just share of the cost of the houses, and that he had not properly accounted for the rents, brought an action for an account on the 15th August, 1902:—*Held*, that the plaintiff was barred by the Statute of Limitations in respect of his claim as to the cost of the houses, and also with regard to the rents except for six years before the commencement of the action; the plaintiff and the defendant were not partners; nor was the defendant an express trustee for the plaintiff; he was an ordinary agent without any special fiduciary character. *Coyne* v. *Broddy*, 15 A. R. 159, *Burdick* v. *Garrick*, L. R. 5 Ch. 233, and *Lyell* v. *Kennedy*, 14 App. Cas. 437, distinguished. *Ross* v. *Robertson*, 24 C. L. T. 228, 7 O. L. R. 413, 3 O. W. R. 158, 513.

Account running over several years —*Statute of Limitations pleaded — Part payment pleaded—Proof of appropriation of payment.*]—Action to recover the amount of an open account. The learned Master found that the bar of the Statute of Limitations was fatal to all the plaintiff's claim prior to July, 1906, except $3.76.—Teetzel, J., *held* that the burden of proof lies on the party who sets up part payment on a partially statute barred account to shew that the payment was expressly or by necessary implication made with reference to the earlier items.—Plaintiff's claim dismissed as to statute barred items.—Judgment of Local Master, Cornwall, affirmed. *Ross* v. *Flanagan* (1911), 19 O. W. R. 499, 2 O. W. N. 1267.

Acknowledgment — *Authentic act — Security—Novation—New period.*] — The acknowledgment by an authentic act of a debt which may be barred by a five years' prescription, accompanied by a hypothec to guarantee the payment, does not operate as a novation. Therefore, the debt will be barred by a new period of five years counting from the execution of the authentic Act. *Rioux* v. *Boulianc*, 29 Que. S. C. 448.

Acknowledgment — *Letter — Refusal to sign promissory note.*]—In reply to a letter from the plaintiffs enclosing a promissory note for the amount claimed, with a request to sign it, the defendant wrote: "Some future time I may be able to do something for you. I am not able, at present, and it would not do for me to sign a note, as I would not be able to meet it when due:"—*Held*, a sufficient acknowledgment to take the debt out of the Statute of Limitations. *Silver* v. *Butler*, 40 N. S. R. 46.

Acknowledgment — *Payment of dividend by assignee—Interruption of prescription.*]—The payment of a dividend upon a debt by the curator to an assignment of property, does not interrupt prescription; in the present cause it was not even alleged that the defendant had interrupted the prescription or had renounced the benefit of it. *Desrosiers* v. *Burdon*, 7 Que. P. R. 395.

Acknowledgment in writing—*Agent of executor—Power of attorney—Letter.*]—A power of attorney from the executor, resident out of the jurisdiction of a deceased maker of a promissory note to the surviving maker, within the jurisdiction, "to do all things which may be legally requisite for the due proving and carrying out of the provisions" of the will, which, among other things, directs the payment of the testator's debts, does not authorise the surviving maker to bind the estate by an acknowledgment of a debt of which the executor knows nothing, and which is barred at the time. A letter from the executor of one maker of a note to the holder thereof, advising the holder to look to the surviving maker for payment, as he is now doing well, is not a sufficient acknowledgment. A direct acknowledgment of the debt in a letter by the executor of one maker of a note to the surviving maker of no avail to the holder. Judgment of Boyd, C., 31 O. R. 573, 20 C. L. T. 209, affirmed. *King* v. *Rogers*, 21 C. L. T. 106, 1 O. L. R. 69.

Acknowledgment of debt — *Interruption — Art. 2264, C. C.*]—An acknowledgment of a debt, not operating as a novation, is prescribed by the same lapse of time as the debt itself, the prescription of which it has interrupted. *Charette* v. *Lacombe*, 17 Que. S. C. 539.

Acknowledgment of debt — *Sealed instrument — Promissory note — Period of limitation.*]—A private writing, described by the parties hereto as an "indenture," and executed under seal, containing an acknowledgment of a personal debt, with hypothec on real property to secure the payment of such debt, is not a promissory note, and the prescription of five years does not apply. *Zampino* v. *Blancheri*, 24 Que. S. C. 265.

Actions for damages against owners of railways under the legislative authority of the Parliament of Canada — *Continuous damage—Flooded lands.*]—The limitation of one year in s. 306 of the Railway Act, R. S. C. 1906, c. 37, does not apply to an action of damages for the continuous flooding of land, caused by the defective construction of culverts on a railway within the legislative authority of the Parliament of Canada. *Leamy* v. *Can. Pac. Ry. Co.* (1910), 38 Que. S. C. 149.

Annuity — *Will — Charge on land — Arrears—Lunatic.*]—By a will made in 1872, a testator who died in the same year devised land to two sons, "subject to the payment by my said two sons, of the sum of $200 per annum, for the benefit of my son Thomas Anson, which said sum, or annuity, or so

much thereof as shall be reasonably necessary for the support and maintenance of my son Thomas Anson, shall be paid, yearly and every year for and during the natural life of my said son Thomas, to the person or persons who may be his guardian or guardians." The son Thomas Anson was of age at the time of the testator's death, but was of unsound mind, and he was declared a lunatic in 1898, and the plaintiffs were appointed committee of his person and estate. After the father's death, the son lived with his mother, to whom from time to time till February, 1889, payments were made on account of the annuity:—*Held*, that the annuity was charged on the land; that it was, therefore, by virtue of s. 2 (3) of the Limitations Act, R. S. O. 1897, c. 133, rent within the meaning of that Act; that the payments to the mother, who was the natural guardian, were good; and that the statute did not begin to run till the last of them were made; that apart from the question of disability the right of action would have been barred at the expiration of ten years from that time; but that by ss. 43 and 44 the time was extended for five years from the removal of disability, or for twenty years; and that, therefore, an action brought in February, 1903, was in time; and that six years' arrears could be recovered. Judgment in 31 O. R. 594, 20 C. L. T. 120, affirmed. *Trusts and Guarantee Co.* v. *Trusts Corporation of Ontario*, 21 C. L. T. 373, 2 O. L. R. 97.

Assignment of debt — *Sheriff's sale—Equitable assignment—Payment to stranger—Ratification.*]—In Nova Scotia, book debts cannot be sold under execution, and the act of the execution debtor in allowing such sale does not constitute an equitable assignment of such debts to the purchaser. The purchasr received payment on account of a debt so sold, which, in a subsequent action by the creditor and others, was relied on to prevent the operation of the Statute of Limitations:—*Held*, that, though the creditor might be unable to deny the validity of the payment, he could not adopt it so as to obtain a right of action thereon, and the payment, having been made to a third party who was not his agent, did not interrupt the prescription. *Keighley* v. *Durant*, [1901] A. C. 340, followed. *Moore* v. *Roper*, 25 C. L. T. 55, 35 S. C. R. 533.

Bill of Exchange — *Period of limitation.*]—A bill of exchange given for a commercial debt is barred by five years' lapse of time. *Guimond* v. *Blanchard*, 21 Que. S. C. 106.

Building — *Faulty construction—Action against architect or contractor — Starting point.*]—The prescription of an action against the contractor or architect for the total or partial loss, within 10 years, of a building constructed by them, has for its starting point the manifestation within the 10 years of the fault in the construction or in the soil, and such right of action endures for 30 years from the time of the manifestation of such fault. *Archambault* v. *Curé and Churchwardens of St. Charles de Lachenaie*, 12 Que. K. B. 349.

Claim on promissory note — Commencement of statutory period—Return of defendant from beyond seas—Amendment—Limitation Acts in force in territories — Imperial Acts — Territorial Ordinance — Effect of. — *Plano Manufacturing Co.* v. *Peterson* (N.W.T.), 3 W. L. R. 565.

Claims for professional services — Cross-accounts—Items more than 6 years old — Effect of later items — Statute of Frauds—Promise to pay for services rendered to third persons—Claim against executor — Corroboration — Entries in books — Evidence. *Halliwell* v. *Zwick*, 13 O. W. R. 1.

Construction of statute — *Contract for supply of electric light—Negligence—Injury to person not privy to contract—"Consolidated Railway Company's Act, 1896," 59 V., c. 55 (B.C.) ss. 29, 50, 60.*]—Appellant company, having acquired the property, rights, contracts, privileges and franchises of Consolidated Rw. and Light Co., under provisions of "Consolidated Railway Co.'s Act, 1896," (59 V. c. 55 (B.C.), is entitled to benefit of Limitation of Actions provided by s. 60 of that statute, Idington, J., dissenting.—Limitation so provided applies to case of an infant injured while residing in his mother's house by contact with an electric wire in use there under a contract between company and his mother.—Judgment appealed from (14 B. C. R. 224), reversed, Davies and Idington, JJ., dissenting. *B. C. Electric Ry. Co.* v. *Crompton* (1910), 30 C. L. T. 524, 43 S. C. R. 1.

Contract — *Fraud — Creditor's action — Knowledge of fraud — Pleading.*]—Inasmuch as an action by a creditor to set aside a contract for fraud must, under art. 1040, C. C., be brought within one year from the time of his obtaining a knowledge of such contract, and inasmuch as that article is prohibitory in its terms, and denies absolutely the right of action unless exercised within the year, it is essential, whenever the fact does not appear by the dates of the contract attacked and of the institution of the suit of proceeding, that the party seeking the avoidance of the contract should allege and prove that he only obtained knowledge thereof within the year preceding the institution of his suit or proceeding. Where not pleaded, the objection based on the omission of such allegation may be raised at any stage of the case. *Gagnon* v. *Dunbar*, 20 Que. S. C. 515.

Costs — *Solicitor — Distraction—Judgment—Period of prescription—Prête-nom—Discontinuance of action — Termination of retainer — Commencement of statutory period.*]—Distraction of costs is a judgment in favour of the attorney or solicitor, and therefore he has a title to his costs, which can only be barred by a 30 years' prescription, as against the party ordered to pay the costs or against the person really liable of whom the other is the *prête-nom*.—The short period of prescription for professional services and disbursements of the advocate of the plaintiff runs from the date of discontinuance of an action brought by the latter, even if it is not followed by a judgment.—The costs of an action are not due to the advocate until his mandate *ad litem* has ended by a judgment or otherwise. *Bernard* v. *Carbonneau*, 15 Que. K. B. 330.

Damages—*Quasi-delict — Prescription — Interruption of — Settlement with adverse party—Demurrer—C. P. 191, C. C. 2227,*

2262.]—A right of action for *quasi-delictual* damages is lost and extinguished by the lapse of one year; all the allegations of the declaration relating to said prescribed right should be rejected on demurrer. An agreement with the defendant company's manager by which the company is to pay plaintiff "his wages until such time as the doctor attending him should advise that he was able to return to work" does not interrupt prescription, said agreement creating a new debt based on the contractual relationship between the parties and giving a new and different cause of action. *McKinstry* v. *Irvin* (1910), 12 Que. P. R. 214.

Debt — *Acknowledgment — To whom made—Stranger—Vendee of book debts — Right of sheriff to sell—Absence of statutory authority.*]—An acknowledgment or payment, to take a debt out of the Statute of Limitations, must be made to the party legally entitled to receive the same or his agent. An acknowledgment or payment made to a person who occupies the position of a stranger has no binding force or effect whatever. A sale by the sheriff, of book debts, without statutory authority, is void, and confers no right upon the purchaser. *Moore* v. *Roper*, 37 N. S. R. 161.

Debt — *Acknowledgment — Writing — Payments — Appropriation.*] — An acknowledgment of a debt or promise to pay, to take such debt out of the law of limitations, must be in writing, and cannot be proved in any other way (art. 1235, C. C.) A payment made before any of the items of an account have been prescribed should be imputed to the earliest item of the account, no item of the account bearing interest and all being of the same nature and equally onerous: art. 1161, C. C. *Beaudoin* v. *Fecteau*, 14 Que. K. B. 29.

Debt — *Part payment — Dividend paid by assignee for creditors.*]—A dividend paid by an assignee, under the usual voluntary assignment by a debtor for the benefit of his creditors, is not such a part payment as will take a debt, otherwise barred, out of the Statute of Limitations. 21 Jac. I. c. 16. *Birkett* v. *Bissonette*, 10 O. W. R. 171, 15 O. L. R. 93.

Ejectment.] — Mortgagee brought an action of ejectment and recovered judgment which he recorded, but took no further steps for 20 years:—*Held*, that judgment and mortgage were both barred. *Re Lands of James Ling* (1908), 43 N. S. R. 69.

Foreign contract — *Pleading.*]—The plaintiff should allege in his declaration all that is essential to the maintenance of the right of action which he asserts.—If his declaration discloses an action absolutely prescribed according to our law, he cannot, in reply to a plea of prescription, allege that his action is governed by the law of a foreign country which does not recognise such prescription, even when the declaration discloses that the contract was made in that country. *Shattuck* v. *Tyler*, 16 Que. S. C. 401.

Goods sold and delivered — *Division Court—Amendment of defence — Misleading particulars of claim.*]—Action in a Division Court for the amount of an account for goods sold and delivered to the defendant by the plaintiffs. The particulars attached to the summons gave the dates of sale as in 1896, and the action was brought within six years from the earliest date given. The defendant entered a dispute note, but did not give notice of a defence of the Statute of Limitations. When the plaintiffs' books were produced at the trial, they shewed that the entries were all made in 1895, more than six years before action:—*Held*, that the defendants should have leave to amend by setting up the statute as a defence, and were entitled upon that defence to defeat the action. *Meehan* v. *Berry*, 22 C. L. T. 237.

Injury from electric light wire — *Six months' limitation clause in Act of Incorporation — Negligence.*]—While plaintiff was working in his mother's cellar he touched an electric light wire with a saw and was injured. The action was commenced more than six months after the injury was sustained. The Incorporation Act of the defendants required that actions for damages or injury sustained "by reason of the tramway or railway or the works or operations of the company" shall be commenced within six months after such damage or injury received:—*Held*, that as action not founded on contract it must be dismissed. Note the comprehensive phrase quoted above. *Crompton* v. *British Columbia Electric Rw. Co.* (B.C.), 10 W. L. R. 377.

Interruption of statute — *Assignment for creditors — Claim against estate.*]—An assignment of property for the benefit of creditors does not interrupt prescription.—2. The lodging of his claim by a creditor in the hands of the curator of the estate of an insolvent, the collocation, and part payment of such claim, by the curator, interrupt prescription. *Carter* v. *McLean*, 20 Que. S. C. 395.

Interruption of statute — *Claim for services—Gift in recognition of—Payment—Subsequent annulment.*]—The defendant had for several years been the agent and solicitor of a lady, and she, to testify her profound gratitude for his services, and as a mark of her affection, made him a gift of $8,000 out of her estate from the moment of her decease and before the division of her property. This gift was annulled by the Court (Q. R. 12 S. C. 162, 13 S. C. 205), upon the ground that it was a *donatio mortis causa*. The defendant then accounted for the sum which he had received from the executors in respect of the gift, but asserted a set-off of a greater amount as due to him by the estate of the deceased for solicitor's and agent's charges. The plaintiff replied that the defendant's claim was prescribed:—*Held*, that, although the gift had been declared void, the prescription of the defendant's claim had been interrupted by the recognition and promise to pay which the gift imported, and had been suspended until the decease of the donor, the defendant not being able before that to claim the price of his services; and, moreover, the prescription had been interrupted by the payment by the executors of the amount of the gift. *Boucher* v. *Morrison*, 20 Que. S. C. 151.

Interruption of statute — *Proof of payments — Admissions.*]—In a commercial matter, governed by art. 1235, C. C., proof of payments interrupting prescription may be

made by the admission of the defendant; art. 1245, C. C. *Guay* v. *Guay*, 11 Que. K. B. 425.

Intestate estate — *Claims of creditors —Duty of administrator.*]—B. died intestate in 1883 and his estate was distributed in 1896 among the creditors of whose claim the administrator had then notice. In 1900 the administrator discovered further assets:—*Held*, that the claims of creditors were barred by the Statute of Limitations, which the administrator would be bound to plead in an action by a creditor; and the next of kin were entitled. *Re Bedson* (1910), 14 W. L. R. 541.

Judgment — *Action on — Execution— Sale of land — Sum realized credited on judgment — Part payment.*]—The plaintiff entered a judgment against the defendant, and 22 years afterwards brought an action on the judgment. The defendant pleaded the Statute of Limitations. It appeared that within the 20 years an execution had been issued on the judgment, and the defendant's land had been sold under the execution, and knocked down to the plaintiff for a small sum, which sum was credited on the execution:—*Held*, that this was part payment within the meaning of the statute. *Hart* v. *Griffin*, 40 N. S. R. 236.

Judgment — *Execution—Part payment.*]—This action was brought on the 10th January, 1898, on a judgment for $412.69 entered on the 24th November, 1876; the defence was the Statute of Limitations. An execution was issued on the 17th December, 1877, returnable within sixty days. The sheriff on the 31st January, 1878, sold the defendant's land under execution. It was knocked down to the plaintiff for $35, and this sum was credited on the execution:—*Held*, that this was part payment within the meaning of the statute. *Chinnery* v. *Evans*, 11 H. L. Cas. 115, followed. *Hart* v. *Griffin*, 21 C. L. T. 567.

Judgment — *Execution—Part payment.*]—The plaintiff recovered judgment against the defendant in the Supreme Court on the 18th October, 1875, and recorded the same so as to bind the lands of the defendant. The first execution was issued thereon on the 23rd October, 1875, and returned unsatisfied. The defendant died intestate on the 26th April, 1876. On the 10th September, 1887, another execution was issued, directed against lands of the defendant. A portion of the defendant's lands were sold thereunder, and purchased by the plaintiff, and the amount of the proceeds was credited on the execution. On the 14th July, 1901, one Lefurgey purchased from the heirs the remaining lands that belonged to the defendant. On the 31st August, 1901, the plaintiff obtained leave to issue another execution for the balance due on the judgment, and he proceeded under the execution to sell the lands purchased by Lefurgey. An order was made staying proceedings until an issue should be directed and tried as to the title of the lands.—*Semble*, that proceedings were barred by the Limitations Act, the sheriff not being the agent of the judgment debtor. *Chinnery* v. *Evans*, 11 H. L. Cas. 115, distinguished. *Hart* v. *Griffin*, 21 C. L. T. 567, referred to. *Harrington* v. *Meloney*, 21 C. L. T. 598.

Judgment — *Revivor—Time—Notice.*]—In 1894 the plaintiff obtained *ex parte* (the defendant being out of the jurisdiction) an order reviving a judgment for the payment of money which he had recovered against the defendant in 1875, and allowing the entry of a suggestion on the judgment roll, and the issue of execution. The plaintiff entered the suggestion in 1894, and afterwards examined the defendant as a judgment debtor, whereupon the defendant made an offer of settlement, which was not accepted. The plaintiff died in 1895 and the defendant in 1899, after which the personal representative of the plaintiff obtained an order on *præcipe* reviving the action in his name as plaintiff and in that of the personal representative of the defendant as defendant:—*Held*, that the last order should have been made on notice, but it was proper to treat an application to set it aside as a substantive motion on notice, and, so treating it, the order should be confirmed. The order made in 1894 reviving the judgment should have been made on notice, under the Common Law Procedure Act, then in force, but, under the circumstances of the defendant's absence from the country, his subsequent examination, and the attempted settlement, it was a valid and binding order.—*Held*, also, following *Mason* v. *Johnston*, 20 A. R. 412, that the judgment remained in force for twenty years, and the entry of the suggestion within that time was effectual to renew the time from which the statute begins to run. *Allison* v. *Breen*, 20 C. L. T. 103, 19 P. R. 119.

Above decision affirmed on appeal. *Boice* v. *O'Loane*, 3 A. R. 167, as to the lifetime of a judgment, followed in preference to English decisions. The practice of dealing with the question raised on an application to set aside an *ex parte* order as if the application were a substantive one for such order, approved. *Allison* v. *Breen*, 20 C. L. T. 207, 19 P. R. 143.

Judgment barred after 20 years—*Acknowledgment to take case out of statute —Execution—Collection Act.*]—The Statute of Limitations, R. S. (1900), c. 167, s. 22, provides that no action or other proceedings shall be brought to recover any sum of money secured by any judgment—but within 20 years after the present right to receive the same has accrued—unless in the meantime some part of the principal money or some interest thereon has been paid, or some acknowledgment of the right thereto has been given, etc.:—*Held*, that the mere issue of a writ of execution and the placing of the same in the hands of the sheriff, without any further action being taken thereon to enforce the payment, was not sufficient to bring the judgment within the saving clause of the statute so as to keep it in force, and that the judgment being dead the execution fell with it.—Also, that the section refers to judgment generally; also, that the issuing of a summons under the Judgment Debtors' Act calling upon the debtor to appear for examination, is not such an acknowledgment as to take the case out of the statute. *Boak* v. *Flemming*, 43 N. S. R. 360.

Judgments bearing interest pronounced before the coming into operation of 62 Vict. (Que.) *c.* 51, such interest is prescribed by the terms of 30 years and not that of 5 years under Art. 2250 of the Civil Code, as it stood before the passing of that Act. *Royal Trust Co.* v. *Baie de Chaleurs Ry. Co.* (1908), 13 Ex. C. R. 9.

Limitation and prescription distinguished — *Limitation as to penal actions —Penalty for failure to do a thing within a specified time—Continuing offences—Starting point for period of limitation of actions.*]—Limitation of the time within which an action may be brought operates as an extinction of the right to bring it and is an absolute bar to it, of which the Courts must take notice, if it appears on the face of the pleadings. In that respect, it differs from extinctive prescription which only gives rise to a presumption that the obligation affected by it has been discharged, and must therefore be pleaded.—The action to recover a penalty accrues, and the limitation period in which it may be taken to run, as soon as the offence is committed.—When a statute that prescribes performance of an act within a specific delay, makes a failure to comply a penal offence, the latter is committed and the penalty is recoverable at the expiration of the delay so fixed. Hence, the limitation period for bringing the action runs from the same time. (*Hendsley* v. *Morgan*, 5 L. C. J. 54, overruled.) *Trogadis & Anglo-Am. Tel. Co.* (1909), 19 Que. K. B. 163.

Limitation of one year, applicable to revocatory actions, provided in C. C. by Art. 1032 and following, does not extinguish the right to creditors of an insolvent company to have a shareholder ordered to restore assets, withdrawn from the company to the prejudice of its creditors. *Hyde* v. *Thibaudeau* (1910), 11 Que. P. R. 419.

Malpractice — *Physicians and surgeons —Contract.*]—The prescription provided by Arts. 2261 and 2262 is not applicable to a wrong arising out of contract, in the case, for example, of a physician or surgeon guilty of want of skill and of negligence in the exercise of his profession. *Griffith* v. *Harwood*, 9 Que. Q. B. 203, 2 Que. P. R. 485.

Master and servant — *Injury to servant.*]—Under Art. 2262, C. C., the action of a workman against his employer for the recovery of damages for bodily injuries received in the course of his employment, is prescribed by one year, and the Court is bound to apply the prescription although not pleaded. The doctrine of *faute contractuelle* does not apply to such case. *Robillard* v. *Wand*, 17 Que. S. C. 456.

Master and servant — *Injury to servant — Period of prescription.*]—An action by a workman against his employer to recover damages for bodily injury resulting from an accident in the course of his work is prescribed by the lapse of one year, according to the terms of Art. 2262 (2), C. C., and not by the lapse of two years according to the terms of Art. 2261 (2), C. C. *Versailles* v. *Dominion Cotton Co.*, 32 Que. S. C. 281.

Money demand — *Payment on account by party chargeable — Application of proceeds of security.*]—The plaintiff sued for the balance due upon two lien notes, which were more than six years overdue at the time of suit. He had retaken the goods for which the notes were given, and re-sold them, crediting the defendant with the proceeds of sale:—*Held*, not a payment by the party chargeable or his agent sufficient to take the case out of the Statute of Limitations. *Massey-Harris Co.* v. *Smith*, 6 Terr. L. R. 50.

Money demand — *Statute — Dual language — Set-off — Delay — Pleading — Costs — Success in part.*]—The prescription established by paragraph 4 of Art. 2262, C. C., only applies to actions by hotel keepers, boarding-house keepers, and other tradesmen, and not to a bill for board by one who does not make a trade of keeping a boarding-house.—2. The English text of paragraph 4 of Art. 2262, being more in accord with the law as it stood at the time of codification, should prevail over the French text.—3. In an action to recover the amount due under a covenant the defendant cannot claim a set-off for twenty-one years' board, when, in view of intervening transactions between the parties, such claim will give rise to a serious contest—it cannot be adjusted promptly or summarily, but, on the contrary, will necessitate a difficult accounting and a long inquiry — and it is also claimed in another action between the parties.—4. Since the new Code of Civil Procedure, it is sufficient, in a plea of set-off, to ask for the dismissal of the action; it is not necessary to ask the Court to order the set-off.—5. In this case, the appellant, having succeeded in reversing the judgment below in so far as it declared the debt which he asserted as a set-off to be prescribed, which judgment, if unreversed, could have been invoked against him in another action, was entitled to his costs of appeal. *Naud* v. *Marcotte*, 9 Que. Q. B. 123.

Money in Court — *Payment out by mistake — Lapse of time—Restitution—Interest.*]—Statutes of Limitation have relation only between subject and subject—the Crown cannot be bound by them. The Court is a public trustee as to all moneys and securities in its hands. Moneys in Court are in *custodia legis*—in this case tantamount to *custodia regis* — and to such a fund and such a custodian the Statute of Limitations has no pertinence. Suitors and claimants are not barred by any lapse of time in their application for payment out of Court of moneys to which they are entitled, and reciprocally they should not be protected by lapse of time from making restitution if they have improperly or fraudulently received moneys from the Court to which they had no just claim; and an order was made ordering restitution after a period of fourteen years, although without interest, as the mistake was that of an officer of the Court. Where moneys in Court have been improperly paid out in an action, a motion to compel a refund is the proper procedure. *Allstadt* v. *Gortner*, 20 C. L. T. 100, 31 O. R. 495.

Nuisance — *Injury to property by misuse of neighbouring premises — Starting*

point for period of limitation.]—The extinctive prescription of the remedy for the recovery of damage caused to an immovable by the injurious effect of chemical agents in use in an adjoining factory, begins at the moment of the arising of the right of action, and that right arises as soon as the injury manifests itself in an appreciable fashion. *L'Huissier* v. *Brousseau*, 33 Que. S. C. 345.

Overpayment of debt — *Action to recover excess — Commercial debt—Period of prescription.*]—Where by error a person in paying a commercial debt pays more than is due, the obligation to repay the excess creates a commercial debt; and, therefore, an action to recover the excess is prescribed by the lapse of five years. *St. Maurice Lumber Co.* v. *Scott*, 33 Que. S. C. 332.

Partnership — *Claims of partners inter se — Period of limitation — Commencement — Stock dealings — Commercial partnership.*] — A partnership formed between a notary and an advocate to operate upon the exchange by the purchase of shares with the object of selling them at a profit, is a commercial partnership. Therefore, the reciprocal claims of the partners are barred by a lapse of five years reckoned from the time they become due, that is, from the moment at which the partnership ends. *Myler* v. *Huot*, 35 Que. S. C. 483.

Paulian action — *Sale of immovable by father to daughter — Presumption of fraud—Action taken several years after sale —Proof of knowledge of sale infra annum.*] There can be no presumption of fraud attaching to a sale of his immovable property by a father to his daughter if he remains proprietor of movable property which his creditors may seize, and the creditors cannot sue to have such sale annulled without proving that, at the time of the sale, the seller was and knew that he was insolvent.—The plaintiff who asks that a sale, which had been effected several years previously, be set aside for fraud, must prove that he knew of the sale only within one year of the date of his action. *Deslandes & St. Jacques* (1909), 19 Que. K. B. 289.

Payment for services — Contract — *Quantum meruit* — Solicitor — Acknowledgment — Correspondence — Costs. *Segsworth* v. *DeCew*, 10 O. W. R. 575.

Payment of money — *Order for — Instalments — Commencement of prescription.*]—The defendant had given to the plaintiff an order on the Richelieu & Ontario Navigation Company to receive $20 a month on his wages till the whole amount which he owed to the plaintiff should be paid. Subsequently he left the employ of the company, and thereby deprived the plaintiff of the benefit of the order. He contended that the whole balance due to the plaintiff was prescribed because more than five years had elapsed since he had left his employment:—*Held*, that the debtor cannot invoke against his creditor Art. 1092, C. C., so as to make it imperative on the latter to sue before the lapse of the term stipulated between them. It is optional on the part of the creditor to avail himself of that Article or not.—2. The prescription, in cases like this one, begins to run only on each instalment as it matures, according to the terms of the order or draft. *Laliberté* v. *Gagnon*, 16 Que. S. C. 292.

Personal injuries — *Subsequent damages — Reservation of rights.*]—The reserve, in a judgment awarding damages for bodily injuries, of the plaintiff's recourse for damages resulting from the same accident subsequent to the judgment, has the effect of interrupting prescription, and therefore an action may be brought for the recovery of subsequent damages, although more than a year has elapsed since the date of the accident. *Racicot* v. *Ferns*, 17 Que. S. C. 337.

Personal injury — *Second action — Right reserved.*]—In 1895 the plaintiff sustained bodily injuries through negligence on the part of the city, and recovered judgment for $1,000 damages therefor, recourse being reserved for any further action she might have for future damages which might result from the same accident. On the 3rd December, 1897, she brought a second action for further damages said to have been ascertained since the institution of her first action, and recovered $5,000 additional damages:—*Held*, that at the time the second action was brought any right that the plaintiff may have had was barred by the limitation declared in Art. 2262, C. C., which commenced to run from the day on which the right of action accrued; that the Courts should, of their own motion, take notice of prescriptions acquired in such cases, as provided by Art. 2188, C. C., and dismiss the action; that tacit renunciation of such acquired prescription cannot be presumed from the failure of the defendant to plead the limitation that the reservation in the first judgment did not constitute a judicial condemnation within the meaning of Art. 2265, C. C., for the purpose of interrupting prescription already acquired or causing a new prescription to begin; and that there could be no reservation of an action the right to which is absolutely denied by the provisions of the Civil Code. Such a reservation amounts merely to a declaration that, in a second action, such judgment could not be pleaded as *chose jugée*, provided the future damages so reserved did not appear to be included in the demand by the first action; and could have no effect after the expiration of one year. *Montreal* v. *McGee*, 21 C. L. T. 3, 30 S. C. R. 582.

Personal injury — *Second action — Right renewed.*] — The plaintiff was employed by the defendant as a stevedore. On the 29th September, 1898, he was injured by some sacks of sugar falling on him. About a month later he brought action for $1,999 damages, alleging that he had suffered permanent injuries and that the accident was caused by the negligence of the defendant. On the 16th March, 1899, the plaintiff obtained judgment for $300 for damages sustained up to that date, the Court reserving the right of the plaintiff to bring another action for future damages. This judgment was satisfied by payment of the amount awarded. The present action, brought under the reserve contained in the first judgment, was for $4,700 additional damages. It was only commenced on the 12th October, 1899, more than a year after the date of the accident;

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but it was contended that the prescription which would otherwise apply was interrupted by the reserve in the first judgment, and that the year should be calculated from that date:—*Held*, following *Montreal* v. *McGee*, 21 C. L. T. 3, 30 S. C. R. 582, that the first judgment had not the effect of the interrupting prescription. *Ferns* v. *Racicot*, 21 C. L. T. 81.

Prescription — *Board — Proof — Presumption—Legacy — Creditor.*]—Paragraph 4 of 2262, C. C., respecting prescription of actions for hotel and boarding-houses charges, does not apply to a person who does not make it a business of carrying on a boarding-house.—The presumption created by art. 890 C. C. applies to legacies generally, even to one which carries a remuneration with it; and such presumptions can only be destroyed by a clause in the will itself, or by an admission made by the creditor and established according to the rules of evidence.—All presumptions are left with and are discretionary with the Judge. *Bonin* v. *Ducharme* (1910), 16 R. L. n. s. 391.

Principal and agent — *Collection of rents — Agreement to account.*] — Where the defendant received the rents of a property for a period of 25 years, without during that time accounting to the plaintiff, it was *held* that the right to an account was not barred by the lapse of time, the defendant having taken possession of the property under an agreement with the plaintiff, which had never been terminated, to hold the property for him and to account to him for it. *Pick* v. *Edwards*, 2 E. L. R. 232, 3 N. B. Eq. 410.

Principal and agent — *Reformation of agent's account.*] — An action for the reformation of an agent's account is prescribed by a period of five years. *Grange* v. *Sauvé*, 5 Que. P. R. 100.

Promissory note — *Acknowledgment — Interest.*]—After the expiration of six years from the making of certain promissory notes, the maker wrote to the payee's solicitor stating that he acknowledged his indebtedness on the notes so as to prevent the operation of the Statute of Limitations, and that in no event would it have made any difference, for, statute or no statute, the debt was one he would pay, if it took his last penny. He enclosed a letter to the payee himself, stating that he thereby begged to acknowledge his liability to him on the notes, and that the acknowledgment was made by him to prevent the running of the Statute of Limitations. The maker died a couple of years afterwards:—*Held*, that the claim was taken out of the operation of the statute, both as to principal and also the interest due, not only at the maturity of the notes, but also after maturity, by way of damages. *Re Williams*, 24 C. L. T. 91, 7 O. L. R. 156, 1 O. W. R. 534, 2 O. W. R. 47, 3 O. W. R. 251.

Promissory note — *Acknowledgment—Promise to pay—Conditional promise.*]—In an action upon promissory notes, the defendant pleaded the Statute of Limitations:—*Held*, that a letter written by the defendant to the plaintiff's solicitor, in answer to one from the solicitor demanding payment of the notes, in which the defendant wrote: "I am coming up in a week or two *and will fix it up all right*," was a sufficient acknowledgment to prevent the statute running.—*Edmonds* v. *Goater*, 21 L. J. Ch. 290, and *Collins* v. *Stack*, 1 H. & N. 605, followed.—Another letter in which the defendant wrote that he had been looking for the money, and had not got it yet, but as soon as he got it, the plaintiff would get his, was regarded as a promise dependent upon a condition; and *semble*, that it would be insufficient as an acknowledgment. Judgment of Ryan, Co.C.J., affirmed. *Eyre* v. *McFarlane* (1910), 14 W. L. R. 247.

Promissory note — *Acknowledgment after period of prescription—Conditional renunciation.*]—A promissory note signed by the defendant in favour of the plaintiff had been barred by the Statute of Limitations since 1897. In 1902 the defendant wrote to the plaintiff: "You ask me for money; at this moment I have none. I have bought land and paid all I had; but I am negotiating for the sale of my land and I will pay you as soon as I sell it." The plaintiff contending that this letter constituted a renunciation of the prescription acquired, sued the defendant for the amount of the note and interest without waiting for the sale of the land:—*Held*, that this letter did not amount to a renunciation of the rights acquired, but only to a conditional offer to renounce the prescription acquired; and therefore the creditor, in order to acquire again the right of action which he had lost, should have waited for the fulfilment of the condition. *Perrier* v. *Perrier*, 25 Que. S. C. 183.

Promissory note — *Acknowledgment in writing — Revival of liability — Agent of executor — Letter to third person—Admissibility.*]—The executor of the will of one of the joint makers of a promissory note proved the will after the debt on the note as against the testator or his estate became barred by the Statute of Limitations. The will directed that all the testator's just debts should be paid by his executors as soon as possible after his death. The executor, who lived out of Ontario, executed a power of attorney to the other joint maker of the note, who was primarily liable on it, and against whom it had been kept alive by payments, to enable him in Ontario "to do all things which might be legally requisite for the due proving and carrying out of the provisions" of the will—the executor having at this time no knowledge of the note:—*Held*, that a letter written by the surviving maker shortly after the execution of the power of attorney, even if in its terms sufficient, was not such an acknowledgment, within R. S. O. c. 140, s. 1, as would revive the liability after the expiry of six years; for there was no trust created by the will for the payment of debts, nor was there any legal obligation on the part of the executor to pay statute-barred debts, and the surviving maker was not an agent "duly authorised" to exercise the discretion which an executor has to pay such debts. Three years later the executor wrote to the holder of the note to the effect that the holder ought to look to the surviving maker for payment, as he was now doing well.—*Held*, that this, though some recogni-

tion of the debt, was not sufficient—there must be such a recognition as amounts to a promise or undertaking to pay. Just before this action was brought to recover the amount of the note, the executor wrote to the plaintiffs' solicitors asking them not to take any further steps till he could hear from the surviving maker; and to the latter he wrote: "The debt is owing, and they are anxious to get their estate settled up."—*Held*, insufficient as an acknowledgment, and that the letter to a third person—not the creditor—was not admissible. *Goodman* v. *Boyes*, 17 A. R. 528, followed. *King* v. *Rogers*, 20 C. L. T. 209, 31 O. R. 573.

Promissory note — *Action on — Absentee defendant — Service of process by publication — Period of prescription expiring before second publication.*]—The service upon an absentee of the writ of summons in an action is not perfect and complete until there have been two publications in newspapers; a promissory note overdue for five years, when the five years expire between the dates of the two publications, is prescribed for all purposes of law. *Gauthier* v. *Charlebois*, 10 Que. P. R. 6.

Promissory note — *Collateral security by mortgage — Period of prescription—Interest — Commencement of period — Acknowledgments — Interruption of prescription — Renunciation.*]—Prescription of five years and not 30, applies to a promissory note, notwithstanding that part thereof was for money lent, for securing which hypothec was given. Interest on demand note runs from the date thereof. Prescription begins to run from the date thereof and not from the date of demand of payment. Acknowledgments made by one party to a note interrupt prescription as to the others. Acknowledgments can be proved by the oath of one of the parties defendant. A transfer of property by one defendant to the plaintiff, though signed by the defendant before the consideration was filled in, and imperfect in form, when coupled with the admission of the defendant that the consideration, whatever it was, was to be placed to the credit of the said note, is a "*reconnaissance par écrit*" at the date of the transfer, and sufficient to interrupt prescription. The oath alone of one defendant is in itself enough to interrupt prescription. While it requires a new promise to pay, clearly expressed, to renounce a prescription acquired, the sole acknowledgment of a debt is sufficient to interrupt prescription, while running. *Bank of Ottawa* v. *McLean*, 26 Que. S. C. 27.

Promissory note — *Commencement of statutory period.*] — The last day of grace upon a promissory note was the 19th September, 1894, on which day it was presented for payment and dishonoured:—*Held*, that an action thereon begun on the 19th September, 1900, was one day too late to save the Statute of Limitations. *Sinclair* v. *Robson*, 16 U. C. R. 211, followed in preference to *Kennedy* v. *Thomas* [1894] 2 Q. B. 759. *Bank of Toronto* v. *McBean*, 21 C. L. T. 44.

Promissory note — Covenant in mortgage — Foreign lands — Sealed instrument —Foreign law — Foreign judgment—Jurisdiction — Defendant resident in territories —Subject of foreign state — Allegiance — Natural justice — Purchase by mortgagee at judicial sale. *Dakota Lumber Co.* v. *Riederknecht* (N.W.T.), 1 W. L. R. 481, 2 W. L. R. 86, 275.

Promissory note — *Joint note—Statute of Limitations — Payments by one maker—Agency — Evidence of — Cox's.*] — Action upon a joint promissory note made by W. W. Greenwood, deceased, and his wife, defendant Mary J. Greenwood. The defence chiefly relied upon was that of the Statute of Limitations, in reply to which plaintiff proved several payments on account by W. W. Greenwood within six years of the commencement of the action, and plaintiff sought to establish that these payments were out of money to which defendant Mary J. Greenwood was entitled, and were made by her husband with her authority:—*Held*, that the evidence fell short of establishing either that the payments or any of them were made out of the wife's money with her knowledge and consent, or that in making any of the payments the husband was acting as her agent. The fact that the husband had general authority to collect certain assets belonging to the wife, and was allowed by her to apply the same either for his own benefit or for hers as he saw fit, would not constitute him her agent so that by payments (out of money so collected) on account of the note he could either continue or renew her liability upon a joint note which but for such payments would be barred by the Statute of Limitations. Payments made by one of two joint makers will not take the case out of the statute as against the other unless made expressly as his agent and by his authority: *Creighton* v. *Allen*, 26 U. C. R. 627. See also *Paxton* v. *Smith*, 18 O. R. 178. While the husband did make collections for the wife and did not account to her fully for the same, there is no evidence that any part of such collections was ever specifically applied by him upon the note. It was clear that, if he did so apply the money, it was without her knowledge or express consent. While this note was outstanding the husband caused to be conveyed to the wife several parcels of incumbered real estate, the equity of redemption in which would have been available in his hands to pay plaintiff. The action as against defendant Mary J. Greenwood, dismissed. *Harris* v. *Greenwood*, 4 O. W. R. 140, 25 C. L. T. 72, 9 O. L. R. 25.

Promissory note — Lien on land — Right to redeem — Tender — Sale — Confirmation — Costs. *Re Hardaker* (N.W.T.), 1 W. L. R. 161.

Promissory note—Payment on account —Conflict as to source of payment — Evidence — Inference. *Geralamy* v. *Cameron*, 6 O. W. R. 425.

Promissory notes — *Acknowledgment in writing — Inference of promise to pay.*] —*Held*, that in order to take a case (in this case a claim upon promissory notes) out of the Statute of Limitations, there must be an acknowledgment or promise to pay, and where there is a clear acknowledgment a promise to pay will be inferred, but if such acknowledgment is coupled with words which

prevent the possibility of the implication of the promise to pay arising, the acknowledgment is not sufficiently clear to take the case out of the statute. *Deering Harvester Co.* v. *Black*, 8 W. L. R. 91, 1 Sask. L. R. 123.

Promissory notes — *Art. 2260, C. C.— Interruption of prescription — Dividend paid by curator of insolvent estate.*]—The short prescription of promissory notes provided by Art. 2260, C. C., is interrupted by a payment of dividends made by the curator to the assignment of the property of the promisor. *Caverhill* v. *Prévost*, 32 Que. S. C. 81.

Promissory notes — Commencement of statute—Absence of defendant from province —Return. *Moore* v. *Balch*, 1 O. W. R. 824.

Promissory notes — *Prescription — Interruption — Payment of dividend by curator of insolvent estate.*]—The extinctive prescription by lapse of five years of promissory notes is not interrupted by payments made by the curator to an abandonment of property of the debtor. *Hochelaga Bank* v. *Berome*, 33 Que. S. C. 383; *Hochelaga Bank* v. *Richard*, 3 E. L. R. 575.

Qui tam action — *Prescription — Amendment—C. C. 1245, C. P. 522, R. S. Q. 2615.* [754.]—An amendment which would resuscitate an apparently perempted suit will not be allowed.—Counting from the day upon which the offence was committed, a *qui tam* action, taken against a company which has failed to register the declaration required by law, is prescribed by one year.—Such prescription only commences to run from date upon which company commenced its business operations, all transactions respecting organisation of company, such as purchase of land, loans, election of officers, etc., not being considered business operations. *Cf. Robinson* v. *McAllister*, 15 Que. S. C. 93; *Donaldson Steamship Line* v. *Robert Reford Co.*, 22 Que. S. C. 510; *Lachance* v. *Desbiens*, 23 Que. S. C. 524, *Croysdill* v. *Crescent Turkish Bath Co.* (1910), 38 S. C. 207, 16 R. L. n. s. 357.

Railway — *Fire caused by sparks from engine — Period of prescription.*]—An action for damages caused by a fire started by the employees of a railway company is prescribed by the lapse of two years, and the claim of the plaintiff is then absolutely extinct. *Villani* v. *Northern Colonisation Rw. Co.*, 9 Que. P. R. 204.

Railway — Fires from engine — Destruction of property — "By reason of the railway" — Period of limitation — Statutes— Special Act — General Railway Act—Subsequent amendments — Application of. *Northern Counties Investment Trust* v. *Can. Pac. Rw. Co.* (B.C.), 4 W. L. R. 539.

Recovery of tax — *Municipal corporation — Period of prescription — Statutes— "Current year."*]—In a provision of a city charter that the right to recover an assessment is prescribed and extinguished unless the city, within three years, in addition to the current year, to be counted from the time at which such assessment became due, has commenced an action for the recovery thereof, the words "current year" mean the year in which the action is brought. When therefore, an assessment became due on the 24th March, 1898, an action to recover it brought and process served on the 5th February, 1902, was still within the delay, and had not become prescribed. *Vannier* v. *Montreal*, 15 Que. K. B. 479.

Sale of goods — *Action to set aside — Period allowed for—Pleading—Costs.*] — An action to set aside a contract for the sale of machines, begun more than a year after the making of the contract, cannot be maintained in face of Art. 1530, C. C.; but, if the defendant does not set up this ground until the hearing, after having specially pleaded that the machines were good and such as were warranted to do the work for which they were sold, which has not been established, the purchaser having on the contrary proved that they were worth nothing, the defendant, while successful in having the action dismissed, will nevertheless, be ordered, on account of his pleading, to pay the costs of his trial, including witnesses, etc. *Valière* v. *Puteaux Berceit. & Mfg. Co.*, 21 Que. S. C. 826.

Sale of goods — *Warranty—Fraud.*]— The defendant, who was a nurseryman, sold to the plaintiff a number of peach trees, giving a warranty that they were "No. 1 peaches, warranted true to name."—*Held*, that this was a warranty that the trees were of the varieties contracted for, not that the fruit would be of those varieties; that, the trees not being of the varieties contracted for, the warranty was broken at the time of the sale; and that, in the absence of fraud, an action for damages for its breach brought more than six years after the sale was barred, although until the trees came into bearing shortly before the action it was impossible to tell that they were not of the varieties contracted for. *Bogardus* v. *Wellington*, 20 C. L. T. 398, 27 A. R. 530.

Simple contract debt — *Conversion into specialty debt—Payment or acknowledgment of debt—Evidence of.*]—Two promissory notes payable to a bank not having been paid, a trust deed was entered into, to which the defendant, the maker of the notes, the defendant's father, an agent of the bank as trustee, and the bank itself, were parties. The deed recited the defendant's indebtedness to the bank and also to his father, and that the father held certain lands as security therefor, and the father thereby conveyed the same to the trustee as security, in the first place for his indebtedness, and then for that of the bank, power being given to the trustee to sell the lands on one month's default in payment and notice in writing of the trustee's intention to sell. The deed contained an acknowledgment by the defendant of his indebtedness, but there was no covenant by him to pay the same. In 1893, on the bank pressing for payment, deeds of release were executed by the defendant and the other heirs and next of kin of the father, who was then dead, on the understanding that the father's debt had been paid, whereby, after referring to the recitals in the deed of 1884, and reciting that the releases were given to save the expense of a sale, they released to the bank all their interest in the said lands, and subsequently

$5,500 was realised by the bank from a sale of a portion of the lands or the timber thereon:—*Held*, that the effect of the deed of 1884 was not to convert the debt into a specialty debt, nor did the reference to the recitals in a deed of 1884 or the deed of 1893 so incorporate them in the latter as to amount to an acknowledgment of the debt; nor did such deed operate as a transfer or assignment of the interest, if any, which the defendant had in his father's estate, as one of his personal representatives; nor did the receipt by the bank of the $5,500 constitute a payment by the defendant on account of the debt; so that no bar was created by the running of the Statute of Limitations, and it could, therefore, be validly set up by the defendant as a defence to an action brought by the bank in 1902; Maclennan, J.A., dissenting. Judgment in 2 O. W. R. 332, affirmed. *Bank of Montreal* v. *Lingham*, 24 C. L. T. 123, 7 O. L. R. 164, 3 O. W. R. 182.

LIMITED PARTNERSHIP.

See PARTNERSHIP.

LINE FENCE.

See BOUNDARY—FENCE—TRESPASS TO LAND.

LIQUIDATED DAMAGES.

See CONTRACT — RESTRAINT OF TRADE — STREET RAILWAYS.

LIQUIDATION.

See BANKRUPTCY AND INSOLVENCY.

LIQUIDATOR.

See COMPANY — DISCOVERY — PARTNERSHIP —PROHIBITION.

LIQUOR ACTS.

See CONSTITUTIONAL LAW — INTOXICATING LIQUORS.

LIS PENDENS.

Action to cancel — *Contract for sale of land—Interest of vendor—Instalments—Notice — Land Registry Act—Declaratory judgment—Cause of action—Perfecting after commencement of action.*]—In 1894 a husband conveyed certain lands to his wife, and from her by writing dated in October, 1896 (registered in March, 1897), the plaintiff contracted to purchase one parcel of the land; the agreement provided that the purchase money should be paid by instalments, which were paid until November, 1898, when the wife conveyed to the plaintiff and took his note in payment of the balance. In August, 1897, the defendant company commenced an action against the wife to set aside the conveyance to her from her husband as a fraud on his creditors, and registered a *lis pendens* on the 24th September, 1897, and by the final judgment in that action the wife was directed to do all acts necessary to make the lands comprised in the impeached conveyance available to satisfy the claims on her husband's estate. The plaintiff on applying to register his title first learned of the action and the *lis pendens*. In an action for cancellation of the registry of the *lis pendens*:—*Held*, that the estate acquired by the conveyance to the plaintiff from the wife remained subject to the rights of the company, as they should be determined by the result of its action against the wife.—2. The plaintiff in order to get a title should not be compelled to pay again that portion of the purchase money which he had paid since the registration of the *lis pendens*.—3. Notice of the company's adverse claim was not imputed to the plaintiff by reason of the registration of the *lis pendens*. —4. Sections 85-88 of the Land Registry Act, providing for the cancellation of a *lis pendens*, are not available in practice where, as in this case, the nature and extent of the interest affected by the *lis pendens* are not ascertained.—5. The plaintiff was entitled to a declaration of right only, and the Court declared that he was within his rights in making the payments before notice of the adverse claim; that the *lis pendens* did not affect the interest acquired by the plaintiff under his contract; and that the defendant company had a charge on the lands for the amount of purchase money unpaid. So long as there remains anything to be done to work out the judgment in an action, the action is pending. Upon a contract for the sale of land, purchase price of which is payable by instalments, the vendor retains an interest in the land proportional to the amount of purchase money unpaid, which interest is capable of being affected by *lis pendens*.—*Semble*, generally a cause of action imperfect at the issue of the writ is not perfected, either at law or in equity, by subsequent events. *Peck* v. *Sun Life Assurance Co. of Canada*, 11 B. C. R. 215, 1 W. L. R. 302.

Cancellation of — *Security—Speeding trial.*]—On a summons to cancel *lis pendens*, the Judge being of the opinion that the plaintiffs could not succeed in the action, ordered that the *lis pendens* be cancelled on the applicants giving the nominal security of $1:—*Held*, that it was not a case for cancellation of the *lis pendens*, but that the plaintiffs should be put on terms to speed the action. *Merrick* v. *Morrison*, 7 B. C. R. 442.

Exception of lis pendens will lie only where there are the same parties, the same cause and the same object in both suits. *Pacaud* v. *Pacaud* (1911), 12 Que. P. R. 318.

Failure to prosecute action — Writ of summons not served and not renewed—Action dismissed. *Lyon* v. *Marks* (1910), 1 O. W. N. 836.

First action settled by note—*Costs in vacating—Second action based on note.*]—When an action is settled by giving in pay-

ment a promissory note, this transaction terminates the suit; it has the effect of a judgment debt even though the question of costs may still be in dispute. If the note is not paid at maturity, the plaintiff may enforce the payment of it by process of law, and a plea of *lis pendens* by the defendant will be rejected. *Guay* v. *Dupré* (1909), 10 Que. P. R. 424.

Lease — *Damages—Breach of covenants —Cancellation.*]—The defendant in an action for damages for breaches of covenants in a lease cannot plead as *lis pendens* the pendency of an action for damages arising from the cancellation of the lease. *Larue* v. *Couture*, 5 Que. P. R. 469.

Motion for discharge — *Jurisdiction of Judge in Chambers after trial and pending appeal — Effect of judgment dismissing action.*]—Where the action has been dismissed at the trial, but the plaintiff is appealing from the judgment of dismissal, a Judge in Chambers has no jurisdiction to order the registry of a certificate of *lis pendens* to be discharged.—*Semble*, that the defendant should have applied to the Judge at the trial to make the discharge part of the judgment.—The defendant's motion to discharge was dismissed, without prejudice to any application to the District Registrar for cancellation. *Campbell* v. *Campbell* (1910), 13 W. L. R. 288.

Motion for order superseding order declaring lunacy — *Evidence of sanity—Appointment of expert to examine—Practice.*] — Petitioner presented two affidavits stating that he was not a lunatic, and was perfectly capable of conducting his own affairs, etc., and asked for an order superseding an order declaring him insane: — *Held*, that the affidavits were not sufficient to warrant an order of *supersedeas* as the practice required the Judge to examine the lunatic so as to satisfy himself. Order made that petitioner be examined by Dr. Clark as an expert, that supplemental evidence from medical men and others acquainted with petitioner, be received and notice given to his next of kin, and then if the Court is satisfied that petitioner has recovered, the order will be vacated and full civil capacity granted. *Re Robinson* (1910), 16 O. W. R. 220, 1 O. W. N. 883.

Motion to vacate — Action by simple contract creditor to set aside waiver of agreement for sale of land—Attachment of debts —Discontinuance of action — Costs. *Green* v. *Temple*, 6 O. W. R. 15.

Motion to vacate — Action for equitable execution — Notice of execution in sheriff's hands — Delay in prosecution of action—Costs of motion. *Barwick* v. *Radford*, 6 O. W. R. 583.

Motion to vacate—Delay in prosecuting action — Special circumstances. *Bank of Hamilton* v. *Grose*, 3 O. W. R. 218.

Motion to vacate—Tying up land pending result of another action—Summary dismissal of action. *Knapp* v. *Carley*, 2 O. W. R. 1186, 3 O. W. R. 187, 940.

Order vacating registry of — *Vexatious proceeding — Action for declaration of inchoate right to dower.*]—Plaintiff sought a declaration that she was entitled to dower out of certain lands admittedly held by defendant as trustee for her husband, the defendant. A *lis pendens* registered was vacated as being a vexatious proceeding. *King* v. *King*, 13 O. W. R. 769.

Pleading — *Exception.*] — *Lis pendens* must be set up by preliminary exception, and allegations of *lis pendens* in a plea will be struck out on motion. *Pulos* v. *Scroggie*, 6 Q. P. R. 205.

Promissory note — *Revendication—Action for account and partition.*]—It is not a ground for staying an action *en revendication* of a promissory note, that an action for account and partition of property, of which this note is a part, is pending at the time. *Legault* v. *Legault*, 6 Que. P. R. 32.

Registry of certificate—Motion to vacate—Cause of action—Pleading—Statement of claim — Guaranty — Payment into Court. *Brock* v. *Crawford*, 10 O. W. R. 756, 879, 11 O. W. R. 143.

Registry of certificate—Motion to vacate—Judicature Act, s. 98 (3)—Vendor and purchaser—Claim against purchaser to share in land. *Rhum* v. *Pasternack*, 9 O. W. R. 130.

Vacating—*Ex parte application — Registration.*]—The plaintiff having registered a *lis pendens*, a local Judge, on the plaintiff's *ex parte* application, made an order vacating it, and the plaintiff registered the order within 14 days of its being made:—*Held*, that ss. 98 and 99 of the Judicature Act, giving a Judge the power to vacate a certificate of *lis pendens* where the plaintiff or other party at whose instance the certificate was issued does not in good faith prosecute the litigation, and allowing registration of the vacating order only, on or after the fourteenth day from the date of the order, are applicable only when the party seeking to vacate the certificate is not the person by whom and for whose benefit it has been registered. Where a party to an action registers a *lis pendens* for his own benefit, he may get an order vacating it at any time, and register the same. *McGillivray* v. *Williams*, 22 C. L. T. 373, 4 O. L. R. 45, 1 O. W. R. 519.

See EXECUTION — MECHANICS' LIENS — PLEADING.

LITIGIOUS RIGHTS.

Joinder of small claims in one action —*Assignment of choses in action—Exception —Plea to merits.*]—A number of persons having small claims of the same kind can put them into one hand for the purpose of recovering the same by suit in a single action, and the exception of litigious rights does not then apply.—2. A defendant cannot make a plea of litigious rights subsidiary to a plea to the merits. *Elliott* v. *Lynch*, 9 Que. P. R. 312.

Purchase of — *Action by assignee — Pleading—Inconsistent defence.*]—A defendant sued by the assignee of litigious rights may in his defence contest the claim and at the same time invoke the benefit of art. 1582, C. C., and deposit the amount which he alleges to be the price paid on the sale of such rights to the plaintiff, in view of the fact that by such deposit he offers to take the plaintiff's bargain, and thereby ceases in effect to contest. *Crevier* v. *Evans*, 4 Que. P. R. 133.

Sale of—*Cession à réméré—Possession of third person—Revendication—Costs and expenses.*]—The sale of rights and claims resulting from *cession à réméré* in an immovable in the possession of a third person, whose vendor has never had possession, made without warranty and at a low price, payable after the rescission to be sued for by the purchaser as a third person in possession, is a sale of litigious rights. Therefore, the third person in possession, sued for revendication, is entirely discharged from the obligation of delivering the immovable to the purchaser, upon repayment of the price, with the reasonable cost and expenses. *Latour* v. *Bélanger*, 32 Que. S. C. 274.

See CONTRACT—SOLICITOR.

LITISPENDANCE.

Parties—*Identity of actions—Joint and several debtors.*] — An action begun by a creditor for the recovery of a sum of money against a number of joint and several debtors cannot, by a plea of *litispendance*, be set up by another joint and several debtor who was not made a party and served as such, in opposition to a second action for the recovery of the same sum, brought against him. *Bank of Montreal* v. *Roy*, 21 Que. S. C. 439.

See DEFAMATION—HUSBAND AND WIFE.

LIVERY STABLE KEEPER.

See LIEN — MUNICIPAL CORPORATIONS — NUISANCE.

LOAN.

Association. *See* MORTGAGE.

Company. *See* COMPANY — MUNICIPAL CORPORATIONS.

Of Chattels. *See* BAILMENT.

LOCAL.

Board of Health. *See* MUNICIPAL CORPORATIONS.

Courts Act. *See* REGISTRY LAWS.

Improvements. *See* ASSESSMENT AND TAXES — ELECTIONS — VENDORS AND PURCHASERS.

Legislature. *See* CONSTITUTIONAL LAW.

Option By-laws. *See* ELECTIONS — INTOXICATING LIQUORS.

Registrar. *See* ELECTIONS.

LOCAL JUDGES AND MASTERS.

High Court—*Barrister—Deputy Judge—Jurisdiction.*]—A barrister appointed by a local Judge of the High Court as his deputy has no jurisdiction to make an order in an action in the High Court. *Denny* v. *Carey*, 21 C. L. T. 581; *Webb* v. *Nickel Copper Co. of Ontario*, 21 C. L. T. 592.

Jurisdiction—*Referring actions to drainage referee.*]—A local Master of the High Court has jurisdiction by virtue of Rules 42 and 49—see also Rule 6 (*a*)—to make an order, under s. 94 of the Municipal Drainage Act, R. S. O. c. 226, referring an action brought in his county to the Referee under the Drainage Laws. *McKim* v. *Township of East Luther*, 20 C. L. T. 399, 19 P. R. 248.

Jurisdiction — *Winding-up — Motion to rescind.*]—A local Judge of the Supreme Court has no jurisdiction to make a winding-up order. An order made *ultra vires* should be moved against, not appealed from. *Re Kootenay Brewing Co.*, 7 B. C. R. 131.

Jurisdiction in Chambers—Reference of motion to Master in Chambers. *Mahoney* v. *Welsh*, 6 O. W. R. 18.

Local Judge in Admiralty. *See* SHIP.

Local Master of Titles. *See* LAND TITLES ACT.

Report — *Appeal — Reference back — —New report—Disregard of findings of Court — Reference to another Referee.*] — This matter had been referred back to a local Master. Without taking further evidence he disagreed with the findings of the Court. His report was set aside, and the case was remitted to another referee. *Anderson* v. *Ross*, 13 O. W. R. 625;—

Held, on appeal, that the new referee had much exaggerated the amount of damages proved and the damages were fixed at $500. *Ibid.* (1910), 15 O. W. R. 240.

Resignation—*Concurrent appointments.*]—While an appeal from his report was pending a local Master sent a letter of resignation to the Attorney-General's department, and, without any acceptance of this resignation, a commission was issued appointing another gentleman "a local Master" for the county in question. Subsequently the appeal was allowed, and the report was referred back to "the Master" for the county:—*Held*, that there could not be two local Masters; that the action of the executive was equivalent to an acceptance of the resignation; and that the reference must proceed before the new incumbent of the office. *Re Glen — Fleming* v. *Curry*, 20 C. L. T. 198, 27 A. R. 144.

See COURTS — REFERENCE AND REPORT — REGISTRY LAWS—WRIT OF SUMMONS.

LOCATION.

See MINES AND MINERALS.

LOCATION TICKET.

See CROWN.

LODGE.

Injunction granted restraining enquiry as to whether an employee of a municipal corporation was a Free Mason. *Fortier* v. *Guerin* (1910), 12 Que. P. R. 108.

LODGING HOUSE KEEPERS.

See INNKEEPERS.

LORD CAMPBELL'S ACT.

See CROWN — DAMAGES — EXECUTORS AND ADMINISTRATORS — FATAL ACCIDENTS ACT—MASTER AND SERVANT — NEGLIGENCE—RAILWAY—WAY.

LORD'S DAY ACT.

Prosecution of railway company for breach of—Leave of Attorney-General required by s. 17—Condition precedent to jurisdiction of magistrates—No evidence before magistrates of leave granted — Motion to quash conviction—Notice to magistrates — Rules of Court. *Rex* v. *Can. Pac. Ry. Co.* (N.W.P.), 6 W. L. R. 620.

See CRIMINAL LAW — RAILWAY—SUNDAY.

LOST.

Deed. *See* DEED.

Document — Debenture — Action on — Indemnity — Costs — Tender. *Cusack* v. *Southern Loan and Savings Co.*, 2 O. W. R. 179.

Grant. *See* WAY.

Indictment. *See* CRIMINAL LAW.

Luggage. *See* CARRIERS—RAILWAY.

Note. *See* BILLS OF EXCHANGE AND PROMISSORY NOTES.

Property—*Rights to finder—Third person — Master and servant — Property found by servant on master's premises.*] — The defendant was a shop-keeper, and the plaintiff a salesman in the employment of the defendant in the shop. One day the plaintiff picked up from the floor of the shop a roll of bank-notes, and handed it to the defendant, who caused inquiry to be made for the owner, and put the notes in his till for safe-keeping. No claim was made, and the defendant kept the notes: —*Held*, that the property in question was "lost," in the legal sense of the word; and in such a case, as against all other persons than the owner, the finder becomes the substantial owner of the thing found by him, and may maintain trover or other appropriate action to enforce such right of ownership. *Bridges* v. *Hawkesworth*, 15 Jur. 1079, 21 L. J. Q. B. 75, and *South Staffordshire Water Co.* v. *Sharman*, [1896] 2 Q. B. 44, referred to. And the plaintiff was not, by reason of being in the employment of the defendant, deprived of his rights as a finder. *McDowell* v. *Ulster Bank*, 60 Alb. L. J. 346, distinguished on the ground that it was the duty of the porter of the bank who found the lost property in that case, to pick up such articles and hand them over to the bank, and his possession was the possession of the bank itself. *Haynes* v. *Mundle*, 22 C. L. T. 152.

Will. *See* WILL.

LOTTERY.

See ASSESSMENT AND TAXES — CONSTITUTIONAL LAW—CRIMINAL LAW—PROHIBITION.

LUNACY.

Action brought in name of—Benefit of lunatic's executors—Payment into Court—Amendment. *Ramsay* v. *Reid*, 2 O. W. R. 720, 4 O. W. R. 113, 6 O. W. R. 114.

Action by — *Dismissal — Reservation — Costs.*]—If the plaintiff in an action is not in full possession of his mental faculties and is notoriously of unsound mind, and incapable of giving a valid consent to the suit begun, it will be dismissed (reserving rights), upon *exception à la forme*, without costs. *Parizeau* v. *Belanger*, 2 Que. P. R. 388.

Action by committee — *Recovery of debt due to lunatic—Defendant raising question of validity of interdiction—Exception to form.*]—The reviewing or setting aside of an interdiction for lunacy can only be demanded by the party himself or one of his relatives: an exception to the form raised by a debtor sued by the committee of the interdict, demanding the dismissal of the action, on the ground of irregularities in the procedure in interdiction will be refused. *Chevalier* v. *Swan*, 9 Que. P. R. 98.

Appointment of committee—Security and undertaking — Practice. *Re Simpson* (B.C.), 7 W. L. R. 36.

Appointment of guardian — *Married woman—Capacity to act.*]—Where a married woman, possessed of property in her own right and otherwise qualified, is appointed guardian of the person and estate of a person of unsound mind, the appointment will not be set aside on the sole ground of her standing as a married woman.—Since the Married Woman's Property Act, R. S. N. S. 1900, c. 112, many of the objections formerly urged against the appointment of a married woman

as trustee have been swept away, and a married woman may now accept a trust by virtue of her power to contract as a *feme sole*. *Re White*, 42 N. S. R. 248, 4 E. L. R. 307.

Commitment — *Documents required — Documents authentiques—Attack by "Inscription de fausse."*]—The documents required by Art. 3196, R. S. Q., for the confinement of the insane, although made under oath before a justice of the peace, are not authentic documents liable to be attacked by "*Inscription de fausse*." *Rousseau* v. *Sisters of Charity*, 27 Que. S. C. 166.

Commitment to asylum—*Certificate of mayor—Facts to be shewn.*]—The mayor of a municipality cannot be compelled to sign the certificate (form E) provided for by the statute concerning asylums for the insane, except upon sufficient proof that the person whose confinement in an asylum is sought has had his domicil in the municipality during at least 4 months, that he is insane or idiotic, and that he or the person bound by law to maintain him has or has not property available. *Torrance* v. *Weed*, 24 Que. S. C. 364.

Committee—*Funds in hands of — Payment into Court—Reference — Report of Master — Revision of costs.*]—The rule has for many years been that when the Court intervenes in respect to the property of persons not *sui juris*, the money shall not be left to private investment, but shall be paid into Court, and become subject to its general system of administration by which the interest will be punctually paid and the corpus will always be forthcoming when needed. The general rule to be observed by local officers, when it is advisable that the estate should be realised and turned into money, is, that the fund so realised shall be paid into Court; and when part of the estate is converted and part kept for the abode of a lunatic or otherwise, the scheme for dealing with the whole shall be reported to the Court, that proper directions may be given. In two cases where local Masters had reported schemes for the maintenance of lunatics, and made provision for the moneys of the estates being collected by the respective committees, and thereafter for their investment by the committees on securities of different kinds at their discretion, and in one case had taxed the costs and inserted the amount in the report:—*Held*, that it is imperative that the costs in lunacy matters be revised by the proper officer in Toronto; and that the moneys in the hands of the committees and to be collected from debtors or by the sale of the land must be forthwith paid into Court. *Re Norris*, *Re Drope*, 23 C. L. T. 49, 5 O. L. R. 99, 1 O. W. R. 817.

Committee of estate—*Moneys advanced by committee on mortgage of lunatic's lands —Accounting.*]—The committee of a lunatic's estate expended money on the estate without authority of the Court and failed to pass accounts yearly:—*Held*, that the mere failure to account yearly should not *ipso facto* disentitle the committee to costs of accounting and other allowances in analogy to Rule 706. If there is a good excuse for not accounting yearly, as, *e.g.*, the reasonable belief that the property had depreciated, or for some reason had become worth less than what had been paid upon it by the committee to clear it of claims of mortgages pressing for payment, and so a yearly accounting would be merely adding to the financial burden, that aspect should be considered by the official referee. As to money expended without the authority of the Court, it was held, that it should be allowed if a case should be made sufficient to have obtained an order permitting the expenditure. *Re Breen*, *Breen* v. *Toronto Gen. Trusts Cor.* (1909), 18 O. L. R. 447, 13 O. W. R. 1060.

Confinement in asylum—*Certificates — Municipal officers—Mandamus.*]—The father of an insane person, who has not the means to pay the whole cost of the lodging, maintenance, and treatment of such person in an asylum for the insane, may by mandamus compel the mayor and the secretary-treasurer of the municipality in which such person lives to sign and attest the certificates required by Art. 3195a *et seq.*, R. S. Q. (added by 55 & 56 V. c. 30), for the confinement of such person in an asylum for the insane; and the provision of Art. 3228b, R. S. Q., which renders such officers liable to a penalty of $20 in case of their refusing to sign and attest such certificates, does not exclude recourse by *mandamus* to compel them to do so. *Cournoyer* v. *St. Martin*, 21 Que. S. C. 395.

Committee—Bond — Action to recover debt. *Re Hortop* (1910), 1 O. W. N. 999.

Curator — *Appointment of — Choice of person—Rights of mother—Prothonotary — Family council.*]—Under Art. 339, C. C., curators to the person are appointed with the formalities and according to the rules prescribed for the appointment of tutors.—Mothers and female ascendants are entitled during their widowhood to the curatorship of a child interdicted for insanity, when the father is dead, the child unmarried, and there is no valid reason against their appointment. —The nomination of a curator to an interdict, made upon the strength of a declaration by the prothonotary that his mother was not capable of being named his curatrix, is null and void.—A new family council, and not the Court, has the right to appoint a new curator. *Charbonneau* v. *Mercier*, 7 Que. P. R. 326.

Curator to person interdicted for insanity — *Accounting during, and at termination of interdiction — C. C. 368, 369, 843.*]—While he is in office and in discharge of his duties as such, the curator to an interdict cannot be requested to give a final accounting of his administration of the property of the interdict. During the interdiction, and at the demand of relatives or interested persons, the curator can only be forced to account summarily, without costs and informally.—Hence, when the son of the interdicted persons, during the interdiction, takes an action against the curator for a final accounting, the suit will be dismissed with costs, particularly when, in the plea, the curator sufficiently accounts in a summary manner. *Peltier* v. *Fleurant* (1911), 17 R. de J. 261.

Death of—*Confirmation of report—Discharge of committee.*]—Before the confirmation of the Master's report appointing a com-

mittee of the person and estate of a lunatic and propounding a scheme for her maintenance, the lunatic died:—*Held*, notwithstanding the death, that an order should be made (the executors of the deceased consenting) confirming the report and for the discharge of the committee and the surrender or his bond. *Re Garner*, 21 C. L. T. 240. 1 O. L. R. 405.

Death of committee—*Interim appointment.*]—On the death of the committee of the person and estate of a lunatic, the Court appointed the lunatic's son interim committee upon his own petition *ex parte*. *Re Light*, 1 N. B. Eq. 96.

Declaration of lunacy—A petition by C. A. Peel that J. J. Peel be declared a lunatic and also a supplementary petition to appoint a committee of the person and estate of the said J. J. Peel—Riddell, J., directed issues to be tried under 9 Edw. VII. c. 37, s. 7, s-s. (1), (5) and (8)—Costs to be regulated by 1 Geo. V. c. 20—Procedure to be adopted set out—Policy of the Courts is to encourage applications—Practically conclusive evidence essential to commit. *Re Peel* (1911), 19 O. W. R. 511, 2 O. W. N. 1275.

Detention in asylum—*Informalities in certificate—Habeas corpus—Application for discharge under — Affidavit as to alleged lunatic being dangerous—Issue as to sanity.*]—Where the discharge of a person detained in a lunatic asylum as a lunatic was moved for, under a writ of *habeas corpus*, by reason of alleged informalities in the certificate on which the alleged lunatic had been admitted, but it appeared from the affidavit filed by the superintendent and others in the asylum that it would be dangerous to allow him to be at large, the Court directed the trial of an issue as to his sanity; the application for the discharge to stand over, pending the result of the issue or other order of the Court. *Re Shuttleworth*, 2 O. B. 651, approved. *Re Gibson*, 10 O. W. R. 542, 15 O. L. R. 245.

Domicil — Residence abroad—Money in bank in Ontario—Right of foreign committee to—Change of domicil—Private international law—Costs. *Falls* v. *Bank of Montreal*, 1 O. W. R. 538.

Foreign domicil — *Confined in foreign asylum for insane.*]—Middleton, J., granted order declaring lunacy and for sale of lands in Ontario. Proceeds to be paid into Court. Scheme for maintenance to be settled after notice to keeper of foreign asylum. *Re Carr* (1911), 18 O. W. R. 295, 2 O. W. N. 680.

Guardian ad litem—*Motion by defendant for appointment.*]—Refused by Sutherland, J., as it did not appear that defendant had been served with notice of application. Defendants' solicitors having accepted service of statement of claim and entered an appearance for him, apparently made out a strong case as to mental incapacity of defendant. *Wolfe* v. *Ogilvey*, 12 P. R. 645, followed. *Bank of Ottawa* v. *Bradfield* (1911), 19 O. W. R. 18, 2 O. W. N. 1014.

Habeas corpus—*Insane person—Petition for release — Jurisdiction — Can the incarcerated person demand his own release?—C. P. 78, 111¼.*]—He who wishes to regain his liberty, claiming that he is no longer insane, may present the petition for *habeas corpus* in the district in which is situated the institution in which he is confined. The action to recover his liberty is one personal to the person deprived of it, and it is not necessary that it should be taken in the name of such person's curator; the interdict may himself petition the Court to put an end to his incarceration. — *Leduc* v. *Brothers of Charity*, 11 Que. P. R. 138.

Indictable offence—*Acquittal on ground of insanity—Detention in asylum—Warrant of Lieutenant-Governor—Habeas corpus.*]—Where a party accused of an indictable offence was, upon suggestion, found insane and unable to plead and stand his trial, and, under a warrant of the Lieutenant-Governor, was detained in an asylum until the following sittings of the Court, when he was brought up again and found by a jury fit to stand his trial, and, upon arraignment and trial, was found not guilty, on account of insanity at the time of the commission of the offence, his committal for safe-keeping, during pleasure, to a lunatic asylum, under a warrant of the Lieutenant-Governor, is valid and lawful. And therefore, a writ of *habeas corpus* directed, at the suit of the party, to the managers of the asylum, upon that ground of detention being disclosed in the return thereto, will be quashed. *Duclos* v. *St. Jean de Dieu Asile*, 32 Que. S. C. 154.

Interdiction — *Conseil judiciaire—Appeal.*]—The prothonotary or the Judge may, upon a petition for interdiction for lunacy, do no more than appoint a *conseil judiciaire* for the respondent.—2. An appeal lies to the Judge from the decision of the prothonotary so naming a *conseil judiciaire*. *Ledoux* v. *Meunier*, 5 Que. P. R. 249.

Interdiction—*Deeds executed previously —Evidence of insanity.*]—Proof that a person has been interdicted for organic dementia which goes as far back as one or two years, and that his condition was notorious during the 6 months before the interdiction, is sufficient to set aside deeds executed by him within that time, especially if they are against his interest. *Désy* v. *Bérard*, 16 Que. K. B. 113.

Interdiction for imbecility — *Formal objections—Grounds for revision.*]—Where a person has been interdicted for imbecility, by a judgment rendered out of Court, after contestation of the petition praying therefor and after examination of the interdict, mere formal objections, as, that the petition did not contain a specification of the acts of imbecility, that the family council was not composed as required by law, are not sufficient grounds for a revision by the Court of the judgment; more particularly when the presiding Judge, who rendered it, is satisfied, from the examination of the interdict, that the interdiction was right and proper. *Gingras* v. *Richard*, 34 Que. S. C. 62.

Interest under will—Advice to trustees —Right of appointment by lunatic—Payment into Court — Maintenance of lunatic. *Re Faulkner*, 3 O. W. R. 391.

Issue to determine—*Marriage of alleged lunatic—Over 80 years of age—To woman of 30 — Action to declare marriage void—In-*

quiry as to mental condition—Evidence contradictory—Presumption as to sanity—Findings of trial Judge — Found sane — Action dismissed—Costs reserved.]—Plaintiff, a retired farmer, over 80 years of age, it was said, went through a form of marriage with defendant, a woman about 30. Catharine McCormick (a daughter of plaintiff's cousin German) brought action, as his next friend, alleging that plaintiff was of unsound mind, and charging defendant and her father, a retired Presbyterian minister of experience as an editor, with conspiracy and forcing an entrance into plaintiff's house, etc., and asked to have said ceremony declared a nullity and void. Defendants moved under Con. Rule 261 to have the action dismissed as frivolous and vexatious.

Riddell, J., *held* (16 O. W. R. 164, 1 O. W. N. 800, 843), that if the plaintiff was *non compos mentis* the action should not be dismissed, and he ordered a stay of proceedings until further order, on an undertaking that the next friend should take proceedings to have plaintiff declared of unsound mind. *Palmer* v. *Walesby* (1868), L. R. 3 Ch. 732, followed.

Divisional Court (16 O. W. R. 165, 1 O. W. N. 894), by consent of counsel varied the order of Riddell, J., by directing that the next friend of the plaintiff have liberty to have medical experts examine the plaintiff as to his sanity, and the appellants undertake to facilitate such examination, such examination to take place within one week, and to be upon forty-eight hours' notice to counsel for the appellants. The proceedings under the Lunacy Act, 1909, if any, to be launched by the respondents within four days after the medical examination. The costs of this appeal to be costs in the proposed application for a declaration of lunacy as between appellants and respondent.

Sutherland, J. (16 O. W. R. 786, 1 O. W. N. 1105), granted an order directing a trial of an issue whether or not Michael Frazer was, at the time of such inquiry, of unsound mind and incapable of managing himself or his affairs.—Divisional Court (16 O. W. R. 959, 2 O. W. N. 26), affirmed above order.

Britton, J., tried the issue and found (17 O. W. R. 583, 2 O. W. N. 241), Michael Frazer sane at the time of the enquiry, and dismissed the action. Costs reserved.

Divisional Court visited Frazer at his home, and after examination of him, *held*, that although he was not a lunatic in the popular conception of that term, yet he was and is suffering from *senile deterioration*, and was of unsound mind, and incapable of managing himself or his affairs within the meaning of the Lunacy Act. Committees ordered to be appointed under the statute. Costs out of the estate.—Judgment of Britton, J., reversed. *Re Michael Frazer* (1911), 19 O. W. R. 548, 2 O. W. N. 1321.

Magistrate's commitment of sane person as a lunatic—*Judicial proceeding —Subsequent discharge — Action for damages — Malicious prosecution — Failure to prove favourable termination.*]—In an action for malicious prosecution against persons by whom proceedings had been taken under the Act respecting Public Lunatic Asylums, R. S. O. 1897 c. 317, for arrest and confinement of the plaintiff as insane and dangerous, before a justice, who committed him to gaol, from which he was afterwards taken to an asylum, and was discharged on the ground that he was not and never had been insane:—*Held*, that the inquiry before the justice was a judicial proceeding, and that it was essential to the plaintiff's success that he should allege and prove that the proceedings had terminated in his favour, which they had not done so long as the order of the justice stood, and this although the statute did not provide for setting aside the adjudication of the justice by way of appeal or otherwise. *Bush* v *Park*, 12 O. L. R. 180, 8 O. W. R. 506.

Maintenance — *Commissioners of Public Charities — Voluntary payment to, by municipality — Right to recover from lunatic's husband.*] — The wife of the defendant left him, and the defendant published a notice that he would not be responsible for any debts incurred by her. She subsequently became insane, and was maintained by the Commissioners of Public Charities, who claimed from the plaintiff municipality payment for her maintenance. The plaintiff municipality paid the claim and then sued the defendant:—*Held*, that, as the defendant, when his wife became insane, became directly liable to the Commissioners of Public Charities for her maintenance, the payment made by the plaintiff municipality must be regarded as voluntary, and judgment should be entered for the defendant. *Municipality of Cape Breton* v. *Jost*, 40 N. S. R. 79.

Maintenance — *Money in bank—Attachment by creditor.*]—Where money of a lunatic deposited to his credit in a bank was attached by a creditor, it was, nevertheless, ordered to be paid into Court for the maintenance of the lunatic, without prejudice to any priority over other creditors which the attaching creditor might have obtained as to any surplus which might remain if the lunatic should die or recover. *Re Vernon*, 20 C. L. T. 309.

Maintenance of lunatic in public asylum—*Action by inspector of prisons and public charities to recover for — Property of lunatic—Never had any within meaning of Act—R. S. O. (1897), c. 317—Action dismissed — Improperly brought — Costs.*] — The Inspector of P. and P. C. for Ontario brought action, under R. S. O. (1897), c. 317, to recover from defendants the amounts owing for maintenance of one Isabella MacDougall, who, as he alleged, at the time she was placed in the asylum at Kingston, or subsequently thereto, came into possession of certain property within the meaning of s. 47 of c. 317.—Latchford, J., *held*, that Isabella MacDougall never came into possession of property within the meaning of the statute, and the action was not maintainable, and should be dismissed with costs; that the plaintiff wholly misconceived his rights in interfering as he did with the administration of the estate, and had the facts of the case been fully known to the Court, the order removing the executor and appointing the plaintiff in his place and stead, would not have been made; that plaintiff must pay into Court all moneys he has received, and if he still holds the promissory notes, deposit them with the accountant. He is not entitled to any disbursement. That the Court has no power to compel plaintiff to pay defendant's costs as between solicitor and

client, but that this should be done, otherwise defendant would suffer no slight loss. *Inspector of Prisons, etc.* v. *Macdonald* (1910), 17 O. W. R. 630, 2 O. W. N. 289.

Moneys expended in maintenance of lunatic not so found—Right to recover—Ability to contract — Necessaries—Evidence. *Prest* v. *Prest*, 8 O. W. R. 659.

Order declaring — Petition for—Relatives intervened and asked for costs—Not allowed—Nothing to shew that their action was financially beneficial to estate. *Re Brown* (1911), 18 O. W. R. 919, 2 O. W. N. 924.

Partition and sale of lunatic's lands — *Action by Inspector of Prisons and Public Charities for — Recovery of lunatic — Stay of proceedings.*] — Plaintiff being in an asylum, and her recovery improbable, the Inspector of Prisons and Public Charities found it necessary to sell a portion of her real estate. He found the title clouded by a claim of defendant, who claimed to be a brother of plaintiff. Acting on advice of counsel and approval of Attorney-General, he brought a proceeding for partition of sale, and judgment for sale was given on 21st May, 1907. On 21st May, 1909, plaintiff was discharged from the asylum, her mental indisposition being temporary only. A certificate of the judgment was registered by the inspector's solicitor on 10th March, 1910. Plaintiff moved for an order staying all proceedings under above judgment for partition and sale.—Riddell, J., *held*, that a suit instituted on behalf of a person of unsound mind, not so found by inquisition when he becomes of sound mind, becomes absolutely paralyzed, and all proceedings thereafter are irregular: *Beale* v. *Smith* (1873), 43 L. J. Ch. n. s. 245, followed.—That it was the registration of above judgment which necessitated the present motion, and the inspector must pay the costs of this motion. That he was entitled to his costs only up to the recovery of the plaintiff, as taxed by the taxing officer, deducting therefrom the costs of this motion and the cancellation of the registration. Action dismissed and registration of above judgment cancelled. *McCabe* v. *Boyle* (1911), 18 O. W. R. 551, 2 O. W. N. 695.

Party to cause—*Curator*—*Appointment of new one*—*Appeal*—*Stay of proceedings.*] —If, while a cause is standing for judgment, one of the parties, an interdict, is relieved from interdiction, and subsequently is again made an interdict, and a new curator is appointed for him, an appeal, in case of a judgment unfavourable to him, cannot be brought by the old curator; and a stay of proceedings will not be ordered to allow the new curator to obtain the authorisation required by law. *Loiue* v. *St. Louis de Gonzague*, 5 Que. P. R. 446.

Petition for declaration — Evidence—Interest of alleged lunatic. *Re Connell*, 4 O. W. R. 95.

Petition for declaration of lunacy—*Service out of the jurisdiction—Dispensing with personal service — Jurisdiction of Master in Chambers.*]—A petition for a declaration of lunacy may be served out of Ontario under 3 Edw. VII. c. 8, s. 13 (O.)—And where the supposed lunatic was confined in an asylum outside of Ontario, and an order was made by the Master in Chambers authorising service there upon the supposed lunatic and the medical superintendent of the asylum, and the latter alone was served, because he was of opinion that service might dangerously excite the former, an order was made dispensing with personal service and confirming the service made.—*Quære*, as to the jurisdiction of the Master in Chambers, under Rule 32, to make an order for service out of the jurisdiction of such a petition. *Re Webb*, 12 O. L. R. 194, 7 O. W. R. 565.

Plaintiff becoming insane after judgment—Proposed appeal — Appointment of next friend—Inspector of prisons and public charities. *Holness* v. *Russell*, 1 O. W. R. 655, 774, 2 O. W. R. 334.

Prisoner acquitted on proof of insanity—*Detention in asylum—Warrant of Lieutenant-Governor — Criminal Code, s. 969 — "During pleasure" — Habeas corpus.*]—A warrant by the Lieutenant-Governor in council of the province of Quebec for the detention in an asylum of a prisoner acquitted on account of insanity at the time of the offence, is legally authorised by the terms of the Criminal Code, 1892, s. 749, and by the Revised Criminal Code, s. 969.—*Quære*, if the omission by the Criminal Code of the words "during pleasure" in Art. 969, tends to create judicial supervision over the life of a Lieutenant-Governor's warrant? *Ducloz* v. *Sisters of Charity*, 8 Que. P. R. 372.

Proceedings to set aside interdiction —*Recovery of costs — Solicitor — Effect of judgment.*] — An advocate or notary, acting upon the instructions of an interdict for insanity, and in good faith believing that the cause of interdiction had ceased, but acting without the consent and contrary to the instructions of the curator, is not entitled to recover from the curator in his said quality the costs of such proceedings, which were unsuccessful because it was held that the cause of interdiction had not ceased. — *Semble*, a judgment setting aside the interdiction would have a retroactive effect to the date of the cessation of the cause of interdiction, and would necessarily validate an agreement by the interdict to pay the costs of the proceedings to obtain the removal of the interdiction. Judgment in 16 Que. S. C. 395, affirmed. *Bouchard* v. *Bastien*, 19 Que. S. C. 507.

Repairs to estate—*Collection of rents—Agent.*]—Committee of the estate of a lunatic empowered to make needed repairs to the estate and to employ an agent at a fixed salary to collect rents. *Re McGivery*, 3 N. B. Eq. 327, 2 E. L. R. 19.

Responsibility for tort — *Damages — Intervention of statutory guardian.*]—Under the common law, a lunatic is civilly liable to make compensation in damages to persons injured by his acts, though, being incapable of criminal intent, he is not liable to indictment and punishment. In this case, however, where the defendant had burnt a barn, and lunacy was set up, the evidence went to shew that, while not responsible, perhaps, to the extent

of an ordinary man, he was not utterly unconscious that he was doing wrong:—*Held*, therefore, that the defendant was liable at least to the extent of the damage done, taken, however, at rather a low than a high estimate. It was ordered that, before execution issued, notice should be given to the Inspector of Prisons and Public Charities. *Stanley* v. *Hayes*, 24 C. L. T. 289, 8 O. L. R. 81, 3 O. W. R. 784.

Sale of land for maintenance of — Annuity charged thereon — Disposition of purchase money — Sale freed from annuity —Payment into Court — Mortgage. *Re Dowd*, 9 O. W. R. 746.

Sale of lands—Confirmation of—9 Edw. VII. (Ont.), c. 37, s. 16(*a*). *Re Beard* (1910), 1 O. W. N. 807.

Senile decay—*Appointment of guardian —Provisions of order.*] — W. was about 85 or 90 years of age. He was not of unsound mind in the usual sense, but from extreme age and physical weakness was incompetent to manage his affairs, and required constant care and attention. An order was made appointing two of his children to act "in the nature of a guardian or committee of his person and estate." Form of order given. There was no fund in Court, nor did the order provide for payment in of any fund. *Vane* v. *Vane*, 2 Ch. D. 124, and *Re Brandon's Trusts*, 13 Ch. D. 773, followed. *Re W.*, 21 C. L. T. 340; *Re B.*, *ib.* 341.

Tort committed by — *Responsibility of parent.*]—Where a lunatic has attained his majority, but is living in his father's house, the father is not responsible for damage caused by the lunatic, although the father has failed to procure an interdiction of the son as such, if it appears that the son has for a long time been withdrawn from the authority of his father, and it is not proved that the father knew the dangerous character of his son's malady, or that the damage complained of would be the consequence of his imprudence or negligence. *Theroux* v. *Carrier*, 21 Que. S. C. 156.

See Contract — Criminal Law—Devolution of Estates Act — Discovery — Equitable Assignment — Gift — Husband and Wife—Municipal Corporations—Will.

MACHINERY.

See Assessment and Taxes — Gift — Master and Servant — Negligence—Patent for Invention—Will.

MAGISTRATE.

See Criminal Law — Justice of the Peace — Police Magistrate—Prohibition —Stipendiary Magistrate.

MAGISTRATES' COURTS.

See Courts.

MAIMING CATTLE.

See Criminal Law.

MAINTENANCE.

Defence to action — *Offence of third party.*] — The offence of maintenance, committed by a third party for the advantage of the plaintiff, cannot be set up against the plaintiff as a defence to the action brought by him. *Ménard* v. *La Ville de Bordeaux*, 34 Que. S. C. 335.

See Champerty and Maintenance—Deed — Dower — Infant — Lunatic — Parent and Child—Pauper—Trusts and Trustees—Will.

MAINTENANCE OF HIGHWAY.

See Way.

MAINTENANCE OF PERSONS.

See Lunatic — Parent and Child—Will.

MALICE.

See Arrest — Defamation—False Arrest — Malicious Procedure — Parliamentary Elections.

MALICIOUS INJURY TO PROPERTY.

See Criminal Law.

MALICIOUS PROSECUTION AND ARREST.

Absence of probable cause.]—An employer who, through his servants, finds a workman in a place, at an hour and under circumstances that lead to suspicion, but of which an explanation is offered on the spot, who refuses to verify the same, and causes a search-warrant to issue and be executed at the workman's house, does so without probable cause and inferentially through malice and is liable for the damages thereby caused. *Masse* v. *Dominion Bridge Co.* (1910), 38 Que. S. C. 429.

Absence of probable cause—*Prosecution dismissed on debatable point of law.*]—In an action of damages for malicious prosecution, it is not enough to establish the dismissal of the prosecution, the plaintiff must further prove that the defendant had no probable cause for instituting it.—When it appears that the prosecution was dismissed on a debatable point of law, and the plaintiff himself, in his pleadings, suggests that the defendant might have appealed from the decision of the magistrate, it cannot be pre-

tended that absence of probable cause has been established. In such circumstances, no action for damages can be maintained. *Langevin & Lecompte* (1909), 19 Que. K. B. 198.

Absence of reasonable and probable cause—*Facts submitted to counsel.*]—Plaintiff was charged by defendant with stealing dog muzzles, and was arrested and sent up for trial. The grand jury ignored the bill. Plaintiff brought action for damages. Jury found in plaintiff's favour and assessed damages at $500. Britton, J., entered judgment accordingly. *Dundas* v. *Wilson* (1911), 19 O. W. R. 17, 2 O. W. N. 995.

Absence of reasonable and probable cause is not in itself malice, however cogent evidence it may be. *Winefield* v. *Kean*, 1 O. R. 153, followed. *Burns* v. *Rombough* (1911), 18 O. W. R. 689, 2 O. W. N. 767 (D.C.).

Action against justices of the peace —*Malice — Findings of jury — Absence of reasonable and probable cause — Evidence— Knowledge of one justice — Concurrence of other — Costs.*]—Action against two justices of the peace for false imprisonment. Judgment against one as no reasonable and probable cause, but dismissed as against the other. *Baker* v. *Tedford*, 11 W. L. R. 614.

Action against police officer — *What constitutes arrest and imprisonment—Necessity for notice before action — Acts done in performance of duty—Not guilty by statute.*]—Two persons having died under circumstances suggesting murder, suspicion was directed against two Chinamen, one of whom was arrested, but the other could not be found. The police made search diligently for some time, but could obtain no trace of the suspected man. Believing that he was being harboured by his fellow-countrymen in the city, and that, if a general search was made, they would conceal him, it was determined to visit every Chinese resort in the city and take the occupants to the police station, keeping them there until the search was completed, and so ascertain if the man for whom they were searching was in the city. This plan was carried out, a man being stationed at each entrance to the various buildings, and a search made, and the occupants removed in a conveyance, accompanied by an officer, and placed in charge of another officer at the station, and not permitted to depart until all places had been visited. The police had no warrant authorising a search, nor had they any strong reason for suspecting any particular person of harbouring the suspected man. Actions were brought by some of the Chinamen against the officers for false arrest and imprisonment. The defendants pleaded that they had not detained the plaintiffs, and also "not guilty by statute," under which it was proposed to plead want of notice of action:—*Held*, that the right violated by false imprisonment is freedom of locomotion, and the gist of the offence is a restraint whereby the party complaining is hindered and prevented from going where he pleases; and therefore, as the evidence shewed that the plaintiffs were prevented from going where they pleased, they must be held to have been imprisoned.—2. That, as the police officers had no warrant nor any reasonable ground of belief that the plaintiffs were harbouring a fugitive from justice, they could not be said to be acting in pursuance of any statute or in discharge of their duty, and were not therefore entitled to notice of action. *Mack Sing* v. *Smith*, 1 Sask. L. R. 454, 9 W. L. R. 28.

Action against public officer — *Preliminary notice — Officer's good or bad faith —Civil responsibility for false arrest—Carrying out instructions — Suspicious circumstances.*]—A local superintendent of public works is a public officer within the meaning of Art. 88 C. P., and he cannot be sued for damages arising from the exercise of the duties of his office unless a preliminary notice of one month has been given to him.—A public officer sued in damages for false arrest, who establishes that what he swore to was according to instructions received from his superior officer, and for the purpose of putting an end to certain abuses, and under such circumstances as enabled him to believe that what he had stated in his sworn information constituted one of such abuses, shews his good faith sufficiently to entitle him to the preliminary notice.—*Per* Archambeault, J.—Such proof, in any event, shews that the officer sued had acted with probable cause and without malice in laying the information. *Deschenes* v. *Julien* (1909), 19 Que. K. B. 210.

Arrest — *Damages — Verdict less than $10.*]—In an action to recover damages for malicious arrest and prosecution plaintiffs recovered verdict for $5. Defendant asked for a certificate under section 312, Common Law Procedure Act (P.E.I. 1873), disentitling plaintiff to costs:—*Held*, (Peters, J.) that under the circumstances of the case defendant was entitled to the certificate. *Robinson* v. *Nelson* (1880), 2 P. E. I. R. 318.

Arrest and prosecution of plaintiff on charge of stealing from freight sheds—Constable acting in discharge of public duty — Employment and payment by railway company — Liability of railway company for acts of constable—Absence of direction to prosecute or interference with prosecution — Malice — Reasonable and probable cause—Nonsuit. *Nazarino* v. *Can. Pac. Ry. Co.*, 11 O. W. R. 662.

Arrest and trespass — *Reasonable and probable cause — Malice — Post office—Letter with fictitious address.*]—The plaintiff, a letter carrier employed by the post office department at Montreal, was intrusted with the delivery of two decoy letters for the purpose of testing his honesty. Each of the letters contained a small sum of money. One of the letters bore a non-existent address, the other a real address. The latter was delivered, but the former, under the rules of the department, should have been entered in the book kept at the post office for that purpose, and the letter returned. There being no entry of this letter, after the usual time for making such entry had elapsed, the plaintiff was detained and searched by the defendant, a peace officer acting under the instructions of the department. The letter not being found on the plaintiff he was released. On the following day the letter was returned to the post office:—*Held*, that the plaintiff having violated the rules of the department, there was reasonable

and probable cause for detaining and searching him, and that his action for damages against the officer, who acted without malice, could not be maintained. 2. A letter is a post letter, although directed to a fictitious address. *Mayer* v. *Vaughan*, 20 Que. S. C. 549.

Arrest by person employed as watchman by and appointed constable on recommendation of railway company —Liability of railway company — Express or implied authority — Interference — Railway Act. *Thomas* v. *Can. Pac. Rw. Co.*, *Bush* v. *Can. Pac. Rw. Co.*, 8 O. W. R. 93.

Arrest of railway employee on arrival of the train on which he works, made by a special constable in service of the company, by order of superintendent, in consequence of a telegram received from the conductor that a passenger had complained to him of having been robbed, followed by the detention and prosecution of the employee for theft, the whole in spite of his protestations of innocence and without taking any steps to ascertain if the suspicion of the complaining passenger had any foundation, is without probable cause and inferentially malicious, and the company is liable to the employee so arrested and prosecuted, for damages. *Waller* v. *Can. Pac. Rw. Co.* (1910), 39 Que. S. C. 240.

Capias — *Falsity—Reasonable and probable cause.*]—In an action by P. against M. for malicious arrest upon a *capias* for $75, the falsity complained of was: (1) that P. was about to leave the county; (2) that the cause of action did not exceed $80. It appeared that P. had given to M. an order for his claim which had not been honoured, and had made several appointments with M. which had not been kept; that P. was trying to let his house, and his wife had gone away; and that M. had been informed by two respectable persons that P. was about leaving: —*Held*, that M. had "reasonable and probable cause."—In respect to the alleged falsity that the cause of action was under $80, it appeared that the cause of action which M., a sub-contractor, had against P., a contractor, was for plastering a house of L., and that the amount coming to M. was actually $150, and he had filed a mechanic's lien for this amount. There were two prior liens, and M., after inquiries, estimated that his lien would not realize more than one-half from this source, and, therefore, considered that he was justified in deducting that much, and proceeding by a *capias* for the balance. —*Held*, that there was nothing in the circumstances from which malice could be inferred. —The ordinary layman, acting honestly, is not to be held responsible in this kind of action if he makes a mistake in an intricate question of law. *Patterson* v. *Munro*, 40 N. S. R. 550.

Charge of fraud amounting to theft —*Proceedings taken on advice of solicitor—Question of good faith in obtaining advice—Reasonable and probable cause — Evidence not satisfactory — Trial Judge withdrew case from jury — Non-suit.*]—Plaintiff made the following statutory declaration: "With regard to the disposition of the ore on the Nova Scotia lease from Peterson Lake, there is no means of checking the same, either on surface or below, and the head ore-sorter, who superintends the bagging of ore, takes his instructions from the managing-director, and only a certain portion is credited to Peterson Lake, and nearly all the leaf silver which comes from Peterson Lake is bagged and shipped as Nova Scotia ore. The above can be verified by Mr. R. F. Taylor, who was formerly superintendent of the Nova Scotia mine, and who is now with the Kerr Lake mine, and also Mr. James Carr, who is head ore-sorter at the Nova Scotia mine."—The managing director above referred to was the defendant. He therefore consulted his solicitor, who obtained affidavits of Taylor and Carr contradicting the above statements, which plaintiff said they would verify. Then defendant, on advice of his solicitor, laid a charge of perjury against plaintiff, who was acquitted. Plaintiff then brought action against defendant for malicious prosecution. —Falconbridge, C.J.K.B., at trial, withdrew the case from the jury and dismissed the action with costs as the evidence was all one way.—Divisional Court dismissed plaintiff's appeal with costs, holding that there was no evidence upon which a jury could fairly pronounce that defendant had a guilty knowledge of the act charged, or that there was a lack of *bona fides* in what he did in laying the matter before his solicitor.—*Langdon* v. *Bilsky* (1910), 16 O. W. R. 877, 2 O. W. N. 18, 22 O. L. R. 4.

Charge of theft by servants of company—*Probable cause—Disobedience of orders — Liability of company — Instructions of officers — Damages — Contributory negligence.*]—When the servants of a plate glass company are instructed to always bring back to the shop the old plate glass removed upon a new one being put in, or report their reason for not doing so, the failure to comply with such orders is not sufficient of itself to justify a charge of theft against them. In such a case the employer should make further inquiries, and, if he prefers a charge without doing so, he will be held to have acted without probable cause.—A corporation is liable in tort for false arrest when the charge is laid under instructions from its vice-president and local manager.—Disobedience to orders by which an employee lays himself open to a suspicion of theft, amounts to contributory negligence, and will be so considered in assessing the damages caused him by an arrest upon an unfounded charge for that offence. *Leonard* v. *Ramsay*, 30 Que. S. C. 345.

Civil action — *Damages — Costs.*] — *Held*, following *Scott* v. *McCaffrey*, 1 Que. Q. B. 123, that a creditor is not responsible for damages (irrespective of costs) caused by proceedings taken by him, in good faith and without malice or want of probable cause, for the recovery of a debt before a Court of justice, even when such proceedings have been declared void for informality or illegality. *Darveau* v. *O'Dell*, 17 Que. S. C. 334.

Commissioner under Collection Act —*Refusal to discharge debtor—Judicial act —Malice — Inference — Disqualification from interest.*]—An action against a commissioner, acting under the provisions of the Collection Act, R. S. N. S. 1900 c. 182, to recover damages for the arrest, imprisonment, and detention of the plaintiff, was withdrawn from the jury by the trial Judge:

—*Held*, that the case was properly withdrawn from the jury, there being no evidence of malice or from which malice could be inferred.—The refusal of the commissioner to discharge the plaintiff from custody under an order for his arrest, made on the ground that he was about to leave the country, is a judicial act, and a perfectly justifiable proceeding, and there is no inference of malice.—It does not take away jurisdiction, and make the matter null and void, that it is afterwards discovered that the commissioner is disqualified from interest, as having, as a solicitor, a claim for another person against the same debtor. *Campbell* v. *McKay*, 38 N. S. R. 333.

Constable — Good faith — Warrant — Notice of action — Fine — Municipal corporation — Resolution — *Ultra vires* — Members of council — Justice of the peace. *Gaul* v. *Ellice*, 1 O. W. R. 119, 3 O. L. R. 428.

Conviction under Liquor License Act —*Bail — Afterwards arrested — Habeas corpus — Action for damages — Not guilty by statute — Insufficient notice of action.*]—Plaintiff was convicted for selling liquor without license and sentenced to four months' imprisonment, January 17th, 1907, but was allowed to go at large on giving his recognizance to appear. Later, magistrate issued his warrant and had plaintiff delivered to the keeper of the county gaol on March 28th, with instructions to keep him in custody four months. On a writ of *habeas corpus* Riddell, J., discharged plaintiff, June 28th, on grounds that the term of imprisonment began and ran from date of conviction and therefore expired May 17th. Plaintiff brought action for trespass and false imprisonment:—*Held*, that the notice of action served on defendant was insufficient, he not being responsible for the trespass and imprisonment during the period in respect of which it was given. Judgment of Divisional Court, January 14th, 1908, affirming Magee, J., at trial affirmed. *Robinson* v. *Morris* (1909), 14 O. W. R. 1001, 1 O. W. N. 164.

County Courts Act, B.C., ss. 23, 31 —*Waiver of objection to jurisdiction—False imprisonment — Interference by complainant.*]—The plaintiff took possession of the defendant Mason's float, which he found adrift on a lake. Mason, although aware that the plaintiff claimed a lien for salvage, made no move towards recovering the float until after three weeks, when he, in company with a constable, demanded it, and on the plaintiff refusing to give it up without compensation, he was arrested without a warrant and taken to gaol, and subsequently an information laid against him under s. 338 of the Code for taking and holding timber found adrift, was dismissed. Mason provided the tug which got the float and carried the plaintiff to gaol, and accompanied the constable with the plaintiff to the gaol:—*Held*, on the facts, that the arrest was the joint act of Mason and the constable, and that Mason was therefore liable for damages for false imprisonment. An action for malicious prosecution was tried in a County Court, which has no jurisdiction to try such an action unless a signed agreement consenting thereto is entered into by the parties. No signed agreement was shewn, but the action was tried without objection by either party, and judgment was given in favour of the plaintiff:—*Held*, that the question of the jurisdiction of the County Court could not be raised on appeal. *Robitaille* v. *Mason*, 23 C. L. T. 205, 9 B. C. R. 499.

Criminal prosecution — *Pleading — Statement of defence — Embarrassment.*]—1. In the statement of defence in an action for malicious prosecution, a simple traverse of the plaintiff's allegation of the want of reasonable and probable cause is sufficient. 2. In such an action, when the defendant in separate paragraphs of his statement of defence alleges certain facts tending to shew reasonable ground for his belief in the plaintiff's guilt, but leaves it open for himself to prove other and distinct facts for the purposes of this defence at the trial, so that the plaintiff might be misled into assuming the allegations on the record to be all he has to meet, such paragraphs should, under Rule 318, Queen's Bench Act, 1895, be struck out as embarrassing. 3. In such a defence it is not sufficient to allege that the defendant received certain information, without shewing the source, or that it was reliable, or to allege possession by the plaintiff of the animals which he had been accused of stealing, without shewing that it was recent possession, or that all the information received had been laid before the magistrate before whom the charge had been laid and before counsel who advised the prosecution complained of, without shewing what facts had been laid before them; and paragraphs of the defence setting up such matters without shewing absolutely reasonable and probable cause should be struck out. *Rogers* v. *Clark*, 20 C. L. T. 419, 13 Man. L. R. 189.

Criminal prosecution—*Reasonable and probable cause — Belief — Malice—Jury.*]—In an action for malicious prosecution the Judge intimated that he thought there was no evidence to go to the jury, but he decided to let the case go to the jury so that the full Court might have the benefit of the findings in case an appeal was taken. The jury found that defendant had not taken reasonable care to inform himself of the facts before he proceeded against the plaintiff, and that he did not honestly believe in the charge, being actuated by an indirect motive, viz., to obtain recompense for the loss of his horse. Damages were assessed at $200. The Judge dismissed the action, holding that there was not a want of reasonable and probable cause:—*Held*, by the Court, that on the findings the plaintiff was entitled to judgment. *Shrosbery* v. *Osmaston*, 37 L. T. N. S. 792, followed. *Baker* v. *Kilpatrick*, 7 B. C. R. 150.

Criminal prosecution—*Reasonable and probable cause — Nonsuit.*]—The defendant had the plaintiff arrested on a charge of fraudulently disposing of her property to defeat the defendant's claim for money due. The plaintiff was acquitted. She was a married woman, carrying on business for herself, her husband driving a delivery waggon for her. She denied that she owed the defendant anything. The defendant supplied goods for the plaintiff's business to the husband, who, according to the plaintiff's story, was given the cash for each purchase. Ap-

parently he did not pay it over, as the defendant charged the price of the goods to the plaintiff. She said she had told the defendant not to give her husband any goods for her unless for cash. The defendant told the constable not to arrest the plaintiff if she would pay the amount due, but she refused to do so:—*Held*, that the plaintiff's evidence, if believed, would go to shew the absence of reasonable and probable cause on the part of the defendant. The credibility and effect of that evidence was for the jury, and the trial should have proceeded in the ordinary way, and the case should not have been withdrawn from the jury. *Burns* v. *Clark*, 21 C. L. T. 24.

Criminal prosecution — *Evidence — Record of acquittal — Clerk of the Peace — Fiat of Attorney-General.*]—The books, indictments, and records of the Court of Quarter Sessions, which are in the hands of the clerk of the peace, are public documents which everyone who is interested has a right to see; and a defendant who has been tried and acquitted at the Sessions is entitled to a copy of the record of acquittal, and it is not necessary to obtain the fiat of the Attorney-General therefor. *Regina* v. *Ivy*, 24 C. P. 78, and *Hewitt* v. *Cane*, 26 O. R. 133, distinguished. *Rex* v. *Scully*, *Scully* v. *Peters*, 21 C. L. T. 432, 2 O. L. R. 315.

Damages—*Charge of theft — Permission to take property.*]—The plaintiff was committed for trial on a charge of stealing two loads of wheat straw, the property of defendant, but was afterwards acquitted, and sued for damages for malicious prosecution:—*Held*, that the evidence strongly supported plaintiff's contention that defendant gave him permission to take the straw, and that the damages were properly assessed at $400. *Hulme* v. *Chant*, 22 C. L. T. 216.

Damages—*Responsibility—False arrest—Probable cause—Malice—C. C. 1053.*]—*Held*, that malice is not always evil intention or hatred that one person has towards another. From the legal point of view, malice is often inferred from the gross negligence of a person who, without informing himself and on simple suspicion, causes another's arrest: that there is probable cause for a flour merchant, proprietor of a trade mark, who caused the arrest of another for selling flour in bags bearing his trade mark, for a lower price, without buying any goods from him, and when the bags had been handled, and the twine with which they were sewn up was not the same as that used by him; that there is no malice when the party causing the arrest of another only acted on the advice of his lawyer who made all due diligence to find out the truth; and when that party on the first advice of his counsel refused to proceed against plaintiff, alleging that "he knew him well, that his relations with him were very good and that he didn't like to do such a thing;" that in an action for damages for false arrest, it is for the plaintiff to prove that the defendant acted through malice and without reasonable or probable cause; that in this action, as the defendant had acted in good faith and with probable cause, and that the plaintiff has been put to large expense in defending himself, each party should pay his own costs in both Courts. *Lake of Woods Milling Co.* v. *Ralston* (1911), 17 R. L. n.s. 226.

Damages for false arrest—*Complainant not proprietor of stolen goods — Plaintiff's health affected by his mother's sickness —Inscription in law — C. P. 191.*]—A party suing in damages for false arrest may allege that neither the defendant, who was the complainant, nor the company of which he is the manager, was the proprietor of the goods alleged to have been stolen. But he cannot allege that his mind was impaired by the serious illness of his mother, when learning his arrest, these damages being too remote. *Fournier* v. *Shier* (1909), 10 Que. P. R. 381.

Determination of proceedings in plaintiff's favour—*Termination of prosecution when two justices decide differently.*]—On the preliminary hearing of a charge of arson against the plaintiff, one justice decided that he should be committed for trial, and the other that the information should be dismissed, and nothing more was ever done in the matter:—*Held*, that it could not be said that the plaintiff had been discharged on this investigation so as to entitle him to bring an action for malicious prosecution against the informant. — *Abrath* v. *North Eastern Ry. Co.*, 11 Que. B. D. 445, *Metropolitan Bank* v. *Pooley*, 10 App. Cas. 210, *Parton* v. *Hill*, 12 W. R. 754, and *Baxter* v. *Gordon*, 13 O. L. R. 598, followed.—*Semble*, that the justices might have been compelled by *mandamus* to make an order of dismissal in the circumstances, and, if they had made such an order, the plaintiff could have proceeded with his action. *Kinnis* v. *Graves*, 67 L. J. Q. B. 584, followed. *Durrand* v. *Forrester*, 18 Man. L. R. 444, 10 W. L. R. 289.

Discontinuance — *Costs — Non-taxable disbursements — C. P. 275, 549 — Proof.*]—Plaintiff in an action to recover damages for malicious prosecution, must establish that defendant acted with malice and without probable cause. *Presseau* v. *Mathews* (1910), 17 R. L. n. s. 36.

Dismissal of action—Delay in proceeding — Leave to proceed. *Scheeman* v. *Dundas*, 2 O. W. R. 184.

Evidence — *Onus—Favourable termination of proceedings — Malice — Reasonable or probable cause.*]—In an action for damages for malicious prosecution, the onus is on the plaintiff to prove, not only that he was discharged from the prosecution, but that the defendant who prosecuted him acted maliciously and without reasonable or probable cause. *Desaulniers* v. *Hird*, 15 Que. K. B. 394.

False arrest — Damages — Arrest for indictable offence — Release on obtaining settlement—Duress—Obtaining money under false pretences—School moneys. *La Minerve School Commissioners* v. *Letourneau*, 4 E. L. R. 170.

False arrest — Reasonable and probable cause—Comparison of English and French law in such cases. *Heut* v. *Dixville Butter & Cheese Assoc.*, 3 E. L. R. 129.

False arrest — *Damages — Preliminary notice to the city of Montreal — Responsibility—False arrest by the police—What is their quality while so acting? — Plea of justification.*]—The action to recover dam-

ages for illegal arrest following upon the laying of a false complaint under oath is not subject to the preliminary notice, to be given within fifteen days after the occurrence of the event, provided for by Art. 536 of the charter of the city of Montreal (62 V. c. 58, amended by 7 Edw. c. 63, s. 45). Although a municipality is not generally responsible for the acts of its police officers when they arrest or lay complaints against persons suspected of having committed an offence, inasmuch as they are not then acting as its agents, but as the agents of the Crown, still if a municipality sets up in a defence to an action, taken against it to recover damages resulting from the acts of its police officers, that the policeman acted without malice and with probable cause, it thereby makes itself liable for the acts of such police officers, and, in the event of failure to establish its plea, it will be condemned to pay the damages which have been suffered. *Huckette* v. *Montreal*, 37 Que. S. C. 344.

False arrest and imprisonment — County constable—Absence of malice and of notice of action—Responsibility for arrest—Special employment and payment of constable—Labour troubles—Picketing. *O'Donnell* v. *Canada Foundry Co.*, 4 O. W. R. 402, 5 O. W. R. 215, 477.

False arrest and imprisonment—Verdict "no damages, $1"—Unreasonableness—Misdirection — Motion on behalf of plaintiff to set aside the verdict of the jury and for a new trial in an action claiming damages for false imprisonment, etc.—No defence of mitigation pleaded — Evidence—Costs. *Sam Chak* v. *Campbell* (N.S. 1910), 9 E. L. R. 194.

False imprisonment — *Action against magistrate—Warrant of commitment — Unauthorised imposition of hard labour—Notice of action—Requisites—Address of solicitor.*]—The defendant, a stipendiary magistrate, issued a warrant of commitment, imposing hard labour during the imprisonment, which the conviction did not impose and which was not authorised by the statute upon which the proceeding was founded. — In an action by the defendant for false imprisonment:—Held, that the issuing of the warrant was a ministerial, not a judicial act, and that the magistrate was liable for including in the warrant of commitment the imposition of hard labour. —The object of a notice of action is to inform the defendant substantially of the grounds of complaint, and the notice ought not to be construed with great strictness.—Where the address of the solicitor as given is attacked, it is incumbent on the defendant to shew that he was misled, and that the address given comprised neither the solicitor's place of abode nor his place of business. *McIvor* v. *McGillivray*, 40 N. S. R. 459.

False imprisonment — *Action for damages—Chinese Immigration Act—Arrest of defendant without warrant—Information — Trial—Conviction quashed—Fine directed to be returned to defendant — Jurisdiction — Erroneous proceedings—Liability of officers executing process.*]—At the trial the plaintiff was allowed as part of his damages for false imprisonment the sum of $100, the amount of a fine he had paid in connection with an alleged violation of above Act. On appeal, *held*, that as defendant had not directly "set in motion" the trial Judge to impose this fine, he was not liable in damages in respect to it, judgment must be varied by striking out this amount. *Cheng Pun* v. *Campbell*, 7 E. L. R. 421.

False imprisonment — *Arrest under capias—Validity of capias—Right to shew—Malice—Want of reasonable and probable cause—Towns Incorporation Act, s. 201.*]—The plaintiff had been arrested under a writ of *capias* and brought before a magistrate, who decided that the *capias* and service were void, and that therefore he had no jurisdiction in the matter. This action was then brought against the defendant for false imprisonment:—*Held*, that the defendant was not precluded, in this action, from shewing that the *capias* and service were not void.—The fact that the person arrested was a commercial traveller, who visited, every year, the county in which he was arrested was not, in itself, a sufficient ground for finding "malice" or "want of reasonable and probable cause."—The proviso in s. 201 of the Towns Incorporation Act, 1895, covers the case of a writ of summons only, and not of a writ of *capias*. *Irwin* v. *Lawson*, 40 N. S. R. 279. — See also *Varian* v. *Weeks*, *ib.* 285n; *McIvor* v. *McDonald*, *ib.* 287n.

False imprisonment—*Charge, plaintiff about to leave country to defraud creditors.*]—Plaintiff, a farmer of Whitchurch, brought action against defendant, a banker of Aurora, to recover $2,000 damages for alleged false imprisonment, on the charge that plaintiff was about to quit the province with intent to defeat and defraud his creditors.—At trial Britton, J., 16th Oct., 1909, gave plaintiff judgment for $1,500 damages and costs, and directed that judgment of defendant against plaintiff in the County Court of York recovered on three promissory notes, be set off *pro tanto* against plaintiff's judgment.—Divisional Court, 5th March, 1910, allowed defendant's appeal and ordered a new trial. Costs of appeal and former trial to be costs in the cause to successful party.—Boyd, C., *held*, that there was an absence of reasonable and probable cause for arrest and that the real cause of the arrest was referable to certain trouble which existed in order to get a settlement between plaintiff and his landlord (over 80 years of age) for whom defendant acted as banker and special agent. Judgment given plaintiff for $500 and a discharge of defendant's York Co. C. judgment with the costs of that action. Costs to plaintiff throughout this litigation. *Fitchett* v. *Walton* (1910), 17 O. W. R. 13, 2 O. W. N. 81, 22 O. L. R. 40.

False imprisonment — *Chinese Immigration Act — Alleged breach — Arrest — Verdict for defendant—New trial—Costs.*]—Action for false imprisonment. At the trial the jury found for defendant. New trial ordered, the jury having been misdirected. The only question for them is whether or not plaintiff had been detained an unreasonable time before he was brought before a magistrate. *Sam Chak* v. *Campbell*, 7 E. L. R. 419.

False imprisonment — *Want of reasonable and probable cause—Malice—Application for new trial—Misdirection—Putting*

questions to jury—Evidence as to character of plaintiff.]—At the trial of an action for false imprisonment, the Judge is not bound to put to the jury specific questions, such as "Did the defendants take reasonable care to inform themselves as to the facts?" "Did the defendants honestly believe that the plaintiff was guilty of the offence for which he was arrested?" but may, with a proper charge, submit all the facts to the jury, leaving them to return a general verdict.—2. In charging the jury, the Judge should not suggest to them that they might put themselves in the plaintiff's place, and consider how much they ought in that case to be paid. But as no objection had been raised as to the damages allowed being excessive, the verdict should not be disturbed on that ground.—3. Evidence to prove the bad character of the plaintiff in such an action was properly rejected at the trial. *Newsan* v. *Carr*, 2 Stark. 69, *Jones* v. *Stevens*, 11 Price 235, and *Downing* v. *Butcher*, 2 Moo. & R. 374, followed.—4. The Judge's charge to the jury that it is necessary in such an action for the plaintiff to prove malice as well as want of reasonable and probable cause, was wrong; but, although there was no evidence of malice except as it might have been inferred from the absence of reasonable and probable cause, the misdirection was not a ground for ordering a new trial, the verdict not having been attacked as excessive.—5. There is no ground for an action for malicious prosecution unless the acts complained of are the result of a complaint laid before a magistrate.—The plaintiff was arrested for theft of a valise which had been left in the hall of a hotel adjoining the bar-room, and was, in fact, removed by another person and put under a table in a near-by restaurant. The plaintiff had been in the hotel hall after the valise was left there, and before it was moved. The hall was open to the public, and there was no evidence as to how many people, other than the plaintiff, had entered it during the same period. The plaintiff afterwards went into the restaurant and sat at the table under which the valise was, but did not know it was there. The arrest was made before the valise was found:—*Held*, that such facts were not sufficient to justify the arrest of the plaintiff without a warrant. *Sinclair* v. *Ruddell*, 3 W. L. R. 532, 16 Man. L. R. 53.

Favourable termination of prosecution — *Pleading—Declaration—Discharge.*]—In an action for malicious prosecution, a statement in the declaration that the plaintiff was discharged from custody under a *habeas corpus* order, whereby the prosecution was determined, is not a sufficient allegation of the determination of the prosecution, and is bad on demurrer. *McKinnon* v. *McLaughlin Carriage Co.*, 37 N. B. R. 3.

Findings of jury — *Damages—Issue of warrant — Absence of malice — Evidence — Misdirection—Mistake of magistrate.*]—The mere finding by the jury, in an action for malicious prosecution, that the plaintiff did suffer damages, and fixing the amount of the damages, is not a ground for a condemnation to pay such damages. And where the jury find, in addition, that the warrant of arrest was issued by the magistrate as being, in his opinion, the proper means of giving effect to the information, and in accordance with the practice of the police office: that the complaint was not dismissed on the merits, but because the case was not in the opinion of the magistrate, one in which the law allowed the issue of a warrant; that the facts alleged in the information and complaint were not true, but that the defendants (complainants) used proper care to inform themselves of the facts of the case, honestly believed the same, and were not actuated by malice—the verdict is really a verdict for the defendant.—2. Complaint of rejection of evidence is not well founded where the record shews that proof of the facts desired to be proved by the evidence alleged to have been rejected has really been made in the cause.—3. A direction by the Judge presiding to the effect that "if the magistrate made a mistake, the defendants, unless they acted maliciously and without probable cause, could not be held, because it would be preposterous to suppose that a person applying in proper form for a remedy should be responsible for the mistake of a magistrate," is well founded in law.—4. The Judge at the trial is not bound, and is right in refusing, to instruct the jury when they come in with their verdict, that it is their duty to find the defendant at fault on some one of the special facts, before they can award damages. *Martin* v. *Montreal Gas Co.*, 23 Que. S. C. 222.

Forgery and theft—*Questions for jury re forgery not submitted—Damages—Plaintiff entitled to have question re forgery tried out.*]—Plaintiff sued for damages for malicious prosecution and false arrest on the charges of theft and forgery. One sheet of paper containing five questions for the jury on the charge of forgery, became detached and was only discovered after the jury had left the jury room.—Mulock, C.J.Ex.D., *held*, 14 O. W. R. 835, 1 O. W. N. 119, that the forgery charges must therefore be treated as untried. As to the charge of theft the jury found that there was an absence of reasonable and probable cause for the information:—*Held*, that plaintiff was entitled to judgment for $750 damages in respect to the charge of theft and could go on trial on the other issues.—Divisional Court *held*, that it was impossible to say that defendants had acted without reasonable and probable cause in laying the information for theft, and that there could be no different conclusion reached as to the prosecution for forgery. Appeal allowed and action dismissed with costs. *Fancourt* v. *Heaven*, 18 O. L. R. 492, distinguished. *Ford* v. *Can. Exp. Co.* (1910), 16 O. W. R. 797, 1 O. W. N. 1117, 21 O. L. R. 585.

Grounds for prosecution—*Absence of reasonable and probable cause—Malice.*]—A charge of theft against a well-known customer holding a responsible position, on the sole ground that a $20 bank note disappeared from the top of a pile of bank notes counted in his presence, is without probable cause to the extent of implying malice on the part of the complainant in preferring it. Judgment in 29 Que. S. C. 14 affirmed. *Sharpe* v. *Willis*, 29 Que. S. C. 475.

Illegal arrest — *Joint conviction — Invalid warrant — Constable — Resolution of municipal council—Ultra vires.*]—The three plaintiffs were summoned before a magistrate to answer a charge of interfering with and

spoiling a spring by the side of a highway, but did not attend, and in their absence were convicted and fined, the conviction imposing one fine on all three. A resolution having been passed by the township council indemnifying the magistrate against costs, he issued a warrant, directed "to all or any constables," following the form of the conviction, and this warrant was handed to a constable, who got the defendant M., one of the informants and also a constable, to assist him, and arrested the plaintiffs and kept them in gaol until the fine and costs were paid. In an action against the township corporation and M. for maliciously enforcing an invalid conviction:—*Held*, that M. acted as a constable in the execution of the warrant, and was entitled to protection as such; he was, by virtue of s. 21 of the Code, exempt from criminal prosecution; and in a civil action was entitled to the protection of R. S. O. c. 88, ss. 1 (2), 13, 14, as to notice of action and time of commencing action. *Ex p. McCleave*, 35 N. B. R. 100, distinguished. —2. That there was no proof of knowledge by the council that the conviction and warrant were illegal, and no proof of malice, that the resolution was *ultra vires*, and the legal consequences were to be visited, not on the municipality, but (if at all) upon the offending members. *McSorley* v. *Mayor, &c., of St. John*, 6 S. C. R. 531, distinguished. *Gaul* v. *Ellice*, 22 C. L. T. 157, 3 O. L. R. 438.

Industrial company — *Prosecution by manager — Scope of authority — Malice — Reasonable and probable cause — Information supplied by foreman.*]—The superintendent of an industrial company acts within the scope of his employment or of his agency in bringing workmen employed by the company before the Court and prosecuting them for deserting their employment and obtaining money by false pretences. Wherefore, if he does so without reasonable and probable cause and maliciously, his employers are liable. In this respect he is the company's *garant simple*, and has a right to intervene to contest an action brought against the company for malicious prosecution. The superintendent of an industrial company to whom a foreman reports that workmen employed by the company have deserted their employment and obtained money by false pretences, acts with reasonable and probable cause in prosecuting them for these offences. *Croteau* v. *Arthabaska Water & Power Co.*, 39 Que. S. C. 129.

Information for theft — Acquittal — Want of reasonable and probable cause — Malice—Damages. *Colville* v. *Johnson* (N. W.T.), 1 W. L. R. 218.

Issue of injunction—*Action for—Particulars—Costs and damages.*]—A plaintiff who seeks to recover costs and damages caused to him by the issue of a writ of injunction will be ordered, under penalty of dismissal of his action, to indicate, within a fixed period, the amount which he claims for costs and that which he claims for damages, and the general nature of such costs and damages. *Sabiston* v. *Montreal Lithographing Co.*, 3 Que. P. R. 393.

Issue of search warrant—*Absence of reasonable and probable cause—Presumption of malice — Master and servant — Libel — Letter — Privilege.*]—1. An employer who surprises an employee in a part of his workshop, at an hour and in circumstances which afford ground for suspicion of theft, but who, instead of immediately verifying the explanations which are offered to him, and in spite of his protestations of innocence, causes to be issued and executed a warrant to search the house of this employee, acts inadvisedly and without probable cause. He is therefore presumed to have been actuated by malice and is responsible for the prejudice caused to the servant.—2. The employer called upon by letter, in the above circumstances, to acknowledge the innocence of his employee, aggravates the injury and adds to it the wrong of defamatory libel, where he, by letter, states that he is by no means satisfied of the servant's innocence. Such a letter is not privileged. *Massé* v. *Dominion Bridge Co.*, 35 Que. S. C. 362, 6 E. L. R. 209.

Issue of warrant for arrest—*Advice of advocates — Malice—Reasonable and probable cause—Bailiff—Notice.*]—Even assuming that a bailiff is a public officer within the meaning of Art. 88, C. P., in this case the bailiff had no right to the notice required by that article, inasmuch as what he did was not done in the exercise of his public functions.—2. The responsibility of the informant who caused a warrant to be issued against a person, is not removed by the fact that he acted on the advice of his advocates, even when the facts of which he informs his advocates, and which thereby become the basis of the warrant, are true; if they are false, it must be inferred that there was malice and absence of probable cause. *Lachance* v. *Casault*, 12 Que. K. B. 179.

Justice of the peace—*Action against—Notice of action — Malice — Jurisdiction — Trespass.*]—The plaintiff caused to be served upon the defendant, a justice of the peace, notice of action claiming damages for maliciously and without reasonable and probable cause, causing plaintiff to be arrested and confined in the common gaol under a warrant issued in a civil action, brought and tried before the defendant, in which one C. was plaintiff, and the present plaintiff defendant, said warrant having been issued without authority, and after the debt for which said suit was brought, and said warrant issued, was satisfied. The plaintiff's statement of claim was framed on the theory that the justice had jurisdiction, but that he acted maliciously and without reasonable and probable cause. There was no count or paragraph founded on want or excess of jurisdiction:—*Held* per Graham, E.J., and Meagher, J., that it was not necessary under the circumstances to consider whether the justice had exceeded his jurisdiction or not; and the warrant having been properly issued, and the only question being whether or not it could be enforced after the debt was paid, that this question was not covered by the notice, and that the action must be dismissed; R. S. N. S. c. 101, s. 12. *Per* Weatherbe, J., that the plaintiff could not succeed, the jury having found that the defendant acted in good faith, and that he had reasonable and probable cause for directing the arrest of the plaintiff, and that he was not actuated by malice; and *quære*, whether, after the warrant was issued, plaintiff could adjust the debt by giving new securities. *Per* Ritchie, J., that the plaintiff could not succeed, the

notice of action being defective: and *quære*, whether the plaintiff could not have succeeded if trespass had been alleged. *Hennessey* v. *Farquhar*, 35 N. S. R. 22.

Liability for tort—*Malicious prosecution—Action by party convicted of a charge—Effect of conviction — Law applicable — Procedure — Appeal — Adjudication of and reasons in a judgment—Evidence obtained by fraud—Res judicata—Limitations to its operation—Trespass in obtaining evidence of an offence—Damages.*]—The decree of authority to be attached by Courts of civil jurisdiction to the judicial decisions and acts of Courts of criminal jurisdiction should be determined on principles of public law, which, in this province, is the law of England.—Under such law, the finding of a competent Court can only be set aside on appeal, or by such direct means as are provided for the purpose. It cannot be challenged or questioned in collateral proceedings, *e.g.*, by a convicted party in an action for malicious prosecution.—No action to recover damages for malicious prosecution will lie in favour of a party who has been convicted of the charge made, not even when the conviction has been procured by false and fraudulent testimony, or other unlawful means.—A respondent in appeal, contending for the validity of the judgment appealed from, as to its adjudication (*dispositif*), may under the practice of the Courts in this province, impugn the reasons (*motifs*), set forth therein, and pray that it be confirmed for other and different ones.—Evidence, otherwise admissible, will not be excluded on the ground that it was illegally and fraudulently procured.—An unreserved conviction, made by competent judicial authority, is conclusive of that which it determines by way of adjudication, but of nothing beyond that. Hence, the facts set forth therein are not necessarily established conclusively between the parties, who may dispute them again in any matter in which they are set up, provided the purpose be not to nullify the decision and defeat its direct object. A party convicted of an offence has no claim for damages arising from a trespass committed in an attempt to secure incriminating evidence against him, of the kind known as "decoy evidence." *Montreal & Lacroix* (1909), 19 Que. K. B. 385.

Magistrate's advice is no protection to defendant in a malicious prosecution action when he did not make a full disclosure of facts. *Scougall* v. *Stapleton*, 12 O. R. 206, followed. *Burns* v. *Rombough* (1911), 18 O. W. R. 689, 2 O. W. N. 767.

Malice — *Prosecution before interested magistrate — Town councillor—Duties of — "Person" — By-law—"Excavation."*] — A member of a town council, who is also chairman of the road committee of the town, has a right and is in duty bound to make himself acquainted with the details of municipal administration, and does not exceed the limits of his duty in causing the snow to be temporarily removed from some of the manholes, for the purpose of having the depth of the drains at these points measured.—2. The word "person" in a municipal by-law enacting that no person shall cause any excavation to be made in the streets without the permission in writing of the council and payment of a fee, does not include a member of the council acting within his administrative rights, and the word "excavation" does not include the removal and replacing of snow by him, to obtain information necessary to guide him in the performance of his municipal duties.—3. A member of the council who had seconded a resolution ordering the prosecution of a fellow member for the act above mentioned, had no jurisdiction as a magistrate to summon and try him, and the taking by the council of such proceeding before a person so disqualified was an element of malice, and the circumstances above stated established want of probable cause. *Therrien* v. *St. Paul*, 23 Que. S. C. 248.

Malice—*Reasonable and probable cause.*] In an action for malicious prosecution the Court must decide whether, upon the facts, the defendant had reasonable and probable cause for his proceeding, and it will be held that he had if he took reasonable care to inform himself of the facts and honestly, though erroneously, believed such a state of facts to be true as would, if actually true, have constituted a *prima facie* case for the prosecution complained of:—*Held* (reversing the judgment of Sifton, C.J.), that the defendant in this case had reasonable and probable cause for his proceeding. *Wainwright* v. *Villetard* (1905), 6 Terr. L. R. 189.

Mandamus—*Record of acquittal—Clerk of the peace—General sessions—Fiat of Attorney-General.*]—The judgment of a Divisional Court, 2 O. L. R. 315, 21 C. L. T. 472, affirmed; Armour, C.J.O., dissenting. *Rex* v. *Scully*, 22 C. L. T. 369, *Attorney-General* v. *Scully*, 4 O. L. R. 394.

Master and servant — *Railway watchman—Railway constable—Scope of authority—Dominion Railway Act, 1903, s. 241.*] —A watchman of the defendants, who was also a constable appointed on their application under s. 241 of the Dominion Railway Act, 1903, 3 Edw. VII. c. 58 (D.), arrested the plaintiffs at a spot about half a mile from the railway line, and swore out an information against them for breaking into a freight car with intent to steal. The evidence failed, and they were discharged, and brought this action for false arrest and malicious prosecution:—*Held*, that the defendants were not liable, because the watchman in his capacity as such had no authority, express or implied, either to arrest or prosecute the plaintiffs under the circumstances; and, as constable, he was to be regarded as an officer of the law, and not as a servant of the defendants, and there was no evidence that the defendants exercised any control over his action as constable. *Thomas* v. *Can. Pac. Ry. Co., Bush* v. *Can. Pac. Ry. Co.*, 8 O. W. R. 93, 14 O. L. R. 55.

Pleading—Defence in bar — Acquittal—Certificate—Grounds for prosecution. *Goldberg* v. *Doherty Mfg. Co.*, 2 O. W. R. 251.

Pleading—*Statement of claim — Disclosure of cause of action—Charge not known to law—Defendant moving before appearance — Defect in pleading — Amendment.*] — Maliciously resorting to criminal procedure and thereby prosecuting a charge, although not for a criminal offence, gives the party

damnified a right of action.—Cases reviewed. —Effect of defendant making a motion in Chambers before appearance discussed.—Defects of the pleading in this case and application of powers of amendment thereto discussed. *Flora* v. *Shandro*, 8 W. L. R. 426, 1 Alta. L. R. 252.

Proof of favourable termination of criminal proceedings — *Release — Compromise or settlement.*]—An action for malicious prosecution, founded upon criminal proceedings, cannot be maintained, where it appears that the termination of the prosecution was brought about by compromise or agreement of the parties.—The plaintiff was arrested and charged before a police magistrate with concealing and disposing of his property with intent to defraud his creditors, contrary to s. 368 of the Criminal Code. After the plaintiff had been taken into custody, as the result of a suggestion, he gave up to the defendant certain moneys found on his person, and gave his notes for the balance of the claim, and the prosecution was withdrawn, the police magistrate indorsing on the information "settled out of Court:" — *Held*, that the plaintiff could not maintain an action for malicious prosecution. *Wilkinson* v. *Howell*, Moo. & M. 495, at p. 496, followed. English and American cases reviewed. *Baxter* v. *Gordon Ironsides & Fares Co.*, 9 O. W. R. 194, 13 O. L. R. 598.

Proof of favourable termination of prosecution—*Bill ignored by grand jury—Reasonable and probable cause — Damages.*] —There cannot be a record of proceedings between the King and an accused person in a criminal prosecution until at least a "true bill" has been found by the grand jury.—The production by the proper officer of a certified copy of the bill of indictment, returned "no bill," is sufficient in view of the provisions of the Evidence Act, R. S. B. C. 1897 c. 71. —Where the act in respect of which the criminal proceedings were launched was done in the light of day, in open view of the defendant, and in pursuance of a statutory right, the trial Judge was right in leaving it to the jury to say whether, in the circumstances, the defendant really thought the plaintiff was a thief.—Upon the question of damages, there was sufficient proof of costs incurred by defendant in defending himself upon the criminal charge when the plaintiff swore that he was indebted to his solicitor, and, producing the latter's bill of costs, said he did not dispute it.—Judgment of Morrison, J., affirmed; Irving, J., dissenting. *Taughe* v. *Morgan*, 11 B. C. R. 455, 3 W. L. R. 146.

Proof of favourable termination of prosecution — *Informal abandonment — Reasonable and probable cause—Findings of jury—Costs.*]—Information laid by Hannah Beemer against plaintiff for unlawfully setting fire to dwelling-house on 18th September, 1902, and warrant of same date to arrest issued. Under this plaintiff was arrested and brought before the police magistrate (since dead), and was let out on bail. That was on Saturday, and she says she was to return on Monday before the magistrate, but did not do so, and heard no more of the matter. Tisdale, the high constable of Oxford, who arrested the plaintiff, said the case did not come on for trial, but he did not know why. He served 11 summonses for the Crown preparatory to the hearing. Before the day of trial the prosecutrix obtained information which caused her to believe the plaintiff could not have set the fire in question. The proceedings were dropped owing to some instructions given by the magistrate to the chief constables, the result of which was that no witnesses appeared. The prosecutrix or her mother paid the costs and nothing more was done in the matter. Three months later the plaintiff brought this action for malicious prosecution:—*Held*, Meredith, J., dissenting, the evidence shewed by the questions of counsel for defendants — that the summons was not prosecuted by defendants before the magistrate, but that the costs were paid and the matter was allowed to drop. No written termination of the proceedings is needed in such a preliminary investigation, and the death of the magistrate precluded his being called. Enough was shewn here, under the authority of *Reid* v. *Maybee*, 31 C. P. 392, to justify the jury and the Court in assuming that the prosecution had terminated favourably to the accused before the action was brought. *Beemer* v. *Beemer*, 4 O. W. R. 549, 25 C. L. T. 37, 9 O. L. R. 69.

Prosecution under N. S. Liquor License Act — *Search warrant — Interference by plaintiff with execution of warrant — Empty threats — Wrongful arrest—Damages.*]—Action for false imprisonment and malicious prosecution against a police officer:—*Held*, that the arrest was unjustifiable and carried out in a harsh and inexcusable manner, and that a summons, not a warrant, should have been issued. Damages awarded plaintiff. *McLean* v. *Gass*, 7 E. L. R. 96.

Reasonable and probable cause — *Absence of malice—Counsel's opinion.*]—In an action for damages for malicious prosecution, the having taken counsel's opinion before prosecuting will not sustain a plea of probable cause and absence of malice, unless it be shewn that all the facts were laid before him and unless he be heard to establish that he advised the prosecution with a full knowledge of them. *Durocher* v. *Bradford*, 31 Que. S. C. 240.

Reasonable and probable cause — *Arrest by constable paid by the defendants —Responsibility for.*]—In an action for malicious prosecution and false imprisonment, it was proved that the plaintiff and one L. were fellow-passengers on the defendants' road. L. complained to an officer of the defendant that a revolver had been stolen from his valise. The plaintiff had been seen by an official of the defendants at one of the stations to take something from L.'s valise. L. made a charge of theft against the plaintiff, and he was arrested by a constable appointed by the government on the recommendation of the defendants, and employed by them for duty on their road and paid by them. The prosecution was carried on by L., but at the instance and with the assistance of the officer making the arrest and other constables in the employment of the defendants. After an investigation by a magistrate the plaintiff was discharged:—*Held*, that the evidence shewed probable cause for the arrest and prosecution, and the de-

fendants were not liable; that if there was want of probable cause the evidence failed to connect the defendants with the prosecution and imprisonment so as to make them responsible. *Dennison* v. *Can. Pac. Rw. Co.*, 36 N. B. R. 250.

Reasonable and probable cause — Bank—Customer—Warehouse receipts—Nonsuit. *Pearen* v. *Merchants Bank*, 1 O. W. R. 277.

Reasonable and probable cause — *Bona fide belief in guilt—Burden of proof—Right of action for damages.*] — An action for damages for malicious prosecution will not lie where it appears that the circumstances under which the information was laid were such that the party prosecuting entertained a reasonable *bona fide* belief, based upon full conviction founded upon reasonable grounds, that the accused was guilty of the offence charged.—*Abrath* v. *North Eastern Rw. Co.*, 11 App. Cas. 247, and *Cox* v. *English Scottish and Australian Bank*, [1905] A. C. 168, referred to.—*Semble*, that in such cases, the rule as to the burden of proof in the province of Quebec is the same as that under the law of England, and the plaintiff is obliged to allege and prove that the prosecutor acted with malicious intentions, or, at least, with indiscretion or reprehensible want of consideration.—*Sharpe* v. *Willis*, 29 Que. S. C. 14, 11 Rev. de Jur. 538, and *Durocher* v. *Bradford*, 13 R. L. (N.S.) 73, disapproved.—Judgment appealed from 16 Que. K. B. 333, 3 E. L. R. 120, affirmed. *Hétu* v. *Dixville Butter & Cheese Assoc.*, 40 S. C. R. 128, 4 E. L. R. 578.

Reasonable and probable cause — Case for jury—Search warrant—Theft—Information—Crime — Amendment. *Pring* v. *Wyatt*, 2 O. W. R. 22, 321, 5 O. L. R. 505.

Reasonable and probable cause — *Commencement and continuation of prosecution — Malice — Damages — Costs—Scale of—District Court jurisdiction — Justice of the peace—Issue of warrant in lieu of summons.*]—In an action for malicious prosecution, though the plaintiff fail to prove want of reasonable and probable cause previous to laying the information, the defendant, having subsequently acquired information such as would leave him without reasonable and probable cause, is liable for the further prosecution of the charge, unless, at least, he brings the facts to the notice of the tribunal seised of the charge.—A plaintiff, bringing an action for damages in the Supreme Court, when he ought to have known that the amount recoverable in the District Court would be ample compensation, will, if he recovers a verdict under $400, be given his costs on the District Court scale only.—Remarks on the impropriety of the issue of a warrant by a justice of the peace, where a summons is calculated to secure the attendance of the accused. *Carruthers* v. *Beisiegel*, 8 W. L. R. 255, 1 Alta. L. R. 390.

Reasonable and probable cause — *Functions of Judge and jury—Actual malice —Inference—Conviction of plaintiff quashed on grounds of law—Evidence — Decease of witness—Depositions before magistrate.*]— In an action for malicious prosecution the question of reasonable and probable cause is for the Judge. The jury may be asked to find on the facts, from which reasonable and probable cause may be inferred; but the inference from the facts found must be drawn by the Judge. Actual malice need not be proved, but may be inferred from the absence of probable cause. It is no answer to an action for malicious prosecution, that the conviction against the accused (plaintiff) was quashed by reason of a proviso in the statute creating the offence excusing the act charged. The evidence of a witness taken before a magistrate on a criminal charge is admissible in an action for malicious prosecution founded on that charge, where the witness, at the time of the trial, is dead. *Peck* v. *Peck*, 35 N. B. R. 484.

Reasonable and probable cause — *Functions of Judge and jury—Questions put to jury — Evidence — Malice—Indirect motive—Search warrant—Nonsuit directed by Court of Appeal — Amendment to King's Bench Act—Procedure—Pending actions.*] — In an action for malicious prosecution, the trial Judge did not rule on the question whether the plaintiff had proved that there had been absence of reasonable or probable cause for instituting the prosecution against him, but he left certain questions to the jury. The first was: "Did the defendants take reasonable care to inform themselves of the true facts of the case?" The jury answered, "No." The second was: "Did the defendants honestly believe the case which they laid before the magistrate?" This the jury did not answer. The third was: "Were the defendants actuated by some motive other than an honest desire to bring a man whom they believed to have offended against the criminal law, to justice?" The jury answered, "Yes." They found a verdict for the plaintiff, assessing the damages at $5,000:—*Held*, that the first question should not have been left to the jury; it was in effect the question which the Judge had to decide, namely, whether there was reasonable and probable cause; and, upon the evidence, he should have decided that question in favour of the defendants. There was no evidence that they acted negligently; they laid all the facts before their solicitor and acted upon his advice. The plaintiff was the defendants' servant, and was prosecuted on a charge of conspiracy to defraud them. They did not appear to the plaintiff for an explanation before arresting him, but in that also they acted upon their solicitor's advice, and were justified in doing so:—*Held*, also, that, upon the undisputed facts, there was a complete absence of malice. It was not evidence of malice on the part of one of the defendants that he said in the witness-box at the trial of the action that he still believed the plaintiff guilty. The finding of the jury on the third question was wholly unsupported by the evidence:—*Held*, also, that the issue of a search warrant under which the plaintiff's house was searched did not give rise to a separate cause of action; it was merely an ancillary proceeding to the prosecution of the plaintiff on the charge of conspiracy.—The trial Judge should have ruled, on the practically undisputed facts as to what was before the defendants to cause them to make the arrest, that the plaintiff failed to shew the absence of reasonable or probable cause, for the defendants' action, and the Judge should have nonsuited the plaintiff: Howell

C.J.A., dissenting as to the nonsuit, and being of opinion that there should be a new trial.—*Lister* v. *Perryman*, L. R. 4 H. L. 521; *Abrath* v. *North Eastern Rw. Co.*, 11 Q. B. D. 455; *Coe* v. *English, Scottish and Australian Bank*, [1905] A. C. 168; *Brown* v. *Hawkes*, [1891] 2 Q. B. 718, and *Archibald* v. *McLaren*, 21 S. C. R. 588, discussed. —The Court of Appeal directed a nonsuit to be entered, by virtue of an amendment to the King's Bench Act passed in 1910, giving the Court power in a case tried by a jury to do what the trial Judge should have done; and *held*, that, as this provision related to procedure, it applied to pending actions. *Renton* v. *Gallagher* (1910), 14 W. L. R. 99.

Reasonable and probable cause — *Functions of Judge and jury—Disputed facts —Nonsuit — New trial—Judicature Act, s. 112—Questions for jury.*]—In an action for malicious prosecution the jury is to find the facts on which the question of reasonable and probable cause depends, but the Judge must determine whether the facts found do constitute reasonable and probable cause. The difficulty is in the determination of the question whether there are any facts in dispute upon which the jury should be asked to pass. In determining that the plaintiff has failed to shew absence of reasonable and probable cause, and withdrawing the case entirely from the jury, the Judge must assume in favour of the plaintiff all facts of which he has adduced any reasonable evidence.—Therefore, where the defendant had prosecuted the plaintiff for the theft of some lumber, and the plaintiff admitted taking the lumber, but swore that he had done so with the defendant's consent, in exchange for lumber of his own:—*Held*, that it must be assumed that the exchange was actually made, and belief of the defendant, when laying the information, in the guilt of the plaintiff, necessarily implied his having forgotten that he had made such an exchange, and such forgetfulness not being admitted, was a question of fact for the jury, and so too the existence in the mind of the defendant of an honest belief in the plaintiff's guilt.—The plaintiff admitted that the defendant, before laying information, charged him orally with the theft of the lumber, and that he (the plaintiff) made no answer to the charge, no allusion to the exchange:—*Held*, that these facts did not warrant an assumption by the trial Judge that the plaintiff's evidence as to the exchange was untrue, or his drawing an inference that, if any such exchange had in fact taken place, it had passed entirely from the defendant's mind.—Judgment of Mabee, J., nonsuiting the plaintiff, set aside, and a new trial directed:—*Semble*, *per* Anglin, J., that s. 112 of the Judicature Act expressly prohibits the putting of questions to the jury in actions of this kind and of the other kinds specified therein. Suggestion of an amendment of this section. *Still* v. *Hastings*, 9 O. W. R. 121, 13 O. L. R. 322.

Affirmed by Court of Appeal, 10 O. W. R. 10, 14 O. L. R. 638.

Reasonable and probable cause — Functions of Judge and jury—Trial. *Peters* v. *Whyte*, 1 O. W. R. 26.

Reasonable and probable cause — *Initiation of criminal proceedings—Continuation after mistake discovered—Favourable termination of proceedings—Abandonment or withdrawal of charge.*]—Action for malicious prosecution. On appeal, judgment given for plaintiffs as there was an absence of reasonable and probable cause in defendant not withdrawing from prosecution of charge when he found same not well founded. *Fauscourt* v. *Heaven*, 14 O. W. R. 230, 18 O. L. R. 492.

Reasonable and probable cause — Interference in prosecution—Evidence shewing. *Hunter* v. *Boyd*, 1 O. W. R. 79, 2 O. W. R. 724, 1055.

Reasonable and probable cause — *Malice.*]—In an action for malicious prosecution the Court must decide whether, upon the facts, the defendant had reasonable and probable cause for his proceeding, and it will be held that he had if he took reasonable care to inform himself of the facts, and honestly, though erroneously, believed such a state of facts to be true as would, if actually true, have constituted a *prima facie* case for the prosecution complained of:—*Held*, reversing the judgment of Sifton, C.J., that the defendant in this case had reasonable and probable cause for his proceeding. *Wainwright* v. *Villetard*, 6 Terr. L. R. 189, 2 W. L. R. 242.

Reasonable and probable cause — *Malice—Absence of criminal intent—Knowledge of prosecutor.*]—A person who lays an information against another and causes him to be arrested upon a charge based on acts which give rise only to a civil remedy, and which he knows were done without criminal intent and in the exercise of an assumed right, acts without probable cause, and therefore with malice. Accordingly, he is responsible for damages resulting from the prosecution and arrest. *Lecomte* v. *Langevin*, 34 Que. S. C. 43.

Reasonable and probable cause — Malice—Functions of Judge and jury—Inference from undisputed facts — Questions put to jury—Findings of jury—Perversity—Court *en banc* disregarding findings and reversing judgment at trial. *Chute* v. *Stewart* (Yuk.), 6 W. L. R. 569.

Reasonable and probable cause — *Malice—Inference.*]—In an action for damages for malicious prosecution, want of probable cause and malice may be inferred from circumstances under which the prosecution was brought and dismissed, incompatible with the supposition that it was justified. *Gauthier* v. *Chenery*, 34 Que. S. C. 133.

Reasonable and probable cause — *Malice—Information laid in law—Assistance in prosecution for criminal offence—Special damages.*] — The defendant went before a justice of the peace with the intention of laying an information against the plaintiff for stealing. The justice prepared, and the defendant swore to, an information for "unlawful taking the defendant's calf into his (plaintiff's) possession." The plaintiff appeared before the justice and was held to bail to appear for trial. The defendant honestly believed the calf to be his, but not that plaintiff was guilty of a theft; he believed him guilty of some criminal offence. The Crown prosecutor examined the papers sent up by the magistrate, and, without having

had an interview with defendant, laid a charge of theft. The defendant, then becoming aware that the charge was theft, assisted in endeavouring to secure a conviction, but the plaintiff was acquitted. The Judge trying an action for malicious prosecution found that the defendant was actuated by malice both in laying the charge and in aiding in the prosecution:—*Held*, that the defendant without reasonable and probable cause laid the information before the justice as for an indictable offence, and procured the plaintiff to be prosecuted for theft before the Court, and was liable in damages to the plaintiff.—2. That an action will lie where the procedure is criminal in form, though the charge be bad in law.—3. That the defendant was liable for the part he took in prosecuting the charge before the Court. *Fitzjohn* v. *MacKinder*, 9 C. B. N. S. 505, followed.—4 That the defendant, having "set the stone rolling," was responsible for the consequences, inasmuch as he had not, as he should have voluntarily done, informed the Crown prosecutor of the facts.—5. That amounts paid by plaintiff to witnesses attending the trial of the criminal charge, for subpœnas and serving, for counsel fees, for expenses of himself and wife attending such trial, for expenses of himself and his servant attending the preliminary examination, should be allowed as special damages. *Powell* v. *Hilgen*, 5 Terr. L. R. 16.

Reasonable and probable cause — *Nonsuit—Search warrant—Theft—Information — Amendment.*] — A dog having been claimed by the plaintiff and taken from the defendant, the latter stated the facts to a magistrate, who drew an information that plaintiff did "unlawfully have and keep in his possession and take away a black collie dog, the property of the complainant," which was sworn to by the defendant. The magistrate issued a search warrant, under which a constable took the dog out of the plaintiff's possession. The constable then laid an information against the plaintiff in the same terms as the former one, and the plaintiff was summoned. Before the magistrate the plaintiff's counsel objected that the information and summons did not charge the plaintiff with any offence, and at the request of the defendant and his counsel the information was amended by inserting the words "steal and take away." The magistrate dismissed the charge. In an action for malicious prosecution:—*Held*, that the defendant, having fairly stated the facts to the magistrate, was not liable in damages for the erroneous view of the magistrate that he had jurisdiction to issue the search warrant, nor for summoning the plaintiff apparently to dispose of the question as to the property in the dog:—*Held*, also, that there was evidence that the defendant assented to the alteration charging the plaintiff with the crime of theft and his prosecution on that charge, and that the defendant was not justified in charging the plaintiff with having stolen the dog, because he believed the dog was his own; that the real question was not whether he believed that the plaintiff had stolen him, that is, taken him without any belief that he had the right to take him; and that the trial Judge should have left the case to the jury, telling them that, if they found that the defendant had authorised the charge of theft and honestly believed when the amendment was made that the plaintiff had stolen his dog, they should find for the defendant; otherwise they should find for the plaintiff; the case should not have been taken from the jury upon the ground that reasonable and probable cause for a criminal prosecution had been shewn; and a new trial was ordered. *Pring* v. *Wyatt*, 23 C. L. T. 191, 5 O. L. R. 505, 2 O. W. R. 22, 321.

Reasonable and probable cause — Question for Court—Evidence — Reasonable belief in truth of charge—Malice—Motive—Honest attempt to ascertain true facts. *Wainwright* v. *Villeclard* (N.W.T.), 2 W. L. R. 242.

Reasonable and probable cause — *Questions for Judge—Functions of jury.*] — The plaintiff was employed as the defendants' agent, and in that capacity received and disbursed large sums of money, as to which he was required to render accounts and to remit balances remaining in his hands. There was a shortage in his accounts which the defendants' auditor was sent to investigate, and, as the result of his reports and the advice of counsel, steps were taken leading to the plaintiff's arrest and examination before a magistrate and his committal for trial. He was acquitted, and brought this action for malicious prosecution: — *Held*, that, on the facts shewn, the defendants had reasonable and probable cause for the course taken by them, and that the trial Judge should have so found and dismissed the action: also, that the trial Judge was wrong in submitting the question of reasonable and probable cause to the jury, that being a question which he was obliged to decide for himself, and that the fact of his subsequently signing an order for judgment in the plaintiff's favour was not equivalent to a decision of this point. *Meaney* v. *Reid-Newfoundland Co.*, 1 E. L. R. 109, 39 N. S. R. 407.

Reasonable and probable cause — *Statements of witness in Court—Defamation—Malice — Termination of prosecution.*] — The defendant and a companion were occupying a bed room in the plaintiff's hotel. During the night, the plaintiff entered the room and searched the pockets of both defendant and his companion, and then took the defendant's pocket-book from his coat pocket and commenced to examine the papers contained therein. The defendant got up and accused the plaintiff of robbing him, and he afterwards laid a complaint to that effect before a justice of the peace. The criminal case had not terminated when the plaintiff brought the present action of damages for malicious prosecution:—*Held*, that the defendant had reasonable and probable cause for laying the complaint, and acted in good faith and without malice. A person cannot be sued for damages by reason of anything said by him while testifying as a witness before a Court of justice, when he states, in answer to questions put to him, what he honestly believes to be true, and is acting in good faith. To establish a cause of action for malicious prosecution, it must be shewn that the prosecution was terminated. In an action for damages for malicious prosecution it is for the plaintiff to prove want of reasonable and probable cause, and malice, which he had not done in the present case;

on the contrary, the defendant had proved that there was reasonable and probable cause. *Renaud* v. *Gucnette*, 25 Que. S. C. 310.

Reasonable and probable cause — *Suspicious conduct leading to prosecution—Accomplice in crime.*]—A young man who had knowledge of an outrage committed on his father's property by a farm servant, causing the death of a neighbour's animal, after three days of torture, who does nothing in that interval to succour the animal, nor to warn its owner, gives, by this conduct to the latter, probable cause for a prosecution of him as an accomplice, and, notwithstanding the termination of the prosecution in his favour, he cannot succeed in an action for malicious prosecution. *Deslauriers* v. *Jasmin*, 18 Que. K. B. 35.

School corporation—*Liability—Authorisation of secretary to prosecute—Malice—Want of reasonable and probable cause—Inference from facts—Civil action.*]—A school corporation who authorise their secretary to lay an information against a person for obtaining money under false pretences, and those who severally take part in his arrest which follows, are severally liable in damages if they act from malice and without reasonable and probable cause. The absence of reasonable and probable cause and the existence of malice were to be inferred in this case from the fact that the corporation had begun a civil action for the recovery of the sum in question, and that such action was contested and pending, and that the charge was evidently laid for the purpose of compelling the defendant by intimidation to settle the matter and pay a claim which was contestable and contested. *Minerve School Commissioners* v. *Létourneau*, 17 Que. K. B. 6.

Search warrant—*Issue and enforcement of—Proceedings terminated in plaintiff's favour—Misdirection and non-direction of jury—Reasonable and probable cause—No ruling as to the absence of—New trial.*]—Plaintiff brought action to recover damages for malicious prosecution. Jury found in plaintiff's favour. Judgment entered for $35. On appeal Divisional Court ordered a new trial on the ground that there had been no ruling as to reasonable and probable cause in the issue and enforcement of a search warrant, upon the information of defendant, in which he deposed that plaintiff had stolen certain ashes. *Richards* v. *Joynt* (1910), 16 O. W. R. 671, 1 O. W. N. 1065.

Submitted facts to counsel.]—If a person honestly believes another stole from him and so believing submits to counsel all the facts known to him and simply acts on the advice of counsel, in laying an information, he is not liable in an action for malicious prosecution although there was no reasonable and probable cause for the arrest. *Dundas* v. *Wilson* (1911), 19 O. W. R. 17, 2 O. W. N. 995.

Want of probable cause—*Inference—Damages—General verdict—Count for false imprisonment.*]—In an action for malicious prosecution and false imprisonment, where the circumstances connected with the offence with which the plaintiff was charged in no way pointed to him as the guilty person, and the defendant interfered at the time of the arrest and failed to prosecute, want of probable cause may be inferred.—*Semble*, if the verdict is general, and all the damages might have been recovered on either count, the Court will not grant a new trial, but will, if necessary, direct the verdict to be entered on the count sustained by the evidence. *Savage* v. *Breton*, 37 N. B. R. 240.

Wrongfully causing search warrant to be issued—*Facts in dispute—Function of Judge and jury.*]—In an action for maliciously and wrongfully causing a search warrant to be issued and premises of plaintiffs to be searched and plaintiffs' goods to be seized and taken away, it was *held*, that issuing a search warrant is not a mere ministerial act, but a judicial act of a magistrate. *R.* v. *Kehr* (1906), 11 O. L. R. 517, 7 O. W. R. 446, followed. Where the facts are in dispute, the jury must pass upon those facts before the Court can say whether reasonable and probable cause is, or is not, absent. *Still* v. *Hastings* (1907), 13 O. L. R. 322, 9 O. W. R. 121, 10 O. W. R. 10, followed. *Ravenga* v. *MacIntosh* (1824), 2 B. & C. 693, followed. The absence of anything in the evidence inconsistent with plaintiffs' innocence distinguished this case from *Fitzjohn* v. *MacKinder* (1861), 9 C. B. N. S. 505. Judgment of Falconbridge, C.J.K.B., nonsuiting plaintiffs, set aside, and a new trial ordered. *Williusky* v. *Anderson* (1909), 14 O. W. R. 595, 1 O. W. N. 13, 19 O. L. R. 437.

See Arrest—False Arrest and Imprisonment—Landlord and Tenant—Lunatic — Particulars—Pleading — Solicitor.

MALICIOUSLY KILLING CATTLE.

See Criminal Law.

MALPRACTICE.

See Limitation of Actions — Medical Practitioner—Medicine and Surgery —Physicians and Surgeons—Pleading.

MANDAMUS.

Cemetery company — *Executor—Right to corpse of testator—Delivery to testator's son—Bona fides.*]—Mandamus will not be granted to an executor to compel a cemetery company to deliver to him the corpse of his testator, which has in fact been delivered to the testator's son in good faith and in ignorance of the claim of the petitioner; in such a case the writ will necessarily be without effect, in view of the impossibility of accomplishing the act demanded. *Valin* v. *Mount Royal Cemetery Co.*, 8 Que. P. R. 379.

Claim for money against municipal corporation—*Resolution of council author-*

ising payment — Refusal of mayor to sign cheque—Action for mandamus — Adequate remedy by action against corporation.]—1. One who has a valid legal claim against a municipal corporation has no right to a *mandamus* to compel the mayor to sign a cheque for the amount, although the council has passed a resolution approving payment over the mayor's veto, because the claimant has another adequate remedy, namely, to proceed by action against the municipality.—*Regina* v. *Hull & Selby Rw. Co.*, 6 Q. B. 70; *Re Napier*, 18 Q. B. 695. *Regina* v. *Registrar*, 21 Q. B. D. 131, followed.—2. The mere fact that the other remedy is not against the defendant in the *mandamus* proceeding does not prevent the above rule applying. *Regina* v. *Commissioners of Inland Revenue*, 12 Q. B. D. 461, followed. *Holmes* v. *Brown*, 8 W. L. R. 459, 18 Man. L. R. 48.

Clerk of executive council—Election of member of Legislative Assembly—Jurisdiction of Court—Interference with jurisdiction of legislature. *Re Dubuc* (N.W.T.), 3 W. L. R. 248.

County Court Judge — *Appeal from conviction—Decision on legal merits—Refusal to hear evidence.*]—A conviction was made by two justices of the peace, under the Summary Convictions Act of British Columbia and amending Acts, for a breach of the Highway Regulation Act. An appeal was taken from the conviction to the County Court of Yale, and the appeal came on to be heard before the Judge. The amendment to the Summary Convictions Act passed in 1901 provides that "in every case of appeal from any summary conviction or order made before any justice, the Court to which such appeal is made shall, notwithstanding any defect in such conviction or order, and notwithstanding that the punishment imposed or the order made may be in excess of that which might lawfully have been imposed or made, hear and determine the charge and complaint upon which such conviction has been made upon the merits," etc. The conviction in question was hopelessly bad on its face, and on the appeal coming on to be heard a motion was made to quash it. For the respondents it was argued that the Judge under the section above quoted must hear evidence and try the case *de novo* in any event. After hearing argument on this question, the Judge gave judgment on the legal merits, allowing the appeal and quashing the conviction with costs. Application was thereupon made to the Supreme Court to grant a *mandamus* to the Judge to enter continuances, hear evidence, and determine the appeal on the merits:—*Held*, following *Regina* v. *Justices of Middlesex*, 46 L. J. M. C. 225, 2 Q. B. D. 516, that the Court had no power to interfere by *mandamus*, there having been a decision by the County Court Judge on the legal merits; that, as the Judge had heard argument on the question, and given a decision on the legal merits, the Court had no right to decide, or inquire whether such decision was right or wrong. *Re Strange & Gellatly*, 24 C. L. T. 190.

County councils may declare local roads to be county roads and charge their maintenance to local municipalities, but the local municipalities cannot be ordered, by *procès-verbal*, to open up the road. *Beaudet* v. *Leclercville* (1910), 38 Que. S. C. 77.

Court stenographer—Copy of evidence taken at criminal trial—Allegation that copy furnished incomplete. *Rex* v. *Campbell* (Y. T.), 2 W. L. R. 223.

Demand for peremptory writ of *mandamus* to compel a mayor to sign a draft deed of retrocession of certain immovables to plaintiff, who alleges that he has become entitled to such retrocession and that the municipal council has adopted a resolution directing the mayor to sign such draft, is not a matter relating to a municipal corporation or office within meaning of Art. 1003 C. P., and an appeal in such a case will lie to Court of King's Bench. *Municipal Homes* v. *Legare*, 16 R. de J. 42.

Division Court—*Committal of judgment debtor—Non-production of books—Notice of motion—Uncertified solicitor.*]—A Judge refused to commit the defendant for non-production of his books under a *subpœna duces tecum*, and pursuant to notice, on his examination as a judgment debtor under s. 243 of the Division Courts Act, in a Division Court plaint, because, there being no express provision in the Division Courts Act authorising a committal for non-production of books, and the liberty of the subject being involved, he thought it wiser to take that course:—*Held*, without expressing any opinion as to whether the Judge was right or wrong in his view, in favour of which there was a good deal to be said, that the Judge having given judgment in a matter within his jurisdiction, *mandamus* would not lie to compel him to give a different judgment. A preliminary objection that the notice of motion was given by an uncertificated solicitor was answered by *Sparling* v. *Brereton*, L. R. 2 Eq. 64, *Re Jackson* v. *Clark*, 20 C. L. T. 42.

Election Act, R. S. M. 1902, c. 52—*Revising officer—Duties—Board of registration functus officio.*]—A revising officer appointed to revise and close the lists of electors under the Manitoba Election Act, R. S. M. 1902 c. 52, although directed by the board of registration to hold its sitting for that purpose on a certain day and between certain hours, has power to continue the sitting to a later hour and on a subsequent day or days if necessary, to enable him to hear and dispose of all applications brought before him. Where, however, it was shewn that, before the hearing of the application for a *mandamus* to the revising officer to compel him to re-open his Court for the purpose of hearing further applications to be placed on the lists, he had, pursuant to s. 92 of the Act, transmitted the list of electors and all books and papers to the chairman of the board of registration, and that, before the final argument of the motion, the chairman had pursuant to s. 97 of the Act, sent the revised lists to the King's printer, and the books, documents, and other papers to the clerk of the executive council:—*Held*, that the issue of a *mandamus* to the revising officer as asked for should be refused, as it would be fruitless and futile, and both he and the board of registration were *functi officio*. *Rex* v. *Bishop of London*, 1 Wils. 11, *Rex* v.

Bishop of Exeter, 2 East 466, and *Rex* v. *Bateman*, 4 B. & Ad. 553, followed. *In re Bonnar*, 23 C. L. T. 251; *Rex* v. *Bonnar*, 14 Man. L. R. 467.

Enforcing execution against school district by levy of taxes—*Application to compel treasurer of municipality to make levy—Execution creditor — Sheriff.*]—Either the sheriff or the execution creditor may apply for the *mandamus* authorised by s-s. (*f*) of s. 293 of the Public Schools Act, R. S. M. 1902 *c.* 143, to be issued in case the treasurer of the municipality refuses or neglects to make the levy against the lands comprised in a school district when directed by the sheriff under an execution in his hands against the school district. *Canada Permanent Mortgage Corporation* v. *East Selkirk School District Corporation*, 5 W. L. R. 451, 485, 16 Man. L. R. 618.

Interim order — Municipal corporation —Supply of light to building—Arrears due by previous occupant. *Anderson* v. *Wetaskiwin* (N.W.T.), 3 W. L. R. 251.

Mandamus may be enforced to compel a municipality to discharge an imperative duty, even though previously ordered to do so by an irregular *procès-verbal*. *Beaudet* v. *Lecleroille* (1910), 38 Que. S. C. 77.

Motion for—*To compel Co. C. Judge to hear an application — Motion dismissed—No relief available on material filed.*]—Plaintiff moved for a *mandamus* to compel His Honour, Judge McBeth, Co.C.J., of Middlesex, to hear and determine an application to compel the transfer of certain shares and the payment of a dividend thereon to plaintiff.—Sutherland, J., *held*, that the order should not be granted, and that there was no other relief which plaintiff could obtain on the material filed. Application dismissed without costs and without prejudice to any further motion she might be advised to make. *Daniel* v. *London & Western Trusts Co.* (1910), 16 O. W. R. 914, 2 O. W. N. 28.

Municipal corporation — *Highway — Removal of barriers — Railway crossing — Government railway — Powers of Railway Commissioners.*]—The concurrence of 3 conditions is necessary to give the right to proceed by way of *mandamus*: (*a*) an imperative official duty to be done by a public body or a public officer; (*b*) the refusal to do it; (*c*) the absence of any other recourse to remedy the consequences of such refusal.—A municipal corporation is not imperatively obliged to remove barriers placed on one of its roads by the federal government, at the place where a railway owned by the latter crosses the road. The Railway Act of 1903 gives to the Board of Railway Commissioners the power of entertaining and adjudicating upon complaints made on this subject, and such jurisdiction is exclusive of that of the ordinary tribunals. Upon this ground the recourse of *mandamus* against a municipal corporation is not open. *Carrier* v. *St. Henri*, 30 Que. S. C. 45.

Municipal corporation—*Keeping roads in good condition.*]—Unless there is a special by-law obligating a municipal corporation to repair a road, a *mandamus* does not lie to compel it to repair either a front road or a by-road. *Lichtenheim* v. *Pointe Claire*, 11 Que. P. R. 89.

Municipal corporation — *Repair of bridge—Joint duty—Default of maintenance.*]—The remedy of *mandamus* to compel a corporation to perform a legal duty is not open to another corporation jointly bound to perform the duty, and in default in that regard. Therefore, where two municipalities are charged with the maintenance, in different proportions, of a bridge which lies between them and is in need of repair, one cannot have a *mandamus* against the other, unless it has furnished its part of the cost of maintenance. *La Pointe à Gatineau* v. *Hull*, 15 Que. K. B. 354.

Municipal corporation — *Statutory duty—County officers—Office accommodation — Discretion — Mandamus.*]—The selection of the place in an Ontario county at which an office shall be provided for the County Crown Attorney and clerk of the peace rests with the county council and the Courts should not interfere with the reasonable exercise of the council in making such selection. Judgment of the Court of Appeal, 19 O. L. R. 659, 14 O. W. R. 953 affirmed. Appeal dismissed with costs. *Rodd* v. *Essex* (1910), 31 C. L. T. 255, 44 S. C. R. 137.

Municipal corporation — *Statutory duty—Prerogative writ—Summary application—Action — Affidavits.*]—When a public body is required to perform a statutory duty at the instance of one entitled to call for such performance, the practice in England is to move summarily for the prerogative writ of *mandamus*, according to the prescribed procedure in the Crown office. But in this province all the divisions have co-ordinate jurisdiction; and the practice in cases of the prerogative writ is assimilated to that in ordinary applications of a summary nature: see Rules 1084, 1090, 1091, 1092. And where a meritorious application was made, in an action for a *mandamus* to compel a city corporation to levy a special rate for library purposes under the Public Libraries Act, R. S. O. c. 232, it was directed that the affidavit should be re-sworn and intituled as in an application (not in an action) for the prerogative writ. *Toronto Public Library Board* v. *Toronto*, 21 C. L. T. 79, 19 Que. P. R. 329.

Officers of municipal corporation—*Designation.*]—A writ of *mandamus* addressed to two persons, to one as secretary and to the other as assistant-secretary, will be maintained against the former, and set aside with costs as against the latter, if it is shewn that the latter does not in fact occupy the position.—2. A *mandamus* addressed to two persons whose concurrence is necessary to accomplish the act ordered to be done, will be set aside as against both if it is declared illegal as to one of them; but it will be otherwise if such an act can be done by one only of these two persons.—3. The fact that the writ has been addressed to two defendants as notaries, and that in the petition annexed thereto they are respectively designated as secretary and assistant-secretary of the corporation of a town, does not prevent the designation being sufficient, at-

though the only office recognised by law is that of secretary-treasurer of the town. *Mercier* v. *Roy*, 16 Que. S. C. 510.

Order to compel J. P. to call meeting of inhabitants of school district to grant tavern license, where boundaries of school are not defined—J. P. may take judicial notice of the unfitness of applicant for tavern license. *Re Phelan* v. *Ross* (1875), 2 P. E. I. R. 28.

Police magistrate — Jurisdiction — Information—Criminal offence—Municipal election—Offence at. *Re Rex* v. *Mehan*, 1 O. W. R. 156, 248, 3 O. L. R. 567.

Police magistrate — *Sentence — Ontario Liquor Act, 1902—Voting on—Personation—Information—Deputy returning officer —Prosecutor—Applicant for mandamus — Status.*]—At the voting upon the Ontario Liquor Act, 1902, the defendant presented himself at a polling place and asked for a ballot in the name of another person, whereupon before the defendant had left the polling place, one Stewart laid an information before the deputy returning officer charging the defendant with personation, and on this information the deputy issued his warrant, under which the defendant was arrested and brought before a police magistrate. The deputy then laid an information against the defendant for personation, and the defendant was tried by the magistrate, convicted and sentenced:—*Held*, that, having regard to the provisions of R. S. O. 1897 c. 10 (made applicable by s.s. (5) of s. 91 of the Ontario Liquor Act, 1902), the information which gave the magistrate jurisdiction was that laid by Stewart; and the deputy returning officer had no status to apply for a *mandamus* to the magistrate to impose a different sentence. *Per* Britton, J., that a *mandamus* could not be granted for that purpose. *Re Denison, Rex* v. *Case*, 23 C. L. T. 279, 6 O. L. R. 104, 2 O. W. R. 152, 512.

Public duty—*Substitution of warrantor — Action in warranty — Demurrer.*] — A *mandamus* being a remedial process to insure the performance of a specific act by the defendant as a public duty, the latter can have no warrantor to substitute therefor in his stead. When, therefore, the writ is applied for to compel a turnpike company to make repairs to a road, as required by their charter, an action in warranty brought by them against a tramway company, to which they had given the use of the road, subject to keeping it in repair, will be dismissed on demurrer. *Hull* v. *Gatineau Macadamized & Gravelled Road Co.*, 29 Que. S. C. 354.

Public officer — *Discretion — Municipal works—Approval—By-law.*]—The remedy of *mandamus* cannot be resorted to to compel a public officer to do an act which the law leaves him the discretionary power to do or not to do. Therefore, when a municipal by-law contains a provision that the works to which it relates will not be accepted until an officer named therein shall have approved them, the latter cannot be controlled by way of *mandamus*. *Trudeau* v. *Labelle*, 32 Que. S. C. 42.

Railway company — *Carriage of passengers—Rates and accommodation—Status incorporating Grand Trunk Railway Company — Jurisdiction of Board of Railway Commissioners.*]—Two questions must be found in favour of the applicant before the writ of prerogative *mandamus* can issue; first, has the applicant a specific legal right to the performance of some duty by the respondent; and, second, will the applicant without the benefit of the writ be left without effectual remedy?—Where the applicant sought a *mandamus* to compel the Grand Trunk Railway Company, pursuant to s. 3 of their Act of incorporation, 16 V. c. 27 (C.), to run a train containing third-class carriages, and to permit the applicant to travel therein on payment of a fare not exceeding one penny a mile:—*Held*, that the applicant had an adequate remedy under the provisions of the Dominion Railway Act, 1903 (ss. 8, 23, 25, 44, 214, and 294, being specially referred to), and that that remedy could be more conveniently applied and executed under the direction and supervision of the Board of Railway Commissioners than by the Court; and the application was refused. *Re Robertson & Grand Trunk Ry. Co.*, 9 O. W. R. 629, 14 O. L. R. 497.

Reasons sufficient to justify mandamus — *Fear of prejudice which may result from the judgment—Grounds which may be set forth by the intervening party.*]—A simple eventual interest gives a right to intervene, and the mere fear of prejudice which may result from the judgment is a sufficient reason to intervene. Hence, the purchaser of the right to operate a river ferry may, by intervention, contest a demand for mandamus made by a ratepayer against a municipality to force it to sue the intervening party to deprive him of his exclusive privileges. The latter may urge against the plaintiff any grounds which are not personal to the defendant, amongst others, that mandamus does not lie in such a case. *Gourdeau* v. *Quebec* (1910), 39 Que. S. C. 404.

Right of Crown Attorney to have office in Windsor—*Paid for by county.*] —Action by county crown attorney and clerk of the peace for the county of Essex, to compel the county to provide a proper office for him in the city of Windsor; though not in the county town, it is the most suitable place for such office because of its large size as compared with the county town:—*Held*, that the plaintiff had no right to have an office provided for him at Windsor by the defendants. Judgment of Falconbridge, C.J. K.B. (1909), 27th May, reversed. *Rodd* v. *Essex* (1909), 14 O. W. R. 953, 1 O. W. N. 162, 19 O. L. R. 659.

Affirmed 44 S. C. R. 137.

To County Court Judge — *Judgment debtor—Arrest — Disclosure—Order for discharge.*]—The order provided for by 60 V. c. 28, s. 15, is a substitute for the remedy by writ of *mandamus*, and it will therefore be granted only in cases where *mandamus* will lie. In discharging or refusing to discharge a debtor who has made a disclosure under 59 V. c. 28, s. 7, the Judge or other officer is acting judicially and not ministerially; therefore, the Court refused to make an order under s. 15 commanding the Judge of a County Court to discharge a debtor who has made a disclosure before him. *Ex p. Keerson*, 35 N. B. R. 233.

To municipal corporation—*Projection over highway — Demolition—Discretion.*]—

A *mandamus* to order the demolition of a projection over a city street should be asked against the city corporation, and not against one of its officers.—2. To justify the issuing of *mandamus* in a similar case, the complainant must shew a particular act of neglect of duty on the part of the city, involving a real injustice and damage to him.—3. *Mandamus* is not strictly demandable as of right, but may be issued or withheld in the discretion of the Court. *Pettigrew* v. *Baillargé*, 20 Que. S. C. 173.

See CANADA TEMPERANCE ACT—CHURCH —COMPANY — COURTS — JUSTICE OF THE PEACE—MINES AND MINERALS—MUNICIPAL CORPORATIONS — MUNICIPAL ELECTIONS — PARLIAMENTARY ELECTIONS — RAILWAY — SCHOOL — SHERIFF — WAY — WATER AND WATERCOURSES.

MANDATE.

See ACCOUNT — BANKRUPTCY AND INSOLVENCY—BILLS AND NOTES—BRIBERY—COURTS — EVIDENCE — PRINCIPAL AND AGENT—WRIT OF SUMMONS.

MANDATE AD LITEM.

See SOLICITOR.

MANDATORY.

See SALE OF GOODS.

MANHOOD SUFFRAGE.

See PARLIAMENTARY ELECTIONS.

MANITOBA ELECTION ACT.

See MANDAMUS.

MANITOBA GRAIN ACT.

Application for cars — *Order book—Distribution of cars — Elevators — Loading platforms.*]—The Dominion Statute 63 & 64 V. c. 25, amending the General Inspection Act, R. S. C. 1886 c. 99, enacts (schedule) that the whole of Manitoba and the North-West Territories, and that portion of Ontario west of and including the then existing district of Port Arthur, should be known as the Inspection District of Manitoba. The Manitoba Grain Act (the short title of 63 & 64 V. c. 39, intituled "an Act respecting the grain trade in the Inspection District of Manitoba"), contains, as indicated by subheadings, provisions respecting a warehouse commissioner—elevators and terminal warehouses—country elevators, flat warehouses, and loading platforms — commission merchants—general provisions. This Act is amended by 2 Edw. VII. c. 19.—*Held*, on admission of counsel, where a farmer who is not an elevator owner, lessee, or operator, has grain stored in a special bin in a farmers' elevator at a railway station where grain is shipped and has also grain stored in another elevator at the same point in common with other grain, for which he holds storage tickets, that it is not a violation of the Manitoba Grain Act for the station agent to refuse to recognise such farmer as an applicant, or to recognise his order in the order book for a car or cars to ship his grain.—2. Where a farmer has made order for cars in the order book at the station, and all applicants for cars who had made order prior to his order in such book, had each obtained one car, but the cars so distributed were not sufficient to fill the orders of such prior applicants, while the farmer had not yet been allotted a car by reason of the shortage, and the agent, out of the next lot of cars which arrived, refused to award the farmer a car, but there being a sufficient number of prior applicants, whose orders had not been entirely filled, to exhaust such next lot of cars, awarded out of such cars one to each of such prior applicants, who had already received one car—that this was a violation of the Act.—3. If each of the prior applicants as above mentioned had been supplied with one car at the time when the farmer gave his order, but on the day previous to the farmer's application there had been a surplus of cars after each prior applicant had been given one car, and the agent, in the distribution of the surplus cars, had begun with the first applicant and distributed the cars so far as they would go, giving two or three to each of the prior applicants, but their order nevertheless remained unfilled, and if on the day of the farmer's application additional cars arrived to be loaded, and the agent declined to allot a car to the farmer, but allotted a car to each of the prior applicants, thus exhausting the supply—that this was not a violation of the Act.—4. Where a farmer having grain to ship made order for one car in the order book, requiring it to be placed at the loading platform for the purpose of being loaded, and the agent allotted a car to each of the elevator companies having elevators at the same station, but whose orders were subsequent to those of the farmer—that this was a violation of the Act. *Rex* v. *Benoit*, 5 Terr. L. R. 442.

See CONTRACT—CRIMINAL LAW.

MANSLAUGHTER.

See CRIMINAL LAW.

MANUFACTURER'S LIEN.

See LIEN.

MARGINS.

See BROKER.

MARINE INSURANCE.

See INSURANCE.

MARI ET FEMME.

See HUSBAND AND WIFE.

MARITIME LAW.

See ADMIRALTY — EXCHEQUER COURT OF CANADA—FISHERIES—SHIP.

MARITIME LIEN.

See SHIP—TIMBER.

MARKETS.

See MUNICIPAL CORPORATIONS.

MARKET FEES.

See CRIMINAL LAW.

MARQUES DE COMMERCE.

See TRADE MARKS.

MARRIAGE.

Action for declaration of invalidity —*R. S. O. 1897 c. 162, s. 31—Motion for judgment in default of defence—Suspicion of collusion — Trial in open Court—Oral evidence.*]—The plaintiff, a girl under 19 years of age, brought this action, by her next friend, against a man with whom she went through a ceremony of marriage when only 15, to obtain a declaration that a valid marriage was not effected or entered into. The action invoked the jurisdiction conferred by s. 31 of R. S. O. 1897 c. 162, as added by 7 Edw. VII. c. 23, s. 8 (O.), and by the statement of claim the plaintiff alleged such facts as brought her claim within that enactment. The defendant did not appear or defend, and the plaintiff moved for judgment upon the statement of claim, supported by affidavits of herself, her mother, and the defendant. The defendant stated that he procured a marriage license without obtaining the consent of either of the plaintiff's parents; and it was shewn by the certificate that the return of the marriage contained the information that the plaintiff was then 18 years of age:—*Held*, that, in the circumstances, the motion for judgment was properly refused, and the plaintiff left to proceed to trial in the ordinary way.—*Per* Riddell, J.:—No ceremony of marriage should be declared invalid, as a rule, unless the circumstances establishing the invalidity are proven in open Court, *coram populo*, by *viva voce* evidence.—Judgment of Teetzel, J., affirmed. *Menzies* v. *Farnon*, 18 O. L. R. 174, 13 O. W. R. 586, 711.

Action to annul marriage—*Allowance for costs.*]—In an action by a wife for a declaration of the nullity of a marriage, no order will be made for payment of interim costs by the husband. *Dumouchel* v. *Giguere*, 9 Que. P. R. 163.

Action to annul marriage—*Status of plaintiffs — Pleading.*]—The status of the plaintiffs to demand the annulment of a marriage cannot be brought in question except by a plea to the merits. *Agnew* v. *Gober*, 8 Que. P. R. 217.

Annulment—*Rights of parents—Infant children—Attainment of majority.*]—No action to annul the marriage of children contracted during minority, without the consent of their father and mother, can be brought by the latter after such children have attained their majority. *Agnew* v. *Gober*, 32 Que. S. C. 266, 5 E. L. R. 237.

Competency of Protestant minister to marry two Roman Catholics — *Invalidity of ecclesiastical decrees.*]—The plaintiff, who had been baptised and had made his first communion as a member of the Roman Catholic church, was married to the defendant, who, at one time at least, had also professed the same religious belief, by a minister of a Protestant denomination, by virtue of a license issued in the regular form under the hand and seal of the Lieutenant-Governor. Subsequently the plaintiff applied to the ecclesiastical Court of the diocese in which he resided for a decree pronouncing the marriage null, on the ground that according to law two Roman Catholics could only be married by a Roman Catholic priest. This decree was granted, and the decision of the Court was confirmed on appeal to Rome. The plaintiff asked by this action that the pretended marriage should be declared null as to its civil effects; and that the Court should recognise and affirm, and give full force and effect to, the ecclesiastical decree:—*Held*, that, even if both parties were Roman Catholics at the date of the marriage ceremony in question, yet, according to law, their marriage could be validly solemnised by a Protestant minister; and (2) that, according to law, the sentence of the ecclesiastical tribunal, so far as it pretended to annul the marriage in question, was void, as no ecclesiastical court had competence or jurisdiction to pronounce the annulment of a marriage tie. *Delpit* v. *Coté*, 21 C. L. T. 307, 20 Que. S. C. 338.

Declaration of nullity — *Evading laws of Province of Quebec—Celebration by person not authorized—Church law.*]—A marriage celebrated by a priest or minister professing a faith other than that to which the parties belong, is void. 2. If, before the coming into force of the Civil Code, any church whatever has established for its members a rule in restraint of marriage, and a marriage is celebrated contrary to the law decreeing such restraint, the Court must, upon an action brought to declare the marriage void, and upon proof of such restraint, declare the marriage void for civil purposes only. 3. In this case the parties (Roman Catholics) having, during their minority, and without the consent of their parents or the publication of banns, left their domicil in the province of Quebec in order to go to be married before a Protestant minister in the United States of America, such marriage is void on account of having been contracted

in fraud of the law and before a functionary who was not a curé of the domicil of either of the parties. *Durocher* v. *Degré*, 21 C. L. T. 393, 20 Que. S. C. 456.

Declaration of nullity — *Impotency—Jurisdiction.*]—The High Court of Justice has no jurisdiction to entertain an action to have a marriage declared null and void by reason of the alleged incapacity and impotence of one of the parties. *Lawless* v. *Chamberlain*, 18 O. R. 286, distinguished. *T——* v. *B——*, 10 O. W. R. 1039, 15 O. L. R. 224.

Domicil—*Foreign law.*]—Two Canadians who are married in a foreign country and who establish themselves there are considered to have renounced their domicil of origin, and are governed by the foreign law as to the civil consequences of their marriage. *Marchildon* v. *Chandonnet*, 17 Que. S. C. 226.

Ecclesiastical laws—*Judicial notice — Action for separation—Plea of nullity of marriage.*] — Where the defendant, by his plea to an action for separation from bed and board, alleges the nullity of his marriage with the plaintiff, but does not ask that the nullity be judicially pronounced, the Court cannot take his allegations into consideration. 2. The recognition, by art. 127, C. C., of certain impediments to marriage, has not the effect of obliging the Courts of the province of Quebec to take judicial notice of the ecclesiastical laws which establish them, and therefore the existence of such laws must be alleged and proved by those who desire to take advantage of them. *De Grandmont* v. *Society of Artisans*, 16 Que. S. C. 532, followed. *Smith* v. *Cook*, 24 Que. S. C. 469.

Evidence — *Ecclesiastical laws.*]—*Held*, affirming the judgment in 15 Que. S. C. 147, that the recognition by Art. 127, C. C., of certain impediments to marriage does not oblige the Courts of the Province to take judicial notice of the ecclesiastical laws which establish such impediments; and therefore the existence of such laws must be alleged and proved by those who wish to take advantage of them. *De Grandmont* v. *Société des Artisans*, 16 Que. S. C. 532.

Infant—*Absence of parents' consent — Dissolution — Action brought after majority.*]—The remedy of a declaration of the nullity of the marriage of a minor, for default of the consent of his parents, is open to the parents, within six months from the time of the knowledge they have of it, although the minor becomes of age in that interval.—Judgment in 32 Que. S. C. 206 reversed. *Agnew* v. *Gober*, 17 Que. K. B. 598.

Legitimacy of offspring — *Condition of Territories in 1878 — Presumption of marriage—Evidence.*]—In the year 1878 a white man and an Indian woman, domiciled in the North-West Territories, entered into a contract of marriage per *verba de præsenti* in the Territories, without a ceremony of any kind, and cohabited as man and wife until the former's decease:—*Held*, in view of the legal provisions for the organisation of the Territories and the actual condition, with reference to the facilities for the solemnisation of marriage, at least in the portions of the Territories in the vicinity of the contracting parties' place of residence, that there was not a legally valid marriage. In bigamy cases, strict proof of marriage is required; a different rule prevails in legitimacy cases, where strict proof of the marriage of the parents is not required, but may be presumed from cohabitation and repute; but where the evidence shews the actual terms upon which the parents were cohabiting and the facts relied upon as constituting the marriage, no such presumption can arise. *Re Sheran*, 4 Terr. L. R. 83.

Officer competent to celebrate — *Power of Court to order.*]—The Court, or a Judge, has no authority to order an officer competent to celebrate a marriage to do so, unless such officer is properly brought before the Court or Judge. *Ex. p. Fiset*, 6 Que. P. R. 42.

Petition for dissolution of marriage —Necessity for signature of petitioner—Dismissal of petition. *Plowman* v. *Plowman* (B.C.), 10 W. L. R. 20.

Proof of — *Presumption — Construction of will—Description of legatee—Devise "to my wife"* — *Bigamous marriage.*]—A devise made in a will "to my wife" was claimed by two women, with both of whom the testator had lived in the relationship of husband and wife:—*Held, per* Idington, J., that, even if the first marriage was assumed to have been validly performed, all the surrounding circumstances shewed that, by the words "to my wife," the testator intended to indicate the woman with whom he was living, in that relationship, at the time of the execution of the will and thereafter up to the time of his death.—*Held, per* Duff, J., that the woman who claimed to have been first married to the testator had not sufficiently proved that fact, and that the other woman, who was living with the testator as his wife at the time of the execution of the will and up to the time of his death, was entitled to the devise.—*Held, per* Davies and Maclennan, JJ., dissenting, that the first marriage was sufficiently proved, and, consequently, that the devise went to the only person who was the legal wife of the testator.—Fitzpatrick, C.J., was of the opinion that the appeal should be dismissed. — Judgment appealed from, 13 B. C. R. 161, 6 W. L. R. 329, affirmed: Davies and Maclennan, JJ., dissenting. *Marks* v. *Marks*, 40 S. C. R. 210.

Widow of deceased brother—*Validity —Legitimacy — Presumption — Will.*] — The testator was married on the 30th June, 1855, to the widow of his deceased brother; she survived the testator. In 1884 and 1885 the testator was living with another woman as his wife:—*Held*, that the validity of the marriage between the testator and the widow of his deceased brother could not be disputed after the death of the testator; and the presumption arising from the testator's relationship with another woman was rebutted

by the fact of his lawful wife being then alive; and the appellants, the children of the testator and the other woman, were not legitimate and had no *locus standi* to appeal from a judgment establishing a document as the will of the testator. *Hodgins* v. *McNeil*, 9 Gr. 305, and *Re Murray Canal*, 6 O. R. 685, approved. *Kidd* v. *Harris*, 22 C. L. T. 25, 3 O. L. R. 60, 1 O. W. R. 141.

See Alimentary Allowance—Contract—Criminal Law—Divorce—Evidence—Husband and Wife—Infant—Insurance—Master and Servant—Will.

MARRIAGE CONTRACT OR SETTLEMENT.

See Bills of Sale and Chattel Mortgages — Husband and Wife — Insurance.

MARRIAGE GIFTS.

See Husband and Wife.

MARRIAGE SETTLEMENT.

See Bills of Sale and Chattel Mortgages — Fraudulent Conveyance — Husband and Wife—Partition.

MARRIED WOMAN.

See Company — Courts — Husband and Wife—Infant—Lunatic—Receiver.

MARRIED WOMAN'S PROPERTY ACT.

See Distribution of Estates — Husband and Wife—Limitation of Actions.

MARRIED WOMAN'S REAL ESTATE ACT.

See Dower.

MARSHALLING SECURITIES.

Executors — Assignment for benefit of creditors—Several execution debtors—Costs. *Union Bank* v. *Cook*, 40 N. S. R. 621.

See Company—Execution.

MASON, FREE

See Lodge.

MASTER.

See Local Judges and Masters.

MASTER AND SERVANT.

1. Apprentice, 2632.
2. Contract of Hiring and Dismissal of Servant, 2632.
3. Factories Act, Ontario, 2646.
4. Liability of Master for Torts of Servant, 2646.
5. Negligence—*See* Negligence.
6. Secret Profits of Servant, 2649.
7. Wages, 2650.
8. Miscellaneous, 2655.

1. Apprentice.

Articles of apprenticeship—*Unreasonable provision.*]—*Held*, that a provision in articles of apprenticeship which required the apprentice, during the term of four years of 310 working days, to give and devote to a firm, to whom he was apprenticed, ten hours each working day, or such number of hours as might be fixed by the regulation of the workshop for the time being, or as special exigencies of the business might require, was unreasonable, and could not be enforced against the infant; and therefore an action was not maintainable against the defendant, who was security under the articles for the performance of the infant's duties, to recover damages for the breach thereof. *Regina* v. *Lord*, 12 Q. B. 757, followed. *Macticyer-Gourlay Co.* v. *Sully*, 20 C. L. T. 174, 31 O. R. 535.

2. Contract of Hiring and Dismissal of Servant.

Absence of corporate seal—*Authority of general manager of company—Construction of contract—Period of hiring—Wrongful dismissal—Justification—Neglect of duty — Intoxication—Evidence — Damages—Breach of contract—Failure to obtain employment—Compensation — Principle of assessment.*]—The general manager of the defendants, a company incorporated by letters patent under the Manitoba Joint Stock Companies Act, engaged the plaintiff as general foreman of their quarrying works. There was a written contract of hiring, but no period of hiring was mentioned therein. The writing was simply to the effect that the plaintiff agreed to work for the defendants as foreman "for the consideration of $1,800 per year, payable in instalments of $150 per month." This was signed by the plaintiff and by the general manager, using the name of the defendants and his own name, and by 3 directors of the

defendants, but the defendants' corporate seal was not affixed. The plaintiff began work on the 15th March and continued until the 2nd July following, when he was summarily dismissed by the general manager, and remained without employment until the time of the trial of this action, which was brought for wrongful dismissal:—*Held*, that the contract was binding on the defendants, being made by an official who, on the uncontradicted evidence, had a general authority for that purpose. *McEdwards* v. *Ogilvie*, 4 Man. L. R. 1, followed.—*Held*, also, upon the construction of the contract, that the hiring was for a year.—*Held*, also, upon the evidence, that the defendants' defence of justification by reason of neglect of duty and intoxication, failed.—*Held*, also, that the plaintiff's damage was limited to the balance that he would have earned if he had been retained in the defendants' employment to the end of the year; but if, in the meantime he obtained employment of a similar kind, or might, by the use of ordinary diligence, have procured such employment, his damages would be reduced accordingly; and the burden of proof was on the defendants to shew that he might have obtained other employment; the defendants had not shewn that the plaintiff could have obtained other employment in Manitoba, and the plaintiff was not bound to accept an offer of employment in another province; damages should be assessed as compensation only; and $1,000 was a fair sum for that purpose. *Armstrong* v. *Tyndall Quarrying Co.* (1910), 16 W. L. R. 111, Man. L. R.

Absence of notice — *Misconduct—Prejudice.*]—In order that an employee may be discharged without notice, his conduct must be such as to cause a prejudice to his employer, or to give the latter reasonable cause to fear that he will suffer a prejudice by reason of the acts of the former. *Millan* v. *Dominion Carpet Co.*, 22 Que. S. C. 294.

Action for wages—Accounts — Entries in books—Evidence—Findings of fact—Appeal. *Reaume* v. *Jubinville*, 12 O. W. R. 699.

Action for wrongful dismissal—Justification—Misconduct — Evidence — Damages. *Foreman* v. *Davidson*, 12 O. W. R. 521.

Action by son for wages—*No express agreement—Circumstances shewing some remuneration intended, though amount to be fixed by father.*]—The defendant's sons had worked in his shipyard after coming of age. There had been no express agreement for wages, but defendant had given them what he thought right as they left him, and when plaintiff left, the defendant offered him land worth over £100, which plaintiff refused. The plaintiff then sued his father for wages and the jury found a verdict for £100. The defendant, on a rule for a new trial, contended that plaintiff must prove an express agreement to pay wages, or not having done so could not recover:—*Held*, Peters, J., that the circumstances rebutted the presumption that the services were gratuitous and shewed clearly that some recompense was intended, and that plaintiff was entitled to recover the amount found by the jury. *White* v. *White* (1852), 1 P. E. I. R. 75.

Agent of Crown — *Liability of* — *Evidence.*]—The defendant, the principal of an industrial school, an employee of the Dominion Government, entered into and signed in his own name a written agreement engaging the plaintiff for a certain period in a certain employment. The factory in which the plaintiff was employed being destroyed by fire, and the plaintiff thrown out of employment, he sued the defendant for wrongful dismissal:—*Held*, that evidence of the capacity in which the defendant entered into the agreement and the other surrounding circumstances was admissible. It appearing that the defendant acted merely as agent for the government:—*Held*, that the defendant was not liable. *Bocz* v. *Hagonnard*, 4 Terr. L. R. 69.

Breach — Construction — Wages. *Johnston* v. *Mead* (Yuk.), 4 W. L. R. 192.

Breach — *Damages* — *Action before expiration of term—Pleading—Condition precedent.*]—The plaintiff, who had been engaged for one year from August, 1902, by the defendants, at a monthly salary, was dismissed wrongfully, as the jury found, in December. He sued for damages for breach of contract, and the action was tried in May, 1903:—*Held*, that the plaintiff was entitled to recover damages covering the unexpired term of his engagement. The statement of claim alleged a contract of hiring the plaintiff as superintendent of a mill, arising from two letters, without setting them out and without alleging the continuance of the construction of the mill, which was one of the conditions stated by the defendants in their second letter. The defence denied the allegations in the statement of claim and alleged that the contract was contained in the second letter:—*Held*, that it was not necessary for the plaintiff to prove the continuance of the construction of the mill. *Hopkins* v. *Goodenham*, 24 C. L. T. 104, 10 B. C. R. 250.

Breach — Servant leaving—Consent of master—Servant inducing master's customers to leave him—Improper use of books—Inducing workmen to leave—Conversion of goods —Money advanced by master on faith of continuance of employment—Set-off. *Trebilcock* v. *Burton*, 3 O. W. R. 314, 679.

Breach—Wrongful dismissal—Attempted alteration in term—Justification for dismissal—Damages—Lack of promptitude in seeking other employment—Impossibility of performance of contract—Destruction of ship for which plaintiff's services were engaged. *Robertson* v. *Northern Navigation Co.*, 7 O. W. R. 476.

Breach of—*Contract of hiring—Damages —Elements.*]—In estimating the damages due to the servant for breach of the contract of hiring, when the action is begun before the expiration of the period of the engagement, the Court must take into account the possibility of death, of incapacity to render the services contracted for, and of another engagement to render the same services which may be obtained before the end of such period. *Gregoire* v. *St. Charles de Bellechasse School Commissioners*, 29 Que. S. C. 215.

Claim for salary in advance—*Damages—Accruing instalments of salary.*]—An employee who has been dismissed without cause before the expiration of the term for

which he was engaged, has no right to claim in advance his salary, which was payable week by week, without alleging that his dismissal caused him damages to that amount, he must sue for the weekly instalments as they become due. *Pouliot* v. *Dussault*, 10 Que. P. R. 70.

Company—*Seizure by debenture holders — Operation of, as discharge of servant — Damages.*]—The plaintiff was engaged as accountant of the defendant company in April, 1904. In the following August the debenture holders seized the property and put in charge a receiver and manager, to whom the plaintiff delivered the books of account, the plaintiff himself having actually made the seizure. He afterwards continued in the same position as before the seizure, but was paid by the receiver:—*Held*, that there had been an actual seizure known to the plaintiff, and, following *Reid* v. *Explosives Co.*, 19 Q. B. D. 264, that the appointment of a receiver and manager operated as a discharge of the servants of the company, and the plaintiff could not recover damages, as he was employed for some time at the same salary. *Rolfe* v. *Canadian Timber & Saw Mills*, 12 B. C. R. 393.

Construction of contract — *Services — Strike of workmen — Renewal of term — Notice.*]—"We, the undersigned, consent to accept work from M. & L., at the price of $7.50 per thousand upon the 'Dixie,' $4 per thousand upon the 'Polo,' and $3.50 per thousand on other 'jobs,' without engagement signed on our part. We guarantee, nevertheless, to M. & L. that we will not go on strike, either directly or indirectly, from this date to the 1st August, 1906. We engage ourselves further to give notice to M. & L. 30 days before the expiration of this engagement, if we do not wish to renew it, and M. & L. will do the same if they wish to abandon the said engagement?"—*Held*, that this agreement contained only a fixing of the price applicable to the engagements which the employers made with the workmen signing it. It did not contain any engagement save that of the workmen not to go on strike up to the 1st August, 1906, and that is the thing aimed at in the stipulation in the notice of 30 days to be given on the part of one and the other of the intention not to renew it. *Lockwell* v. *Bédard*, 16 Que. K. B. 92.

Contract — Jury—Damages—Nondirection. *Smith* v. *Bloomfield*, 2 O. W. R. 481.

Contract — *Leaving service — Quantum meruit.*]—The plaintiff's claim was for four months' wages. He swore that the hiring was by the month at $17 per month but the defendant stated that the hiring was for a definite period of eight months for $130, no time having been fixed for payment, and his account was corroborated by a witness who was present when the bargain was made. The plaintiff left the service of the defendant after four months without his consent and without any valid reason or excuse:—*Held*, following *Smith* v. *Hughes*, L. R. 6 Q. B. 597, that the plaintiff was bound by his bargain, even if he had misunderstood the legal effect of it and could not recover anything for his services without fully completing his contract. *Cutter* v. *Powell*, 2 Sm. L. C. 1. and *Britain* v. *Rossiter*, 11 Que. B. D. 123, followed. *Knox* v. *Munro*, 20 C. L. T. 141, 13 Man. L. R. 16.

Contract of hiring — Construction — Payment of commission—Weekly "cash advance"—Liability of servant to account for, where commissions less than weekly sum — Mistake—Parties not *ad idem*—Liability of sureties—Misrepresentation—Assent of master's agent — Estoppel — Relief of sureties. *Williams Mfg. Co.* v. *Michener*, 13 O. W. R. 46.

Contract of hiring—*Payment by commission*—"*Good and accepted orders.*"]—Action for commission on sale of goods and damages for breach of the contract of employment: — *Held*, that "accepted orders" means orders dealt with in such a way that plaintiff and customer believed they were to be filled. Receiving and sending orders to factory to be filled is "accepted" within meaning of contract. There was no time limit to the contract:—*Held*, that plaintiff's illness, though brought on by his own folly, will not justify defendants' breach of contract. The use of "continuously" does not help defendants. Plaintiff's borrowing from customers will not justify his discharge, nor will the seizure of his samples, trunks, etc. for rent during his illness. He is entitled to damages, although he was to be paid by commission. Judgment for plaintiff with reference. *McDougal* v. *Van Allen* (1909), 14 O. W. R. 173, 19 O. L. R. 351.

Contract of hiring—*Term of one year — Wages payable weekly—Wrongful dismissal—Action for.*]—A contract for a year with weekly payments is still a yearly contract unless the yearly hiring be rebutted by evidence to the contrary.—*Davis* v. *Marshall*, 4 L. T. N. S. 217, followed.—*Robertson* v. *Jenner*, 15 L. T. N. S. 514, distinguished. *Noble* v. *Guna Limited* (1910), 16 O. W. R. 594, 1 O. W. N. 884.

Contract of hiring in writing — *Wages—Change of—Onus of shewing agreement to change.*]—Divisional Court affirmed judgment of Riddell, J., 15 O. W. R. 662, 1 O. W. N. 606. *McCabe* v. *National Mfg. Co.* (1910), 16 O. W. R. 944, 2 O. W. N. 26.

Contract to pay "while at work"—Illness of servant—Notice of dismissal—Subsequent retraction — Quantum of damages. *Hay* v. *Billman*, 1 E. L. R. 351.

Covenant by servant not to enter into similar employment at termination of engagement—Oppressive and void contract—Wrongful dismissal—Damages — Evidence—Admissibility. *Harrison* v. *Cornell*, 8 O. W. R. 697.

Damages—*Future commissions.*] — The plaintiff was engaged by the defendants to act as their selling agent for a defined term, and he was to receive a defined salary and commission at a defined rate upon sales effected. Before the expiration of the term he was dismissed without cause, sales to a large amount having up to that time been effected by him:—*Held*, that, in estimating the damages to which he was entitled, the commission on sales which there was reasonable grounds to think might have been

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effected during the unexpired portion of the terms, should be taken into consideration. Judgment of Ferguson, J., 4 O. L. R. 350, 22 C. L. T. 372, 1 O. W. R. 566, reversed. *Laishley* v. *Goold Bicycle Co.*, 23 C. L. T. 504, 6 O. L. R. 319, 2 O. W. R. 780.

Dismissal—"*Boasts*" *of servant in his confidential service—Moral character of servant—Qualification for his position—Dismissal justified.*]—Plaintiff, a servant of defendant under a yearly hiring, was dismissed at the end of five months' service. Plaintiff brought action to recover $750 for work done, and for loss through alleged breach of contract and for dispossession of house occupied by him.—Defendant pleaded that the moral character of the servant, as disclosed by himself, was unfit for his position, and that the dismissal was justified. At trial plaintiff was given judgment for $120 damages, in addition to $210 paid into Court.—Divisional Court *held* that the master was justified in dismissing the servant and the action failed. Appeal allowed. Action dismissed with costs, except as to the amount paid into Court. *Denham* v. *Patrick* (1913), 15 O. W. R. 349, 20 O. L. R. 347.

Dismissal — Justification — Incompetence—Misconduct—Disrespectful language—Provocation. *Williams* v. *Hammond* (Man.), 5 W. L. R. 41.

Dismissal — Justification — Incompetence—Provision making master sole judge—Exercise of power of dismissal for cause and without fraud or caprice—Bonus. *Allman* v. *Yukon Consolidated Gold Fields Co.* (Y.T.), 7 W. L. R. 318.

Dismissal of servant — *Action for wrongful dismissal—Pleading—Statement of claim—Readiness to continue in service — Contract of hiring—Company — Absence of seal — Authority of president — Manitoba Joint Stock Companies Act, s. 64—Damages —Failure to seek employment — Justification of dismissal — Mistake in work — Counterclaim.*]—In an action to recover damages for the wrongful dismissal of the plaintiff from the service of the defendants, it is not necessary for the plaintiff to aver that he was ready and willing to continue to serve the defendants.—The defendants, an incorporated company, hired the plaintiff as foreman. The contract of hiring was in writing, purporting to be signed by the company, by their president, but without the corporate seal. The hiring was for more than a year:—*Held*, that the president had authority to make the contract, it being in general accordance with his powers, and it was, therefore, binding on the company: Manitoba Joint Stock Companies Act, s. 64.—*Held*, as to damages, that the plaintiff, considering the time of year when he was dismissed, and the improbability of securing work, was justified in not seeking employment immediately after his dismissal.—*Held*, that, the dismissal was not justified by the fact that in making some moulded caps he had made a mistake which rendered the caps useless to his employers; but that a counterclaim for this should be allowed, and the plaintiff's damages reduced by the amount thereof. *Beware* v. *Winnipeg Stone Co.* (1910), 14 W. L. R. 575.

Dismissal of servant — Attempted justification—Disobedience of orders—Finding of fact—Review by appellate Court—Wrongful dismissal—Damages. *Bewell* v. *Wheat City Flour Co.* (Man.), 8 W. L. R. 275.

Dismissal of servant—*Justification.*]—Action for wrongful dismissal of plaintiff as a master baker. Action dismissed, the defendant being justified in dismissal of plaintiff who had allowed defendant's premises to get into disrepair and such a condition as injured defendant's business. *French* v. *Morton* (1909), 14 O. W. R. 243.

Dismissal of servant — *Justification — Slander of master—Summary dismissal.*] — A master whose servant uses in regard to him (the master) insulting and slanderous words, has the right to discharge him *ad nutum* and to put an end to the contract of hiring, without liability for damages for dismissal. *Bousquet* v. *Nellis*, 35 Que. S. C. 209.

Dismissal of servant — Justification—Incompetency—Contract of hiring — Provision making master sole judge—Exercise of power of dismissal for cause and without fraud or caprice—Bonus. *Allman* v. *Yukon Consolidated Gold Fields Co.* (Yuk.), 8 W. L. R. 373.

Dismissal of servant — *Justification —Misconduct unknown at time of dismissal —Insufficiency—Evidence—Masters and Servants Ordinance — Complaint — Order for payment of salary in lieu of notice.*]—Improper acts of a servant previous to his dismissal, but unknown at the time of dismissal, justify the dismissal, though occurring long before. *Boston Deep Sea Co.* v. *Ansell*, 39 Ch. D. 339, followed:—*Held*, in this case, a complaint, under the Masters and Servants Ordinance, for the dismissal of a clerk from his employment by a trading company, that the acts complained of were not, upon the evidence, sufficient to justify the dismissal.—Order for payment of 4 weeks' salary in lieu of notice. *Goby* v. *Gordon Ironsides & Fares Co.* (1913), 15 W. L. R. 258.

Dismissal without notice — Proof of custom—Damages—Costs. *Gould* v. *Michigan Central Rw. Co.*, 5 O. W. R. 583.

Disobedience to orders of manager —*Loss not resulting — Single and trifling act — Justification of dismissal.*]—The plaintiff was hired by the defendants as "a mechanical expert" for one year. By the agreement of hiring he was to have full charge of the defendants' machine shop, "but to consult the management concerning the hiring of assistant help." The plaintiff was discharged by the vice-president and manager of the defendants for disobedience to his (the manager's) order. The manager told the plaintiff to pick up a rope which he had thrown away. The plaintiff, in his testimony at the trial, said that the order was a vexatious one, and that he did not intend to pick up the rope at the manager's order—he was engaged by the company (the defendants). He said he would pick up the rope later, but he did not really intend to do so. The manager then told the plaintiff to pick up the rope or hand in his resignation; and the plaintiff left his employment there and

then:—*Held*, that a servant who has been guilty of deliberate disobedience to lawful orders may be discharged; and in such a case it is not necessary to prove that a loss resulted from the disobedience; a discharge without notice may be justified even by a single and trifling act of disobedience. Review of the authorities. And *held*, that the plaintiff was under the control of the manager; that he had disobeyed a lawful order, and that his action for wrongful dismissal failed. *Youngash* v. *Saskatchewan Engine Co.* (1911), 16 W. L. R. 268, Sask. L. R.

Election to treat contract as rescinded—Previous action for wages — Judgment—Estoppel. *Doherty* v. *Vancouver Gas Co.* (B.C.), 1 W. L. R. 252.

Farm labourers — Wages — Contract of hiring not to be performed within a year —Servant leaving employment before expiration of term—*Quantum meruit*—Statute of Frauds. *Collins* v. *Smith*, *Campbell* v. *McWilliams*, 11 O. W. R. 350.

Findings of jury. *Wiswell* v. *Inglis*, 3 O. W. R. 477.

Grounds for dismissal. *French* v. *Lawson*, 5 O. W. R. 217.

Grounds for dismissal — Justification. *Gourmany* v. *Manitoba Club* (Man.), 1 W. L. R. 175.

Hiring — Daily hiring — Wages — Deduction for days absent without leave. *Blain* v. *Britannia Smelting Co.*, 7 W. L. R. 368.

Justification — Incompetency — Master of ship—Damage to ship — Employment of pilot. *McMaugh* v. *Hamilton & Fort William Navigation Co.*, 3 O. W. R. 791.

Justification—*Neglect of duties — Insolent language—Condonation — Evidence.*]— The notice of appointment of plaintiff as janitor of a public school provided for payment of the stipulated salary monthly, on presentment of a certificate from the principal of the school that the duties of the janitor had been satisfactorily performed:—*Held*, that a certificate from the principal of the satisfactory performance of duties condoned any previous irregularity, misconduct, or neglect of plaintiff which properly came under the cognizance of the principal. Nevertheless, evidence of such previous acts might be given to shew that the act which led directly to the dismissal was not a solitary instance, but that the employee had been habitually guilty. Non-compliance with the printed regulations furnished the plaintiff as to the duties required of him in respect to sweeping, dusting, etc., and impertinent and insulting language used towards members of the board of school commissioners, afforded sufficient ground for the immediate dismissal of the plaintiff from his position. *Cook* v. *Halifax School Commissioners*, 35 N. S. R. 405.

Justification — *Wrongful accusation — Knowledge of.*]—Where a servant, upon unfounded suspicion, endeavoured to make his fellow-servants believe that his master had committed a criminal offence:—*Held*, that the master was justified in dismissing his servant:—*Held*, also, that though the master may have been unaware of these acts of his servant at the time of dismissing him, he was entitled to rely upon them as a defence to an action for wrongful dismissal. *Semble*, it was sufficient to justify the dismissal that the servant falsely informed customers of the master that he, the servant, had been placed in his position by other persons for the purpose of "straightening out the business." *McGeorge* v. *Ross*, 5 Terr. L. R. 116.

Lyric artist — *Immoral song — Disobedience — Cancellation of the contract — Created and actual interest.*]—The parties to a contract are bound by whatever it contains expressly and by its natural consequences. A lyric artist who sings immoral songs in a theatre thereby breaks his contract of hiring which forbids his doing so; and, for that reason his employer may dismiss him. If the artist refuses or neglects to submit his songs to a censor named in the contract, he commits an act of disobedience and may equally be dismissed. In a case in which the employer dismissed his employee from his service for good reasons, and the employee persists in attempting to fulfil his contract, and even sues his employer each week for his salary, the employer has a real and actual interest to have the cancellation of the contract, which he has already effected himself, judicially declared to be good and valid. *Ouimet* v. *Fleury & Recorder's Court*, 16 R. L. n. s. 62.

Manager of mining company—Salary —Contract—*Quantum meruit* — Expenditure by manager for work done for company — Settled account — Representation work — Purchase of properties — Authorisation — Costs of action for libel brought against manager—Liability of company to pay—Scope of manager's authority—Office rent and expenses — Interest on overdraft at bank — Counterclaim—Refusal to carry out instructions—Negligence — Appropriating property of company. *Tyrrell* v. *Bonanza Creek Hydraulic Concession* (Yuk.), 4 W. L. R. 131.

Manager of restaurant — *Length of notice—Reasonable notice—Damages—Other employment.*]—The rule requiring a month's notice to be given to terminate the engagement of a domestic servant does not apply to the case of the manager of a restaurant. The latter is only entitled to reasonable notice, having regard to the nature of the employment and the surrounding circumstances, and to entitle him to recover damages for dismissal, it must appear that he not only endeavoured to get similar employment elsewhere and failed, but that he acted reasonably in that behalf. *Lamberton* v. *Vancouver Temperance Hotel Co.*, 11 B. C. R. 67.

Master and Servant Ordinance—*Improper dismissal of servant—Additional wages for —Justice of the peace—Jurisdiction.*]— A bar-tender employed by an hotel-keeper at a monthly salary from the 1st December, became temporarily incapacitated through illness on the 5th June, and, procuring a substitute, left the hotel, returning to work again on the 10th, whereupon he was discharged by his employer, being paid $10 for wages up to the time he left. He claimed the balance of two months' wages for im-

proper dismissal, and on an information before a justice of the peace under the Master and Servant Ordinance (C. O. 1898, c. 50, s. 30), was awarded five days' further wages from the 5th to the 10th, the date of dismissal, and an additional month's wages expressed to be in lieu of notice:—*Held*, on appeal from this order, that the hotel-keeper was not entitled to discharge the bar-tender, under the circumstances, without notice; also that the latter was entitled to be paid wages up to the time of his dismissal. But held further, that the justice had no jurisdiction under the Ordinance to order payment of the additional month's wages, which could not be said to be wages due, but damages for improper dismissal. *Goode* v. *Downing*, 5 Terr. L. R. 505.

Meaning of written notice.]—Where a contract for personal service can be terminated at any time by written notice, such a provision does not mean that the servant can be dismissed *instanter* in writing. The notice implies a certain delay before the contract can be actually terminated. Recorder's Court, Montreal. *Graham* v. *Cadahy Packing Co.* (1910), 16 R. de J. 407.

Monthly hiring — *Contingent yearly hiring — Dismissal — Notice — Reasonable time.*]—The plaintiff was employed by the defendants as their manager, at a salary of $200 per month, until a mill, which they were constructing, was completed and working, when he was to be engaged at a salary of $2,500 per annum, payable monthly. He worked under the $200 per month arrangement a certain time, and for a portion of a month after the mill had been completed, when he was dismissed without notice:—*Held*, that it is usually an implied term of hiring in similar cases that the service could be determined by a reasonable notice, and the jury here having fixed on three months, that was a reasonable notice in the circumstances. *Henderson* v. *Canadian Timber & Saw Mills*, 12 B. C. R. 295.

Payment of bonus — *Condition — Recommendation of "management"—Exercise of discretion—Good cause.*]—A covenant in an agreement between master and servant to pay to the servant, besides his salary, a bonus of 2½ per cent. upon the profits, thus qualified, "subject to the recommendation of the management," does not depend upon the caprice or good pleasure of the "management," for, if so, the covenant would be potestative and void. A refusal to recommend the bonus must, in such a case, be founded upon a just cause. *Gravel Lumber Co.* v. *Coté*, 17 Que. K. B. 398.

Publication of school books by master—Production and adaptation by servant—Original work—Property and benefit of master——Conflicting evidence — Profits. *Campbell* v. *Morang & Co.*, 4 O. W. R. 321, 6 O. W. R. 901.

Recorder's Court of Montreal — *Action for wages—Multiplicity of suits—Writ of prohibition.*]—An employee who is hired at a certain sum per annum, payable in equal weekly payments, has the right to proceed in the Recorder's Court of the city of Montreal, if he claims to have been unjustly dismissed from his position at the end of a week for the amount of his salary then due, if this sum is less than fifty dollars. A petition for a writ of prohibition to prevent the Court of the Recorder from hearing these cases will be refused. *Ouimet* v. *Fleury* (1909), 10 Que. P. R. 422.

Rescission — Continuance in employment —Abandonment—Part payment of commission. *Banfield* v. *Hamilton Brass Co.*, 1 O. W. R. 283.

Servant employed at a fixed yearly salary which is payable by equal weekly instalments of $2000 each, has the right to take suit in the Recorder's Court of the city of Montreal, if he claims he was illegally discharged, for the amount of damages represented by the salary then due, provided such amount does not exceed $50.00. *Ouimet* v. *Fleury* (1910), 12 Que. P. R. 98.

Servant leaving employment—*Wages —Breach — Damages.*] — A servant whose wages are payable periodically and who is dismissed from his master's employment for good cause, or leaves without justifiable cause, after one of such periods has passed, is nevertheless entitled to recover any unpaid wages accrued up to the end of the last of such periods; a right of action accrues at the lapse of each of such periods. The master has only the right to recover damages against the servant for breach of his contract. *Taylor* v. *Kinsey*, 4 Terr. L. R. 178.

Servant of municipal corporation—*Hiring during pleasure—Monthly hiring — Wages for part of month.*]—The hiring of a municipal servant "at the pleasure of the council at $75 per month," is a monthly hiring at the pleasure of the municipality, and the employee cannot, upon leaving his employment in the course of any month, recover any salary in respect of that part of the month which has elapsed. *Sheddon* v. *City of Regina*, 5 W. L. R. 436, 6 Terr. L. R. 289.

Services rendered — *Money paid voluntarily for defendant.*]—Plaintiff sued for services rendered defendant as his housekeeper and for money alleged to have been expended by her on his behalf:—*Held*, that she was entitled to wages for six years, less 40 days barred by the Statute of Limitations. Amount claimed for money paid out for defendant not allowed, as they were paid voluntarily without request of defendant. Plaintiff allowed to amend her pleadings and have judgment for $1,530 awarded her. *Bradley* v. *Bradley* (1909), 14 O. W. R. 810, 1 O. W. N. 110, 19 O. L. R. 525.

Share of profits of business—*Sale of business.*]—The plaintiff and the defendant entered into a contract of hiring and service, which was to continue for a year unless the plaintiff's business was disposed of before that time, and the defendant was to be paid a certain sum each week, and also, at the end of the year, a percentage of the net profits of the business:—*Held*, that the sale of the business before the expiration of the year did not deprive the defendant of his right to the percentage of the net profits up to that time, but that he had no interest in the assets of the business, and therefore no right to a

percentage of the profits made by the plaintiff on the sale of the assets. *Re Sims & Harris*, 21 C. L. T. 230, 1 O. L. R. 445.

Statute of Frauds—*Quantum meruit—Dismissal.*] — *Held*, following *Giles* v. *McEwen*, 11 M. L. R. 150, that where a contract of hiring is not enforceable by reason of the Statute of Frauds, inasmuch as it is not to be performed within a year of the making thereof, the servant is entitled to recover on a *quantum meruit* where he is dismissed without justifiable cause. Justifiable grounds for dismissal discussed. *Rose* v. *Winters*, 4 Terr. L. R. 353.

Termination by notice—*Incapacity of servant—Permanent disability—Findings of jury—Weight of evidence.*]—Where a contract for service provided that it could be terminated by either party giving the other a month's notice therefor, or by the employer paying or the employee forfeiting a month's wages:—*Held*, reversing the judgment in 36 N. S. Reps. 158, that illness of the employee by which he is permanently incapacitated from performing his service would itself terminate the contract:—*Held*, also, Killam, J., dissenting, that an illness terminating in the employee's death, and during the whole period of which he is incapacitated for service, is a permanent illness, though both the employee and his physician believed that it was only temporary. By a rule of the employer an employee was only to be paid for the time he was actually on duty. One of the employees had accepted and signed a receipt for a month's wages, from which the pay for two days on which he was absent from duty was deducted, and his conversations with other employees shewed that he was aware of the rule, but no formal notice of the same was ever given him. He died after a long illness, and his executrix brought an action for his wages during such period, and the jury found on the trial that he did not continue in the employ after notice of the rule and acquiescence in the terms thereof:—*Held*, that such finding was against evidence and must be set aside. *Dartmouth Ferry Commission* v. *Marks*, 24 C. L. T. 167, 34 S. C. R. 366.

Termination of hiring by master without notice — *Monthly hiring — Reasonable notice—Custom on usage of surveyors dispensing with notice—Proof of.*]—The plaintiff was engaged by the defendants as a surveyor's assistant, the terms of hiring being, as he expressed it, "on a monthly basis." He was discharged without notice, and without any cause which would entitle the defendants to discharge him without notice. In an action in a County Court the plaintiff claimed one month's wages in lieu of notice, $75, and the amount paid by him for one month's board and lodging, $30:—*Held*, *per* Macdonald, C.J.A., and Galliher, J.A., that, assuming that a contract "on a monthly basis" could, in the absence of agreement or custom, be terminated only on reasonable notice, a custom or usage, alleged by the defendants to exist among surveyors and engineers and persons employed by them, that employment may be terminated on either side without notice, was well proved, being practically uncontradicted.—*Per* Irving, J.A. (Martin, J.A., reaching the same result without stating reasons), that there was no satisfactory proof of the alleged usage or custom, and, no reasonable notice having been given, the plaintiff was entitled to damages. —The Court being divided, the judgment of the County Court Judge (1909), 12 W. L. R. 163, in favour of the plaintiff was not disturbed. *Andrews* v. *Pacific Coast Coal Mines* (1910), 13 W. L. R. 306.

Tradesmen performing domestic services—*Conduct—Damages—Evidence.*]—The plaintiff, a skilled mechanic, hired with the defendant for one year, performing the services of a mechanic and also of a domestic servant. He left before the expiration of the year, under circumstances indicating a dismissal by the master, although there were no express words of dismissal. The plaintiff did not reside with the defendant or within his curtilage:—*Held*, (1) A dismissal may be created without express words. (2) The plaintiff was a domestic servant in law. (3) The general rule whereby domestic servants may be discharged on a month's notice or on payment of a month's wages in lieu thereof does not apply where they are hired for a year and where it is part of the agreement that "the contract is to be indissoluble during the year." *Burgess* v. *St. Louis* (1890), 6 Terr. L. R. 451.

Wrongful dismissal — *Capacity—Statute of Frauds — Pleading—Waiver.*]—The manager of a veneer company, having heard of the plaintiff as likely to be useful in the business, wrote to him saying: "What we want is a man who is a good veneer maker and knows how to make all kinds of built-up woods that are saleable. We want you to take full charge of the mill, that is, the manufacturing." The plaintiff answered: "I understand fully the making of such articles as you speak of as well as others;" and in a letter he said: "I feel from all the experience I have had I have mastered the entire principle of it (the business). I can at all times lay my hands on good competent machine men who know their business, as also instruct those who do not." Subsequently the plaintiff was hired by the company, but was dismissed in six weeks:—*Held*, reversing the judgment of the Supreme Court of New Brunswick, 27 N. B. R. 332, Idington, J., dissenting, that the plaintiff was not hired as a general manager of the company's business, but as an expert in veneer work, and, as the evidence shewed that he was not competent he was rightly dismissed:—*Held*, also, that the defendants could not rely on the Statute of Frauds, which, though pleaded, was not set up at the trial nor before the Supreme Court of New Brunswick *en banc*, and was therefore waived. *Ulcroft* v. *Adams*, 27 C. L. T. 259, 38 S. C. R. 365.

Wrongful dismissal — Contract of hiring — Construction — Statute of Frauds. *Glenn* v. *Rudd*, 1 O. W. R. 116, 3 O. L. R. 422.

Wrongful dismissal—*Conviction under Master and Servant Ordinance—Jurisdiction of magistrate—Order for payment of wages—Objection to jurisdiction taken first on appeal—Criminal Code, s. 753.*]—Under the Master and Servant Ordinance, a magistrate can impose a penalty for wrongful dismissal and direct as well the payment of any wages found due, notwithstanding that the complaint is for wrongful dismissal only.—A

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mestic ser- *lence.*]—The ved with the ing the ser- a domestic cation of the ating a dis- ere were no plaintiff did within his sal may be (2) The in law. (3) tic servants notice or on Ben thereof hired for a e agreement soluble dur- ais (1890).

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ction under Jurisdiction of wages— t on appeal the Master ate can im- missal and any wages the com- l only.—A

conviction for wrongful dismissal was sustained on appeal, upon the evidence; and the Judge in appeal added to the conviction a direction for payment of wages.—An objection to jurisdiction not taken before the magistrate may be raised on appeal. Section 755 of the Criminal Code does not apply to such an objection. *Re Mathie & Acme Co.* (1910), 13 W. L. R. 110.

Wrongful dismissal — *Insolence as ground for dismissal.*]—A single disrespectful retort by an employee, which has been provoked or called forth by an unbecoming remark of the employer, is not a sufficient ground for dismissal of the employee. *Edwards* v. *Levy*, 2 F. & F. 94, followed.—The defendant, upon being asked by plaintiff for $25 due to him, directed payment to be made, and remarked that it was "another case of paying a man who was not worth it." To this the plaintiff replied that the defendant would have to prove him incompetent before a Judge and jury, or words to that effect:—*Quære*, whether such an answer considering the circumstances, should be regarded as insolent. *Williams* v. *Hammond*, 4 W. L. R. 208, 16 Man. L. R. 369.

Wrongful dismissal — Notice — Damages. *McDonald* v. *Cape Breton Electric Co.*, 40 N. S. R. 631.

Wrongful dismissal — *Voluntary leaving—Onus—Appeal.*] — In an action for wrongful dismissal, where the contract was for a yearly hiring, the defendant rested his defence wholly on the ground that the plaintiff left his service voluntarily. This the plaintiff denied. The employment of the plaintiff by the defendant for a year being admitted:—*Held*, that the onus of establishing his defence rested upon the defendant, and that he must fail if his defence was not substantiated:—*Held*, also, that an extremely slight preponderance of evidence was not sufficient to justify the finding that the plaintiff left the defendant's service voluntarily, when the plaintiff swore positively that he did not:—*Held*, also, that the trial Judge erred in treating the case as one in which the burden rested upon the plaintiff. Judgment below reversed on question of fact. *McInnes* v. *Ferguson*, 32 N. S. R. 516.

Wrongful dismissal—Want of efficiency not made out. *Parsons* v. *Chandler*, 1 E. L. R. 176.

Wrongful dismissal of servant — *Justification—Grounds—Misconduct — Solicitor's letter—Negligence or incompetence—Condonation.*] — Plaintiff entered into an agreement with defendants containing a clause permitting the defendants to instantly dismiss the plaintiff from their employment if he was found guilty of disobedience to orders, theft, drunkenness, or other misconduct. Plaintiff did a particular job so imperfectly that it was unmerchantable. Defendants made him do the job over and deducted $1.45 from his wages, being 6 hours' pay. Plaintiff employed a solicitor to write defendant a letter demanding repayment of the $1.45. Defendant requested plaintiff to withdraw the letter. Plaintiff refused. Defendant thereupon paid the $1.45 and discharged him:—*Held*, it was not disobedience to orders to complain through his solicitor, and was awarded damages. *Clarke* v. *Capp*, 5 O. W. R. 174, 9 O. L. R. 192.

Yearly hiring — *Presumption—Wrongful dismissal — Damages.*] — The plaintiff agreed with the defendant to work for him for $2.25 per day. The trial Judge found that the hiring was an indefinite hiring, the service to be paid for at a certain rate per day, while there was evidence upon which a yearly hiring might be found:—*Held*, that the presumption was in favour of a yearly hiring, which presumption had not been rebutted, and the plaintiff was entitled to reasonable notice of termination of his employment, and, therefore, having been wrongfully dismissed, to damages. *Gould* v. *McCrae*, 9 O. W. R. 626, 14 O. L. R. 194.

See COMPANY — MUNICIPAL CORPORATIONS —SHIP.

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3. FACTORIES ACT, ONTARIO.

Definition of "factory" — *Persons "employed."*] — Premises where seven persons are found working upon or about the machinery but three are the employers of the others, in a place "where not more than five persons are employed," within the meaning of the proviso in s. 2 of the Factories Act, R. S. O. c. 256; and a conviction of the three employers, under s. 19, for keeping the premises in a dangerous state was quashed. *Regina* v. *Weir*, 20 C. L. T. 232.

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4. LIABILITY OF MASTER FOR TORTS OF SERVANT.

Assault by servant — *On co-worker — Joint liability of master and servant.*] — The employee who, in the discharge of the duties with which his employer entrusts him, makes himself liable by committing an assault upon a fellow employee, and may be personally held, as the originator thereof, to answer for the damages caused to his co-worker. The employer himself will also be held responsible for the same damages and in such case the judgment maintaining plaintiff's action may, at the same time, condemn both master and sevant, jointly and severally, to pay the amount awarded, with costs. *Raszis* v. *Gaudry* (1910), 17 R. de J. 155.

Claim for wages — Information and complaint — Counterclaim — Transmission to Supreme Court — Procedure — Clerk of Supreme Court — Entry — Section 3, s.-ss. 3 and 4, of Ordinance — Alberta Supreme Court Act, s. 36. *Mikluski* v. *Hillcrest Coal & Coke Co.*, *Wells* v. *Hillcrest Coal & Coke Co.*, 9 W. L. R. 425.

Employees of mining company — Appointment of medical practitioner—Proceedings under statute—Meetings of employees —Validity — Balloting — Notice calling meetings — Authority — Miners' union — Medical fund claimed by rival practitioners —Interpleader—Assignments of fund. *Bonnell* v. *Hoggins* (B.C.), 8 W. L. R. 395.

False and malicious statements by servant injurious to business of former employer — *Benefit of master — Action on the case—Trade slander—Liability of master—Scope of employment—Company —Judgment against both master and servant —Joint tort-feasors—Measure of damages— Findings of jury—Judgment notwithstanding wrong finding—Rule 615.*]—Plaintiffs carrying on business in the city of Toronto as printers and publishers. They published to sell to the publishers of newspapers throughout the Dominion of Canada, a publication known as an annual Christmas or holiday number, which was disposed of by such purchasing newspaper publishers as a Christmas or holiday number for their papers. Plaintiffs had been publishing the said periodical for many years and alleged that it was an important and lucrative part of their business, from which they have derived considerable profit. Defendant Tibbs was in the employment of plaintiffs in the capacity of salesman, selling the periodical above referred to, and in that capacity travelled each year through different parts of the Dominion of Canada, and became personally acquainted with plaintiffs' customers. He left plaintiffs' employment in November, 1903, and entered that of defendant company. The plaintiffs charged that the defendant company decided to issue a publication, under the name "Christmas Number," similar to the publication issued by plaintiffs, and to sell the same to publishers of newspapers to be issued by them as Christmas numbers for their various publications. The defendant company sent out defendant Tibbs as their salesman much earlier in the season than it was the custom of plaintiffs to send out their salesman; the defendant Tibbs travelled as such salesman for defendant company throughout the Dominion of Canada, soliciting orders for the publication of defendant company, from the various customers from whom formerly he had solicited orders on behalf of plaintiffs. They further charged that for the purpose of inducing the various customers of plaintiffs and others to give their orders to defendant company for the said publication, defendant Tibbs and defendant company, through and by Tibbs as their accredited agent and representative, falsely and maliciously made to many persons untrue and fraudulent statements, intending thereby to injure the trade and business of plaintiffs, and well knowing the same to be untrue. The statements differed somewhat from each other, but were to the effect that the Press Publishing Company (the defendant company) had taken over the business of the Sheppard Publishing Company (the plaintiffs) or that part of their business relating to the publication of the Christmas annual, and that plaintiffs were going out of that branch of the business. The questions submitted to the jury and their answers thereto were as follows. 1. Did defendant Tibbs utter the words charged or words conveying the same meaning to Wilson, Elliott, Featherston, Gordon, Denholm, Fanson, Ellis, and Hogg, or any of them? Answer: Yes. 2. To which of these men did he utter such word? Answer: To all of them. 3. Did he utter them maliciously? Answer: Yes. 4. What damage do you find plaintiffs have proved that they have sustained in consequence of each of the statements which you find Tibbs uttered? Answer: Wilson, 850; Elliott, 830; Featherston, ——; Ellis, 815; Gordon, 820; Denholm, 825; Fanson, 815; Hogg, 825. 5. Did Harkins, knowing that Tibbs had uttered the words charged, to Elliott, and knowing that they were false, and intended to do so, ratify what Tibbs had done? Answer: No. 6. Did Tibbs in uttering any of such words, which you find he did utter, act within the scope of his employment by the Press Publishing Company for their benefit? Answer: No. 7. What general damage, if any, do you find plaintiffs sustained in consequence of such statements charged, which you find Tibbs made? Answer: None. Upon these questions and answers the trial Judge directed to be entered the judgment appealed from:—*Held*, it was clear that Tibbs was employed by defendant company to sell their Christmas number, and as such agent was acting for and on their behalf and within the scope of his employment in obtaining orders for them, and the jury have found that he uttered the words charged maliciously. The defendant company received these orders and filled them and collected the subscription price; in other words, took advantage of the representations that were made by defendant Tibbs.—*Held*, it was clear that the agent was acting in the course of his employment in canvassing for subscriptions, although he made statements which were not authorized by the company; no finding such as is made in answer to question 6 could be sustained, nor was there any reason to think that new light could be thrown upon the case by a new trial. There can, therefore, be no object in sending the case back for a new trial, when, upon the view taken, only one result ought to follow. Therefore judgment should be entered against both defendants with costs, and that plaintiffs' appeal should be allowed with costs, and the appeal of defendant Tibbs be dismissed with costs. *Sheppard Pub. Co.* v. *Press Pub. Co.*, 5 O. W. R. 775, 10 O. L. R. 243.

Injury to third person by negligence of servant — *Responsibility of master — Servant departing from course of employment.*]—The driver of the defendants' ice-waggon, after delivering their ice along its prescribed route, instead of returning to the company's barns, got drunk, and some hours after he was due to return, and while driving out of his homeward course, ran over the plaintiff, causing injury:—*Held*, that the defendants were not liable, as the driver was not acting in the course of his employment at the time of the accident. *Wills* v. *Belle Ewart Ice Co.*, 12 O. L. R. 526, 8 O. W. R. 331.

Magistrates' want of jurisdiction when service terminated—Farm labourer —Menial servant—Period of service—Wages —Notice—Termination of employment. *Re Robert & Weir* (Sask.), 8 W. L. R. 69.

Quebec law—*Negligent driving—Horse owned by servant — Vehicle and harness owned by master—Scope of employment — Several liability.*]—T. an employee of D. while in discharge of the duties of his employment, driving his own horse attached to a vehicle belonging to his employer, who also owned the harness, negligently caused injuries to C., which resulted in his death. In an action for damages by the widow and

children of C.:—*Held*, affirming the judgment in 15 Que. K. B. 472, that, as the injury complained of was caused by the fault of the servant during the performance of duties in the course of his employment, the master and servant were jointly and severally responsible in damages. *Turcotte* v. *Ryan*, 39 S. C. R. 8.

Quebec law — *Scope of employment—Liability.*]—A master is responsible for an accident caused by the running away of the horse of a third person attached to the master's carriage and driven by his servant in the execution of the business for which he is employed. *Amiot* v. *Montreal Waterproofing Co.*, 31 Que. S. C. 455.

Theft of servant—Scope of employment—Bailment — Hospital — Charity patient. *Ierzino* v. *Toronto General Hospital Trustees*, 5 O. W. R. 76.

Trespass to person—Owner of house—Unnecessary force — Solicitor — Damages. *Burke* v. *Burke*, 1 O. W. R. 127, 419.

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5. Negligence—*See* Negligence.

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6. Secret Profits of Servant.

Commission — *Costs* — *Jus tertii.*]—Profits acquired by the servant or agent in the course of or in connection with his services or agency fall to the master or principal. The manager of a cold storage company, at the request of the company, undertook to advise a meat company as to some changes in their plant, and used his position of adviser to influence the purchase by the meat company of a new plant from the defendants, who had promised him a commission on any order they might receive through his assistance. This was not disclosed to his employers or the meat company:—*Held*, that the transaction was one in connection with his service as manager of the cold storage company, and he could not recover a commission from the defendants. The defendants having at first conceded the plaintiff's right to recover, and then paid the money to the cold storage company, taking a bond of indemnity, the action was dismissed without costs. *Jones* v. *Linde British Refrigeration Co.*, 20 C. L. T. 436, 32 O. R. 191.

Contract of servant not to engage in particular business — Wrongful dismissal of servant—Subsequent engaging in same business. *Ryerson* v. *Murdock*, 1 O. W. R. 466.

Dual employment.] — While a servant cannot, in the course of his employment, and in connection with the services he has agreed to render to his master, earn for his own benefit any remuneration or profit, he can do so in connection with any collateral or independent work or business, not carried on in competition with that of the master. The manager of a cold storage company was held entitled, therefore, to a commission on the sale of a cold storage plant effected by the makers thereof through his efforts, the cold storage company not being themselves makers of or dealers in cold storage plant. Judgment of Boyd, C., 32 O. R. 191, 20 C. L. T. 436, reversed. *Jones* v. *Linde British Refrigeration Co.*, 21 C. L. T. 352, 2 O. L. R. 428.

Manager — *Secret profit — Condonation — Dismissal.*]—Where a servant has in fact been guilty of some act of misconduct in his employment—for example, by taking a secret profit—but the master accepts the servant's denial of guilt and honestly comes to the conclusion that the servant is innocent, then, whatever the master's credulity, the servant is not entitled to rely on condonation, since no man can condone a wrong which he does not believe has been committed upon him. *Federal Supply Co.* v. *Angehrn* (1910), 30 C. L. T. 810.

Servant taking contract for his own benefit. *Warren Bitulithic Paving Co.* v. *Lowe*, 1 E. L. R. 114.

Servant to devote entire time to master's business and to engage in no other — *Breach — Account of profits made in other businesses—Damages—Costs—Reference—Statute of Limitations—Competitive business.*]—The defendant in 1889 engaged to devote his entire time and attention to the advertising interests of plaintiffs, and to engage in no other business during the period covered by the agreement then made. This provision of the original agreement was extended to the continued services of defendant with plaintiffs; and that the businesses undertaken by defendant, of which plaintiffs complain, were carried on by him while he was in their employment upon these terms. Defendant engaged in other business:—*Held*, liable to the master for damages for breach of contract, but the master was not entitled to the moneys earned in a different capacity if the servant did not use time which he should have devoted to his master's interest, provided he did not engage in a competitive business. But if the interests conflict in any way with his duty to his master he cannot retain the fruits of his labours against his master. *Sheppard Publishing Co.* v. *Harkins*, 5 O. W. R. 482, 9 O. L. R. 504.

See, also, 4 O. W. R. 250, 277, 477.

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7. Wages.

Absence from duty — *Illness—Resolution of ferry commission — Powers — Approval of Governor in Council—Acquiescence—Notice.*]—M. was employed by the defendants to act in the capacity of captain of one of their ferry steamers, under a contract in writing, the employment to commence on the 1st March, 1899. On the 8th January, 1900, the defendants passed a resolution that after that date no employee would be paid for any time he or she might be absent from duty. This resolution was never formally communicated to M., but there was evidence that he was aware of its terms, and that, on two occasions, a portion of his wages was deducted for absence from duty. On the 15th December, 1900, M. was taken ill, and was

thereafter continuously absent from duty until the time of his death, which occurred on the 16th July, 1901. In an action by the executrix of M. claiming payment of wages for the time during which he was so absent from duty:—*Held*, *per* Weatherbe, J., and Graham, E.J., affirming the judgment appealed from, that the plaintiff was entitled to recover. *Per* Townshend and Meagher, JJ., that deceased having been aware of the passage of the resolution, and of the change which it purported to make in the terms of his contract, and having assented to the resolution by accepting his wages, less the deductions made therefrom, the action could not be maintained. *Per* Graham, E.J., that the resolution was not effective in the absence of evidence that it was submitted to and approved of by the Governor in Council; and that the resolution was *ultra vires*. *Marks* v. *Dartmouth Ferry Commission*, 36 N. S. R. 158.

Absence of agreement — *Powers of Justice of the Peace — Appeal.*]—When a servant is employed by a master without any agreement having been made either before entering upon his employment or during the course of it as to the rate of wages to be paid to him, a justice of the peace has power under the Ordinance respecting Master and Servant (C. O. 1898 c. 50, s. 3), to fix the rate of wages to be paid to the servant. Upon appeal the rate of wages fixed by the magistrate was varied. *Holness* v. *Niebergall*, 5 Terr. L. R. 250.

Absence of agreement — *Quantum meruit*—Pleading—Parent and child—Right of parent to recover for wages of child—Infant over 16—Burden of proof. *Slater* v. *Tunnicliffe* (N.W.T.), 4 W. L. R. 120.

Action for — *Contradictory evidence.*] — The plaintiff entered the defendant's employment without making any agreement as to wages. He swore, however, that subsequently the defendant asked him what wages he expected, to which he replied $50 per month, and that the defendant made no comment, but permitted him to continue in the employment. The defendant absolutely denied the conversation. In an action for wages:—*Held*, that, witnesses being of equal credibility, a witness who testifies to an affirmative is to be credited in reference to one who testifies to a negative, because he who testifies to a negative may have forgotten a thing that did happen, but it is impossible for the one swearing affirmatively to remember a thing that never existed, and, therefore, accepting the statement of the plaintiff, there was evidence of a contract at $50 per month, for which the plaintiff should recover. *Watt* v. *Watt*, 1 Sask. L. R. 418, 8 W. L. R. 953.

Action for by assignees of servant — *Defence — Grossly immoral conduct of servant disentitling him to wages.*]—Plaintiffs sued as assignees of H., for his wages. He was hired by the month. There was grossly immoral conduct on the part of H. throughout the greater part of the service. Defendant did not know of this until after H. quit work:—*Held*, that plaintiff cannot recover as owing to the conduct of H. there was no wages owing to him. *Wood* v. *Barker* (1900), 12 W. L. R. 225.

Action for wages assigned.] — Plaintiff, a storekeeper, supplied wage-earners with goods on verbal agreements that he should be paid, by their employers, out of their wages and the employers consented to those agreements:—*Held*, that the plaintiff had an equitable assignment of sufficient of their wages which might be owing them, to satisfy his accounts, and could sue their employers without joining the several wage-earners. *Lee* v. *Friedman* (1903), 14 O. W. R. 457; affirmed, 14 O. W. R. 1139, 1 O. W. N. 235, 20 O. L. R. 49.

Action to recover undrawn wages —*Appropriaton of payments—7 Edw. VII. c. 34, s. 24—Costs.*] — Plaintiff, on a default judgment, recovered $276.86 as amount due him for undrawn wages:—*Held*, that adopting appropriation of payments, the judgment should be reduced by $17.70 as plaintiff's rights are not only limited, under the statute, to one year's wages, but to a debt for which the company is sued within one year after it became due. Plaintiffs allowed costs amounting to $27.36, together with costs of this action and costs of motion to take evidence on commission. Defendant also to pay costs of setting aside default judgment and allowing him to defend. *George* v. *Strong* (1910), 15 O. W. R. 99.

Agreement to remunerate by legacy — *Quantum meruit. Wakeford* v. *Laird*, 2 O. W. R. 1093.

Amount—Variation on appeal. *Davieaux* v. *Algoma Central Rw. Co.*, 2 O. W. R. 351.

Change of — *Onus of showing agreement to change.*] — Plaintiff, by contract in writing, entered defendants' employ, for 12 months, as a salesman at $240 per month and expenses. Plaintiff was sent to Nova Scotia, but towards fall he desired to return to Ontario. He did so, defendants alleging that he thereby terminated his contract, but plaintiff continued in defendants' employ, as he alleged, without any change of wages:—*Held*, that the onus was on defendants to shew that the contract was terminated, which they failed to do. Judgment for plaintiff. *Lane* v. *Dungannon* (1891), 22 O. R. 264, and *Elgie* v. *Edgar* (1907), 9 O. W. R. followed. *McCabe* v. *National Mfg. Co.* (1910), 15 O. W. R. 662, 1 O. W. N. 606.

Affirmed 16 O. W. R. 944, 2 O. W. N. 26.

Claim against estate of brother — Evidence — Corroboration—Amount—Costs. *Thornton* v. *Thornton*, 2 O. W. R. 972.

Claim against estate of sister — Presumption — Contract — Expectation of legacy. *Mooney* v. *Grout*, 6 O. L. R. 521, 2 O. W. R. 978.

Clerk — *Leaving employment — Notice.*] —As this clerk was not a domestic servant, no notice of leaving necessary. Plaintiff also entitled to succeed upon merits. *Clint* v. *Martin*, 11 W. L. R. 27.

Contract — *Credibility of witnesses.*]—Action for wages. Plaintiff affirmed and defendant denied that wages were a stated sum per month. There were no other witnesses. Both parties equally credible. Following the rule laid down in the authorities, plain-

tiff's statement accepted. Judgment for plaintiff affirmed. *Watt* v. *Watt*, 19 W. L. R. 369, 2 Sask. L. R. 141.

Contract — *Deduction for defective work — Time lost — Damages for defects.*] —Where a cheesemaker, hired for the season, with a stipulation guaranteeing his work, and agreeing that the loss from sales of cheese by reason of defective workmanship might be deducted from his wages, is dismissed before the expiry of his term, he is entitled to his hire for time lost when it is shewn that the defective cheese resulted from defective factory appliances; and where both factory owner and cheesemaker were to blame for defective cheese, the maker should be allowed wages for the lost time, less the damage suffered on sales of defective cheese. *Leduc* v. *Lalonde*, 24 Que. S. C. 423.

Contract — Proof — Credibility of witnesses. *Watt* v. *Watt* (Sask.), 8 W. L. R. 953.

Contract to pay wages — Adopted son — Method of payment — *Quantum meruit* — Period of services — Limitation of Actions. *Chalk* v. *Wigle*, 10 O. W. R. 146.

Dispute as to terms—*Engineer of ship —Evidence.*]—Action for wages. Judgment given for plaintiff for amount claimed less reduction for time he was absent from defendant's ship on business of his. *Waltenbaugh* v. *The "Pauline"* (1909), 12 W. L. R. 206.

Engagement by the day — *Dismissal at mid-day.*] — The defendant had engaged the plaintiff and several other workmen by the day at $2 a day, and they had done masonry work for him from the commencement of July until midday on Saturday the 15th August, when the defendant dismissed them, telling them that he had not space and stone to keep them busy for the rest of the day. The defendant acted thus because, as he said, the number of masons engaged was too great for the work to be done that afternoon. When he dismissed them at midday he only paid them up to midday. They remained at the place at the defendant's disposition, and the defendant did not pay them until 5 o'clock in the afternoon, and then refused to pay them their wages for the afternoon. They sued him for the wages for the afternoon:—*Held*, that they had the right to wages for the half day, because the defendant should have foreseen the shortness in the material and should not have engaged for the whole day more workmen than he had need of. *Corriveau* v. *Larose*, 24 Que. S. C. 44.

Extra services volunteered — *Acceptance — Contract — Implied request—Quantum meruit.*] — Action for wages or compensation for services: — *Held*, that plaintiff had volunteered his extra services and action dismissed. In order to recover under a *quantum meruit* there must be a contract, express or implied, to pay something for the services, and no such action lies upon volunteer services or on extra work rendered by a volunteer already in employment. *Fabris* v. *Sala*, 11 W. L. R. 269.

Findings of fact — *Corroboration — Laches — Appeal.*]—In an action to recover an amount alleged to be due the plaintiff for wages for services rendered to the defendant as his housekeeper, the trial Judge gave judgment in the defendant's favour, on the ground of conflict between the plaintiff and the defendant in their evidence as to the terms of the hiring, and that, on the whole, the probabilities were with the defendant. The Court, on appeal, took a different view of the probabilities, but, in the absence of corroborative evidence, and the plaintiff's claim being a stale one, declined to review the finding of the trial Judge, and dismissed the appeal with costs. *Drake* v. *Duncan*, 39 N. S. R. 49, 1 E. L. R. 17.

Limited term at monthly wages — Servant leaving before end of term—Right to recover wages earned—New trial. *Mousseau* v. *Tone* (N.W.T.), 6 W. L. R. 117.

Masters and Servants Ordinance — Non-payment of wages — Complaint heard by magistrate — Failure to establish relationship. *Rex* v. *Pinkert* (Yuk.), 3 W. L. R. 88.

Monthly rate — *Entire contract — Servant leaving employment — Justification.*] —It was found as a fact, on contradictory evidence, that the plaintiff hired with the defendant at $18 for the first month, and, if each party was satisfactory to the other, for $20 for the whole working season including the first month, and that the wages, though fixed with reference to the months, were payable only at the end of the period of hiring. The plaintiff after working for some months left, and sued for the wages for the number of months he had worked, less the wages for the first month, which he had been paid:—*Held*, that the contract was an entire one and that the plaintiff could not recover. Nature of behaviour of master towards servant justifying the servant in leaving, discussed. *Owen* v. *James*, 4 Terr. L. R. 174.

Payment of — *Jurisdiction of magistrate —Prohibition to magistrate.*]—A magistrate has no jurisdiction to order payment of wages for any period after the discharge of a servant. *Goode* v. *Downing* (1904), 5 Terr. L. R. 505, followed. An abortive attempt to appeal to a Division Court is not a bar to right to move for prohibition to magistrate. *Re Sullivan* (1862), 8 U. C. L. J. O. S. 276, followed. *Swanick* v. *Kotinsky* (1909), 14 O. W. R. 537, 19 O. L. R. 407.

Period of service — Domestic servant— Leaving without notice. *Manson* v. *McKen* (N.W.T.), 4 W. L. R. 545.

Police magistrate — *Appeal to County Court Judge — Jurisdiction.*] — An appeal lies to a County Court Judge from the decision of a police magistrate made under s. 11, c. 157, R. S. O. 1897. Both Judge and magistrate have jurisdiction to hear master's defence of total failure of consideration to servant's claim for wages. *Re O'Neill & Duncan Litho. Co.*, 13 O. W. R. 511, 648.

Summary procedure — *Justice of the Peace — Jurisdiction — Counterclaim of master.*]—On the hearing of a complaint before a justice of the peace, under the Ordin-

ance respecting Masters and Servants (C. O. 1898 c. 500), by a servant against his master for non-payment of wages, the justice has no jurisdiction to allow against the amount of wages any sum by way of damages sustained by the master by reason of the servant's neglect or refusal to perform his duty. *Brown* v. *Croft*, 4 Terr. L. R. 461.

Transmission to Supreme Court — *Alberta Supreme Court Act, s. 36.*]—It is now impossible for cases under the Master and Servant Ordinance to reach the Alberta Supreme Court. *Rikluski* v. *Hillcrest, Wells* v. *Hillcrest*, 9 W. L. R. 425.

Wrongful dismissal of servant — Damages — Costs. *McCrae* v. *Sturgeon Falls Pulp Co.*, 3 O. W. R. 737.

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8. MISCELLANEOUS.

Breach of contract—*Actionable wrong —Damages — Injunction — Necessity for showing malice — Justification — Rules of labour union.*]—It is no defence to an action for persuading a servant to break his contract with his master, that the persuader acted in good faith in pursuance of the provisions of the constitution of a trade union of which the servant and the persuader were both members, and that he had no ill will towards the master. *Reid* v. *Friendly Society of Stone Masons*, [1902] 2 K. B. 732, and *South Wales Miners' Federation* v. *Glamorgan Coal Co.*, [1905] A. C. 239, followed. *Branch* v. *Roth*, 6 O. W. R. 345, 10 O. L. R. 284.

Breach of duty by servant — *Agent of manufacturer — Acting for rival concern —Entry on servant's premises — Trespass— Conversion — Destruction of property — Lists made by servant of customers of master — Property of master — Damages — Evidence — Special damage — Remoteness.*]—The plaintiff, being employed by the defendants as the agent for the sale of their goods in a defined territory, agreed to hold himself subject to the direction of the defendants and to serve their interest, and not to carry or offer for sale any goods except those manufactured or sold by the defendants. The plaintiff was paid by commission on his sales. He entered the service of the defendants on the 1st January, 1908, and continued until the 15th May, 1909, when he was dismissed. He had an office, rented in his own name, and of which he paid the rent, but it had the defendants' name on the door. In January or February, 1909, the plaintiff entered into negotiations with a firm doing a similar business to that of the defendants, with a view to entering into the service of that firm in 1910, and while still in the service of the defendants, endeavoured to induce a number of the defendants' agents to leave the defendants and enter the service of the other firm. A contract was entered into between that firm and the plaintiff, dated the 30th March, 1909, to take effect on or before the 1st January, 1910. The plaintiff had, while in the defendants' service, prepared a mailing list of customers and prospective customers in his own territory for use in the prosecution of the defendants' business, and he had bought from another agent of the defendants a similar list in respect of another territory. He had also a card-index of names. He had also prepared a list of probable buyers all over Canada. He had also a ledger in which he had entered the name of each person from whom he got an order for the defendants, with particulars, prices and dates. During the absence of the plaintiff, the defendants entered his office, removed the furniture, which was their own, and the ledger, the mailing list, and the card-index. The general mailing list of all Canada they destroyed: — *Held*, that the defendants had no right to enter the office without the plaintiff's permission, and in doing so they committed an act of trespass.—*Held*, also, that the general mailing list was the plaintiff's property, and the plaintiff was entitled to damages for its destruction.—*Held*, also, that the other articles were the defendants' own property, and the plaintiff could recover nothing for their conversion. — *Held*, also, that the defendants were entitled, upon their counterclaim, to damages for breach of the plaintiff's contract to serve them to the best of his ability. —Evidence was admitted, subject to objection, to shew loss to the defendants occasioned by the fact that the plaintiff did not continue in their service till the end of the year, although, in fact, the defendants dismissed him.—*Held*, that this evidence was open to the double objection that it was too remote, and that it shewed special damage, for which no ground-work was laid in the pleadings. *Martin* v. *Brown* (1910), 14 W. L. R. 237.

Clerk paying out money on account of office — *Action against representatives for accounting.*] — A. being the clerk and manager of B., the sheriff of Montreal, received and paid in that capacity various sums of money on B.'s account, in the course of the business of the office. B. brought an action against the representatives of A. for an account of the receipts and application of the moneys, which passed through A.'s hands, while in B.'s office:—*Held*, in such circumstances, by the Judicial Committee, reversing the judgment of the Court of Appeals of Lower Canada, that such action would not lie against A.'s representatives. Appeal abated by the death of the respondent, whose heirs renounced the succession, and a curator having been appointed by the Court below, to the vacant succession, the appeal was revived against such curator. *Ermatinger* v. *Guay* (1843), C. R. 1 A. C. 202.

Contract — Company — Lumber driving — Account stated. *Lynch* v. *William Richards Co. Limited*, 3 E. L. R. 383; *South-West River Driving Co.* v. *Lynch*, 3 E. L. R. 420.

Contract of servant in restraint of trade — *Absence of consideration — Void contract.*]—The defendant, while in the employment of the plaintiffs at a monthly salary, signed, at the request of the plaintiffs, an agreement not under seal that he would not, within one year after the termination of his employment with the company, engage or be interested in any business or work within Canada or Great Britain

in competition with the business of the company. The defendant expected to be appointed manager of the business at Winnipeg with an increase of salary, and had reason to believe that a refusal to sign the agreement would be followed by dismissal, but no promises were made to him prior to signing, nor was he told that he would be dismissed if he would not sign. It was, however, a condition that he should sign the agreement before having placed in his hands a new price book issued for use in the plaintiffs' business. He was made temporary manager at Winnipeg shortly after signing, but without any increase of salary or any terms or conditions:—*Held*, that there was no sufficient consideration for the signing of the agreement by the defendant, and that it was not binding upon him. *Copeland-Chatterson Co.* v. *Hickok*, 5 W. L. R. 353, 16 Man. L. R. 610.

Disclosure by servant of master's business contracts — Use in another action — Partnership—Injunction. *Mitchell* v. *McKenzie*, 6 O. W. R. 564.

Hiring plaintiff's servant.]—A person employed as a shopman living in his employer's house is liable to conviction under the Servants' Act, 3 Wm. IV. c. 26, for hiring plaintiff's servant. *Brenan* v. *McIsaac* (1857), Pet. P. E. I. 112.

Implied power of servant to give credit to customers — *Liability of master for disbursements by servant.*]—A driver employed by a laundryman to deliver laundried goods to customers, is not liable for credit given them, when it is established that all the drivers in the same employ were in the habit of doing so, to the knowledge of their employer.—The driver has the right to take credit for sums paid by him to customers for goods lost and due to them by his employer. *Shoveliu* v. *Hanson*, 30 Que. S. C. 360.

Industrial Disputes Act. 1907 — "*Lock out*" — *Labour union — Closing of mine and violation of Act for three days.*]—On appeal from an order of a magistrate dismissing the complaint against the defendants for causing a "lock out" under the above Act, *held*, that under a "lock out" all labour need not be suspended. A mine is not in working order because miners, according to their custom, enter the mine to clean up their stalls. As defendants had laid off men, closed their mine, and attempted to make new terms without giving notice required by s. 57 of the above Act, a fine was imposed. *Re Harrison & Alberta Coal Mining Co.* (Alta.), 10 W. L. R. 389.

Liability of master to pay for medical attendance on servant injured in service — Company — Contract—Authority of officer in charge of works. *Oldwright* v. *Hamilton Cataract Power Co.*, 3 O. W. R. 16, 397.

Medical attendance on servant — *Liability of master — Contract—"Hospital fund."*]—A fund called "the hospital fund" was held by a mining company for the purpose of providing medicine and medical attendance for those of the men who required it, medical men being attached to the works, whose duty it was to attend the men and provide the necessary medicines:—*Held*, that no obligation was imposed on the company to pay out of this fund for the services of any physician whom the men might choose to employ. *Struthers* v. *Canadian Copper Co.*, 25 C. L. T. 323, 6 O. L. R. 374, 2 O. W. R. 748.

Misconduct of servant — *Breach of confidence — Soliciting customers of master.*]—The appellant, a patent solicitor, had, by means of advertisements in the newspapers, solicited correspondence from persons who might need the services of a patent solicitor. By this means he had succeeded in securing patronage, and had a large number of correspondents; and he kept in his office a particular book in which were entered the names and addresses of about 5,000 of his correspondents and clients. The respondent, while in the employ of the appellant, but after having received from him notice of dismissal, had got hold of this book, which was in charge of another employee, during the absence of his employer, and had taken a copy of a great part of the addresses. Later, having left the service of the appellant, and opened an office on his own account as a patent solicitor, he sent to the addresses taken from the appellant's book, a circular announcing his profession, his address, and his photograph, thus soliciting the business of his former patron and even offering his services free:—*Held*, that the respondent had violated his contract and failed in his duty as an employee; and that he had unlawfully committed acts calculated to cause damage to the appellant by turning away from the latter part of his clientele. *Marion* v. *Roberts*, 14 Que. K. B. 23.

Servant leaving employment — *Action — Damages — Particulars.*]—In an action for damages against an employee for deserting his employment, it is sufficient to allege in relation to damages that he left his employment at a time when several of the employees were absent upon holidays. *Chaput* v. *Charland*, 6 Que. P. R. 33.

Servant leaving employment without notice — *Quantum meruit — Cross-demand for damages.*]—The plaintiff was engaged by the defendants at a monthly salary. After working for nineteen days in a certain month, he left without giving any notice, and subsequently brought this action for $20 for 19 days' work actually performed. The defendant company brought a cross-action for damages resulting from the plaintiff leaving their employment without notice:—*Held*, that by leaving without notice, the plaintiff had forfeited his right to wages even for work done. 2. That upon the proof adduced the defendants had made out their case on a cross-demand. *McKee* v. *Can. Pac. Ry. Co.*, 23 C. L. T. 121.

Settlement of claim for damages.]—An agreement between employer and employee, in settlement of a claim for damages caused by an explosion, operates as a novation whereby the delictual obligation is extinguished, and a contractual obligation arises instead. If the latter be conditional,

it only becomes executory upon the fulfilment of the condition. *McKinstry* v. *Irvine* (1911), 39 Que. S. C. 426.

Sharing profits — Special agreement—Statement furnished by employer—Impeaching—Actual fraud—Account—R. S. O. 1897 c. 157, s. 3. *Cutten* v. *Mitchell*, 6 O. W. R. 497, 552, 629, 10 O. L. R. 734

Trespass for shooting dog — *Master liable for acts of servant done in course of employment.*]—If from facts master's concurrence can be presumed trespass lies in absence of such presumption, case against master proper remedy. *Swabey* v. *Palmer* (1899), Pet. P. E. I. 202.

MASTER IN CHAMBERS.

Affidavits verifying mortgage account — *Cross-examination on—Forum—Redemption action.*]—In a redemption action the defendant filed his affidavit verifying the mortgage account in the office of the Master in Ordinary, to whom the action was referred. Plaintiff took out an appointment before a special examiner to cross-examine defendant upon his affidavit; — *Held*, there was no precedent or authority for any such cross-examination before anyone except the Master before whom the reference was pending. Rule 490 had no application as the proceedings in the Master's office were regulated by Rules 654-709. Rule 608 was expressly negative to any such right as was claimed. Motion granted with costs added to the mortgage debt. *Plenderleith* v. *Parsons*, 6 O. W. R. 145, 369, 10 O. L. R. 436.

Jurisdiction — Motion to set aside appointment of referee to proceed with reference — Jurisdiction of Referee questioned—Rule 42 (2), (12) — Appeal—Prohibition. *Toronto* v. *Toronto Ry. Co.*, 2 O. W. R. 225, 3 O. W. R. 204, 298, 4 O. W. R. 221, 330, 345, 446, 5 O. W. R. 14, 64, 130, 403, 415, 6 O. W. R. 574, 677, 871.

Jurisdiction — Removal of arbitrator —Arbitration Act — Reference of motion to Judge in Chambers. *Re Coleman & Union Trust Co.*, 10 O. W. R. 245.

Jurisdiction — *Summary dismissal of action.*] — The Master in Chambers has no power under Rule 261 or otherwise to order the dismissal of an action upon the ground that no cause of action is shewn upon the plaintiff's own statement. *Knapp* v. *Carley*, 24 C. L. T. 232, 7 O. L. R. 409, 2 O. W. R. 1186, 3 O. W. R. 187, 940.

See Courts — Execution — Judgment —Writ of Summons.

See Costs — Discovery — Lunatic — Municipal Elections — Official Referee — Practice — Trial.

MASTER IN ORDINARY.

See Referees and References.

MASTER OF SHIP.

See Ship.

MASTER'S OFFICE.

See Evidence—Mortgage.

MATERIAL MEN.

See Mechanics' Liens.

MATRIMONIAL OFFENCES.

See Divorce—Husband and Wife.

MAYOR.

See Municipal Elections — Municipal Corporations.

MEASUREMENTS.

See Sale of Goods—Lien—Timber.

MECHANICS' LIEN ACT.

See Constitutional Law.

MECHANICS' LIENS.

1. Alberta.

Actions to enforce — *Consolidation—Parties — Lien-holders — Practice—Costs —Alberta Mechanics' Lien Act, ss. 18, 19, 20.*]—The proper interpretation of ss. 18, 19, 20, of the Mechanics' Lien Act is: "Once an action to enforce a mechanic's lien is commenced, it is improper for another lien-holder, in respect of the same subject matter, to commence an action, because all suits or proceedings brought by a lien-holder shall be taken to be brought on behalf of all

lien-holders who became parties within the time limited for instituting proceedings."—*Semble*, that where a lien-holder is plaintiff in an action on his lien, it is improper to join other lien-holders as parties defendant:—*Held*, that such other lien-holders may become parties by order of a Judge on *ex parte* application under s. 18.—Consolidation of actions, costs, and procedure discussed. *Gardner* v. *Gorman, Ross* v. *Gorman*, 7 W. L. R. 630, 1 Alta. L. R. 106.

Actions to enforce — *Jurisdiction of Supreme Court of Alberta — District Courts —Amounts involved — Mechanics' Lien Act —Supreme Court Act — District Courts Act — Costs.*]—Section 21 of the Mechanics' Lien Act is merely permissive, and does not exclude the ordinary procedure by writ of summons:—*Held*, that the combined effect of the Mechanics' Lien Act, s. 2, s.-s. 1, and the District Courts Act, ss. 23 and 24, and the Supreme Court Act, ss. 9 to 25, is to vest in the District Court jurisdiction in mechanics' lien cases where the amount involved is under $400; but in such cases the Supreme Court has concurrent jurisdiction. —*Semble*, costs as between party and party will, however, in such cases, as a rule, only be allowed on the scale or tariff applicable to the District Court, in whichever Court proceedings are instituted.—*Held*, that the two principal clauses of s. 22, Supreme Court Act, are to be dissociated. The first clause refers to jurisdiction generally, without prejudice to the part concurrent jurisdiction of inferior courts; the second clause deals only with the jurisdiction conferred by miscellaneous "statutes, Acts, or Ordinances," or "orders or regulations made thereunder." *Freeze* v. *Carey, McKay* v. *Carey*, 7 W. L. R. 287, 1 Alta. L. R. 81.

Building contract — *Abandonment by contractor — Completion by owner — Payments to contractor.*] — The Alberta Full Court held that payments made by owner will not discharge him from liens existing at the time of such payments. Where trial Judge finds defendant had promised to pay plaintiff, and there was sufficient consideration, it is not open to the Court to reverse that finding. *Union* v. *Porter*, 9 W. L. R. 325.

Building contract — Action to enforce liens — Payment in full to contractor — Prejudice to existing liens — Deduction of damages for delay — Evidence — Conflict of testimony — Credibility of party as witness—Costs. *Gorman* v. *Henderson* (Alta.), 8 W. L. R. 422.

Building contract — Death of contractor — Payments by owners directly to mechanics — Payment of full amount of contract price — Limitation of liability of owner — Alberta Mechanics' Lien Act — Time of attachment of lien — Payments to contractor — Prejudice to existing liens—Costs. *Ross Bros.* v. *Gorman, Gardiner* v. *Gorman*, 9 W. L. R. 319.

Building contract — *Extras — Enforcement of lien — Time of registering — Time when last work done — Trifling character, but done in good faith — Delay for defendant's benefit — Acceptance — Revival of lien — Computation of time—Promissory note — Negotiation — Waiver — Land enjoyed with house.*] — The Mechanics' Lien Act, 6 Edw. VII. c. 21, s. 13, provides that "the lien shall . . . cease . . . after the expiration of thirty-one days, . . . after the claimant has ceased from any cause to work thereon, or place or furnish the materials therefor;"—*Held*, that the doing of work or supplying materials even of a trivial character, should be taken into consideration in determining when the claimant "has ceased," etc., etc., if the work was done or material furnished in good faith, to complete the contract, and not colourably to revive the lien. *Sagward* v. *Dunsmuir*, 11 B. C. R. 375, and *Steinman* v. *Kosciuk*, 4 W. L. R. 514, followed.—*Held*, further, that if the claimant has delayed completion, in order to give the owner time to arrange for payment, by arrangement with the owner, and work is then done to keep the lien alive, the owner having accepted the benefit of the delay, and the work being necessary, the date of completion of such work will be taken as the date upon which the claimant "has ceased," etc., etc.; and *semble*, it makes no difference that such work was merely part of an "extra." It revives the lien in respect of the whole work.—Section 35 provides that "every lien shall absolutely cease to exist after the expiration of thirty days after the filing of the affidavit . . unless the claimant shall have instituted proceedings . . . and a certificate thereof is duly filed:"—*Held*, that in computing the period of thirty days, fractions of a day will not be considered, and hence where the affidavit was registered the 12th December at 11 a.m., and certificate filed on the 11th January at 11.30 a.m., the filing was in time.—*Held*, that the claimant does not waive, release, lose, or extinguish his lien, even to the extent of the amount of the note, by taking and negotiating the owner's promissory note in part payment of the amount then due. The claimant is entitled to enforce his lien for the full amount due him.—*Held*, that the words in s. 4, "land . . occupied thereby or enjoyed therewith," are not necessarily restricted to the particular lot upon which the building is situated, but will include other (adjoining) lots intended for use with the house. *Clarke* v. *Moore & Simpson, Clarke* v. *Moore & Galbraith*, 8 W. L. R. 405, 411, 1 Alta. L. R. 49.

Building contract — Payment of part of contract price to contractor — Abandonment of work by contractor — Completion by owner — Payments to contractor—Prejudice of existing liens — Liability of owner for work done or material supplied after abandonment — Promise to pay — Consideration — Time of registering lien—Material supplied. *Union Lumber Co.* v. *Porter*, 8 W. L. R. 423, 9 W. L. R. 325.

Building contract — *Price payable in instalments — Default — Alberta Mechanics' Lien Act, s. 7 — Further proceedings in action — Posting up copy of pay-roll—Non-compliance with s. 17 — Costs.*] — Where the contract price is payable in instalments, if default is made in payment of an instalment, the contractor, prior to the falling due

of the later instalments, can commence proceedings under the Mechanics' Lien Act to enforce his lien. The words in s. 7 of the Act, "No further proceedings shall be taken in the action until after such extension of time," are to be construed distributively, and default in payment of any deferred payments entitles the lien-holder to take any further proper proceedings in the action. — Costs thereof allowed.—Section 17 of the Act, requiring the contractor to post up a copy of the pay-roll, etc., is intended solely to protect the labourers, and to afford the owner the means of securing himself from liability to the labourers, and non-compliance by the contractor with this section does not prevent his lien coming into existence, or nullify a lien already existing, or prevent the lien-holder from keeping it alive by commencing proceedings, in accordance with the Act. *Spears* v. *Bannerman*, 1 Alta. L. R. 98.

Building erected by lessee—*Liability of owner — Alberta Mechanics' Lien Act—6 Edw. VII. c. 21, ss. 4 and 14.*]—Section 4 of The Alberta Mechanics' Lien Act (6 Edw. VII. c. 21), gives to any contractor or material man furnishing labour or materials for a building at the request of the owner of the land a lien on such land for the value of such labour or materials. Subsection 4 of sec. 2 provides that the term "owner" shall extend to and include a person having any estate or interest "in the land upon or in respect of which the work is done or materials are placed or furnished at whose bequest and upon whose credit or on whose behalf or with whose privity or consent or for whose direct benefit any such work is done," &c. By sec. 11, "every building . . . mentioned in the fourth section of this Act, constructed upon any lands with the knowledge of the owner or his authorised agent . . . shall be held to have been constructed at the request of such owner," unless the latter gives notice within three days after acquiring such knowledge that he will not be responsible. The lessee of land, as permitted by his lease, had buildings thereon pulled down and proceeded to erect others in their place, but was obliged to abandon the work before it was finished. The owner of the land was aware of the work being done, but gave no notice disclaiming responsibility therefor, mechanics' liens having been filed under the Act:—*Held*, that the interest of the owner in the land was subject to such liens. Judgment in *Scratch* v. *Anderson*, 2 Alta. L. R. 109, 13 W. L. R. 113, varying that at the trial in favour of the lienholders, affirmed. *Limages* v. *Scratch* (1910), 31 C. L. T. 256, 44 S. C. R. 86.

Building erected by tenant on demised premises — *Alberta Mechanics' Lien Act, s. 11 — Termination of lease by notice for default — Rights of lienholders—Superintendents of construction.*] — Actions to enforce mechanics' liens. L. leased certain premises to defendant for seven years, the latter having the right to remove a building, and erect another in lieu thereof, new building to become property of L. Defendant also had an option to purchase. Plaintiff filed liens in connection with erection of new building. Defendant having become in arrears for rent, L. forfeited the lease:—*Held*, that the liens were valid against the land. The tenant should have been mentioned in lien as filed. Superintendents of construction are entitled to a lien. *High River Trading Co.* v. *Anderson* (Alta.), 10 W. L. R. 126.

Contractor failing to perform contract — *Claims of sub-contractors—Notice —Part of contract price to be paid by conveyance of land to contractor — Liens transferred to land so to be conveyed — Form of judgment — Costs.*]—The defendant C. entered into an agreement with the defendant D. to build two houses of the value of $3,000 each, the consideration being the transfer to C. of three lots and the payment of $3,000, half of which money was to be paid when $3,000 had been expended, and the remainder paid and the lots transferred as soon as the buildings should be completed according to the specifications and all claims satisfied. Before the completion of the houses, and after the payment to C. of about $2,200, D. gave notice to C. that unless he completed the houses within a specified time they would be taken out of his hands, and the amount expended in completion would be deducted from the sum payable to him, without prejudice to any claim for delay or damages by reason of imperfection in construction or in quality of material. C. did nothing more under the contract, and D. completed the houses, expending more than the balance payable under the contract, and also claiming damages, etc. The three lots had not been conveyed to C.: — *Held*, that the plaintiffs, who did work and furnished materials for the buildings, and had registered mechanics' liens against the property built on, and established by evidence their rights thereto, were entitled to the equity in the three lots, after the satisfaction of D.'s claim for payments made and damages.—Judgment of Stuart, J., 11 W. L. R. 693, reversed, and judgment to be entered declaring the plaintiffs entitled to liens, and directing a sale of the three lots, the proceeds of such sale to be applied, first, in payment of the amount (to be ascertained by the Master) which D. was entitled to deduct over and above the sum of $3,000, and secondly, in satisfaction of the plaintiff's claims—the balance, if any, to be paid to C.—Special directions as to costs. *Read Co.* v. *Coffin* (1910), 13 W. L. R. 663.

Lands of school board — *Installation of furnace in building — Mechanics' Lien Act, s. 4 — Compliance with Act — Strict construction — S. 14 — Sub-contractor — Performance of sub-contract — Compliance with terms of principal contract — S. 2[e]—Rejection of furnace — Lien notwithstanding — Delay in completion of work.*]—The lands of a school board may be made subject to a mechanic's lien.—*Lee* v. *Brakey*, 11 W. L. R. 38, 2 Sask. L. R. 88, followed.—The installation of a furnace in a building comes within the terms of s. 4 of the Alberta Mechanics' Lien Act.—If the Act is to be strictly construed against the person claiming the lien, it is so only in the construction of the sections dealing with the creation of the lien, and not of those dealing with its enforcement; and, even as to the former, s. 14 of the Act requires only a substantial compliance.—A sub-contractor is bound to

gainst the land. n mentioned in its of construc- igh River Trad- , 10 W. L. R.

perform con- *ractors—Notice be paid by con- — Liens trans- yed — Form of* efendant C. en- a the defendant the value of ation being the nd the payment ney was to be expended, and lots transferred hould be con- lications and all completion of yment to C. of to C. that us- within a speci- ken out of his ended in con- m the sum pay- e to any claim on of imperfec- lity of material. e contract, and expending more er the contract, ete. The three o C.: — *Held*, work and fur- dings, and had ainst the prop- d by evidence ntitled to the r the satisfac- ents made and t, J., 11 W. L. it to be entered d to liens, and lots, the pro- d, first, in pay- ascertained by entitled to de- of $3,000, and the plaintiff's to be paid to sts. *Head* Co. 663.

— Installation Mechanics' Lien Act — Strict b-contractor — — Compliance act — S. 3 (f)— notwithstand- of work.]—The e made subject *Brolcy*, 11 W. followed.—The building comes of the Alberta Act is to be person claim- the construc- ith the creation dealing with its to the former. y a substantial r is bound to

shew a substantial performance of his own contract with the contractor, but is not bound to a strict compliance with the terms of the principal contract.—Section 24 of the Act gives the Court power, in a lien action, to deal fully with the rights of all the parties who are before it.—Upon the evidence, the plaintiff, a sub-contractor, was *held*, to have strictly complied with his contract with the principal contractor, and to be entitled to enforce his lien, notwithstanding that the furnace which he installed was rejected by the owners, a school board.—*Held*, also, that there was no unreasonable delay on the plaintiff's part in completing his work. *Malkit* v. *Kovar* (1910), 14 W. L. R. 327.

Lien of del credere agent — "*Ceased from any cause to place or furnish materials*"—*Filing certificate of lis pendens—Neglect of registrar—Payment by promissory note — Waiver.*] — *Del credere* agents supplying materials have such an interest in the goods as entitles them to a mechanics' lien as material-men under the Mechanics' Lien Act. One claim of lien can be filed in respect of all goods supplied, though from different principals, and the time for filing it will run from the date of the last delivery, irrespective of whose goods constitute it.—Delivery of the certificate of *lis pendens* to the land titles office before 4 p.m. on the last day for filing is, as against the "owner," a sufficient "filing" within the Act; notwithstanding that the registration is not completed until the next day.—*Semble*, that the lien-holder cannot be prejudiced by the neglect of the registrar; but *quære*, where a question of priority arises as against rival incumbrancers who may have been misled by the registrar's error.—A mechanics' lien is not waived by the claimant accepting and negotiating a promissory note from the contractor. *Swanson* v. *Mollison*, 6 W. L. R. 678, followed.—Where the claimant, a material-man, had delivered a small quantity of brick by the contractor's orders, some six weeks after he had been given a promissory note for the bulk of the material supplied by him, under a general contract to supply all the brick required; and it appeared that more bricks were at the time still required for the completion of the building, and it was not shewn that the claimant had not acted in good faith, or that the arrangement for supplying the bricks had been terminated when the note was given:—*Held*, that the claimant had not "ceased from any cause to place or furnish materials," prior to such last delivery, although it was not shewn that the brick had gone into the building, and whatever the motives of the contractor in giving the order.—In an action to enforce a mechanics' lien the onus does not lie upon the plaintiff to shew that there is a sum of money owing by the owner to the contractor out of which the lien can be realised. If this is disputed, it is a matter of defence. *Gorman & Co.* v. *Archibald, Anderson* v. *Anderson*, 1 Alta. L. R. 524, 8 W. L. R. 916.

Lien of sub-contractor — Pleadings—Amendment — Filing of claim of lien — Time of completion of work—Architect's certificate—Unimportant work done, after substantial completion—Promissory notes taken by sub-contractor from contractor—Discount —Non-extinguishment of debt—Notes retired by sub-contractor—Statement of sub-contractor as to amount due—Estoppel—No alteration in position—Nothing due from owner to contractor—Provisions of Alberta Mechanics' Lien Act — "Owing and payable" — Lien arising on commencement of work — Amount for which lien to be enforced — Change in specifications—Extras—Interest. *Swanson* v. *Mollison* (Alta.), 6 W. L. R. 678.

Non-completion of work by contractor — *Payments made by owner beyond contract price—Discounting contractor's promissory notes for less than amount due—Estoppel—Sections 19 and 32 Alberta Mechanics' Lien Act.*]—Action to enforce a mechanic's lien. Any work done or material supplied after the amounts paid in satisfaction or prevention of liens and the amounts unpaid for which liens exist together equal the contract price, cannot give rise to any lien, and any lien lien existing cannot support any claim for any such work or material. Any payment made in satisfaction of any claim for such work or material cannot discharge the owner from liability for any claim under a pre-existing lien. Taking a promissory note for part of the amount owing and the negotiation of such note will not extinguish plaintiff's lien. Judgment for amount claimed. *Breckenridge & Lund Lumber Co.* v. *Travis* (Alta.), 10 W. L. R. 392, 2 Alta. L. R. 71.

Affirmed 43 S. C. R. 59.

Over-payment to contractor — Liability of owner of land—Attaching of lien —Negotiation of note—Claim of lienholder—Waiver — Estoppel — 6 Edw. VII. c. 21 (Alta.). — *Travis* v. *Breckenridge-Lund Co.* (1910), 2 Alta. L. R. 71, affirmed, 43 S. C. R. 59.

Payments made by owner to contractor — *Credit — Final certificate of architect withheld.*]—The same decision is given here as in *Ross* v. *Gorman*, 1 Alta. L. R. 516, 9 W. L. R. 319. The claim of a lien-holder will not be defeated by the absence of an architect's final certificate. Deduction by way of liquidated damages not allowed where there was delay by contractor, onus being on owner to shew contractor should not have been given an extension of time, the lien-holder not being the contractor. *Landy* v. *Henderson*, 9 W. L. R. 327.

When lien attaches — *Payment by owner to contractor — Discharge of lien — Liability of owner limited by contract price — Lien claimed by partnership of which "owner" a member.*]—A lien arises and attaches, under the Mechanics' Lien Act, as soon as work is done or materials furnished, subject to be increased or decreased in amount, from time to time, as further work is done or materials furnished, on the one hand, or payments made to the lien-holder on the other hand. Payments made by the owner to the contractor after the lien has attached, are no discharge of such liens for work and materials; but neither the owner nor the land can be held liable to the lienholders for a greater aggregate sum than the amount of the contract price.—A claimant under the Act is not bound to give any notice of lien to the owner.—A lien claimed by a

partnership stands in no different position to any other lien by reason of "the owner" being a member of the partnership.—Judgment of Harvey, J., 1 Alta. L. R. 109, 7 W. L. R. 630, 8 W. L. R. 413, affirmed. *Ross* v. *Gorman*, 1 Alta. L. R. 516, 9 W. L. R. 319.

Work done at instance of lessees — *Knowledge of lessor — Absence of notice disclaiming responsibility — "Owner" — Mechanics' Lien Act, secs. 4, 11, 14.*]—Section 4 of the Alberta Mechanics' Lien Act provides that any one doing work on, or furnishing materials in the construction of, any building on any land, at the request of the owner of the land, shall have a lien for the price of such work or materials. "Owner" is defined as including a person, having any interest in the land, at whose request or with whose consent the work is done. Section 11 provides that any building constructed with the knowledge of the owner shall be held to have been constructed at his request, unless he has given notice that he will not be responsible. The defendant L. leased land and buildings to the defendants S. and A., with an option to purchase. S. and A. altered and improved the buildings, with the knowledge of L., who gave no notice that he would not be responsible. The plaintiffs, who had done work upon the premises or supplied material used in the alterations, registered mechanics' liens against the land. After this, L. cancelled the lease: — *Held*, that the interest of L. was subject to the plaintiffs' liens; L. being an "owner," within the meaning of secs. 4 and 11. Section 11 applies only to cases that do not come within sec. 4, in which the owner has in fact requested the work to be done. *Anderson* v. *Godsal*, 7 B. C. R. 404, discussed.—*Held*, also, that L. not having been prejudiced thereby, objections made to the forms of some of the liens could not prevail: sec. 14 of the Act.—*Held*, also, that the work of superintendence is work done in or for the construction of a building, within the terms of the Act, so as to give the superintendent a lien. Judgment of Beck, J., affirmed. *Scratch* v. *Anderson* (1911), 16 W. L. R. 145, Alta. L. R.

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2. British Columbia.

Action to enforce lien — *Statement of work done—Insufficiency—Amendment — Mechanics' Lien Act, 1900, ss. 12, 13—Trade custom—Method of computing bricks — Unreasonable usage—Absence of knowledge — Set-off—Defective work.*]—In an action in a County Court to enforce a mechanics' lien, the plaintiff's statement of the work done not complying with s. 12 of the Mechanics' Lien Act of 1900, an amendment of the plaint was allowed, it being *held*, that s. 13 gave power so to amend.—The plaintiff's contract was to lay bricks by the thousand, but he sought to affix to it an alleged usage of bricklayers that, in a contract to lay bricks by the thousand, unless kiln count is specified, the method of ascertaining the number of thousands is by measuring the wall. There was no evidence that this alleged usage was known to the defendant, and he stated that it was not known to him:—*Held*, that the alleged usage was an unreasonable one, and not binding on the defendant; and the plaintiff was entitled to recover for laying only the actual number of bricks in the wall, that is, on the basis of kiln count.—The bricks were put into the wall in a wet condition, and it was shewn that in order to make good work, the bricks should be dry. The wall fell down, and the plaintiff rebuilt part of it, but it cost the defendant $590 in labour to do the rest of the work:—*Held*, that the defendant entitled to a set-off of $250 as claimed by him. *Allen* v. *Deane* (1910), 14 W. L. R. 622.

Certificate of action — *Filing—Time —Existence of lien.*]—The certificate of action required by s. 24 of the Mechanics' Lien Act must be filed within the time therein limited, otherwise the lien ceases to exist. *Dunn* v. *Holbrook*, 7 B. C. R. 533.

Clearing land.] — The defendant employed a contractor, under a written contract, to clear a quantity of land for the purpose of cultivation:—*Held*, that the plaintiff, a labourer who worked for the contractor upon the land, was not entitled to a lien for his work, under s. 4 of the British Columbia Mechanics' Lien Act, as amended. *Black* v. *Hughes*, 22 C. L. T. 220.

Filing of claim for lien — *Time of completion of work—Notice to owner—British Columbia Mechanics' Lien Act, 1907, s. 2—Delivery in periods—Sale on general account—Service of notice on agent of owner.*]—Consolidated actions to enforce mechanics' liens. A fifteen days' notice required by s. 2 of the above Act means 15 days before the completion of the work as a whole. As the trial Judge had held that there was no lien properly filed, an appeal lay notwithstanding s. 24 of the amending Act of 1900. Notice of intention to claim a lien given to the owner's agent held to be good. *Coughlan* v. *National*, 11 W. L. R. 202.

Appeal from above judgment allowed. *Ibid*, 491.

Materials furnished — Request of owner—Authority of agent—Onus—Limitation of agent's powers—Absence of notice to material man—Estoppel — Time for filing claim—Delivery of new materials after expiry—Colourable delivery to extend time — Judgment *in personam* — Jurisdiction of County Court—Appeal to full Court (B.C.). *Sayward* v. *Dunsmuir* (B.C.), 2 W. L. R. 319.

Materials furnished — Request of owner — Implication. *Fortin* v. *Pound* (B.C.), 1 W. L. R. 333.

Material men — Action to enforce lien—Payment or satisfaction — Appropriation of payment made by contractor to material men with owner's money—Hardship upon owner. *Lemon* v. *Dunsmuir* (B.C.), 5 W. L. R. 605.

Material men — *Action to enforce lien—Payment or satisfaction — Appropriation of payment on account.*]—The defendant Horrobin contracted to build a house for the defendant Henshaw. Horrobin contracted with the plaintiffs to supply the lumber and building materials. Previous to this, Horrobin, who was indebted to the plaintiffs, gave

them a 30-day note for $1,700, on which, about due date, he paid them $1,000 on account, in doing which he overdrew his bank account by about that sum. A few days afterwards he was paid the sum of $1,200 by cheque, stated on its face to be "re Mrs. Henshaw." This cheque Horrobin indorsed over to his bank, making good his overdraft, which he had obtained on the strength of the promise of the defendant Henshaw's payment. The plaintiffs applied the $1,000 payment to the reduction of the overdue note. Horrobin, through injuries received from a fall, was unable to give evidence at the trial, so that the statement by the plaintiffs' accountant that there was no appropriation by Horrobin of the $1,000 to the defendant Henshaw's account, was not contradicted. The plaintiffs placed a lien on the building for $948.45. The trial Judge came to the conclusion that the $1,700 note must have included some of the materials supplied for the house in question, and that the defendant Henshaw was entitled to a credit of some amount which the accounts ought to shew, and dismissed the action as against the defendants:—*Held*, on appeal, that there had been no appropriation by Horrobin, but, on the facts, that, as there had been a shortage in delivery of lumber entitling the defendant Henshaw to a certain credit, the claim had been brought for too much, and there should be a reference.—Observations on the effect of granting a lien to a material man under the amendments of 1906. *British Columbia Mills, Timber, and Trading Co.* v. *Horrobin*, 5 W. L. R. 275, 12 B. C. R. 426.

Lien of sub-contractor — *Time for registering—Completion of work — Substantial work done to improve plant after work supposed to be complete.*] — The plaintiffs were sub-contractors for the installation of the heating system in a hospital, and completed their work, as the workmen thought, early in December, 1908, but, upon a test being made, it was ascertained that the plant was not sufficient to heat the building to the required temperature. As the hospital was then being used, it was impossible to turn off the water and make alterations in the plant, and the alterations could not be and were not made until May. The plaintiffs were acting in good faith; they registered their lien within 31 days from the time of completing the alterations in May—the work then done being for the purpose of increasing the efficiency of the plant so that it would heat the building in accordance with the terms of the guarantee given by the plaintiffs:—*Held*, that it was substantial work, and not work that could be described as being done to remedy slight defects, such as stopping leaks; and therefore the lien was registered in time.—*Day* v. *Crown Grain Co.*, C. R. [1908] A. C. 150, followed. *Whimster* v. *Crow's Nest Pass Coal Co.* (1910), 13 W. L. R. 621.

Mineral claim — *Holder of option — "Owner."*]—The defendant, a mine owner, gave C. an option to buy a mine for $25,000, with liberty to work it, the net proceeds to be applied towards payment. The plaintiffs claimed liens for labour while employed by C. in working it under the agreement. C. did not exercise his option:—*Held*, Irving, J., dissenting, that the plaintiffs were not entitled to liens under the Mechanics' Lien Act. There is no lien given for cooking under the Act. *Anderson* v. *Godsal*, 7 B. C. R. 404.

Misdescription of land — *Right to amend lien—Interest of timber licensee.*]—Where the land sought to be charged by lien is misdescribed in the lien affidavits, the Court will not give leave to amend by correcting the description, as that would in effect be creating a lien, and the statute provides a specific mode for creating a lien.—Section 54 of the Land Act, which vests in the holder of a special timber license all rights of property in all trees, timber, and lumber cut within the limits of the license during the term thereof, does not give any estate in the land itself chargeable under the Mechanics' Lien Act. *Rafuse* v. *Hunter*, *MacDonald* v. *Hunter*, 12 B. C. R. 126, 3 W. L. R. 381.

"Owner" — *Interest in land — Vendor and purchaser.*]—The plaintiffs claimed a mechanics' lien for $633 against the estate and interest of L. and T. in certain lots in the vicinity of New Westminster, for lumber furnished under the following circumstances; T., the registered owner, agreed to sell the land for $1,200 to L.; $50 was paid down, and the balance was to be paid immediately. No agreement in writing as required by the Statute of Frauds was executed, but L. entered into possession of the premises and proceeded to fit up the buildings for the purpose of his business as a butcher for a slaughter house, spending a large sum in so doing, and the lumber in respect of which the lien was claimed was used in building and repairing the slaughter house and putting up a fence on the land:—*Held*, that the lien attached only upon whatever interest L. might have in the land. *Anderson* v. *Godsall*, 7 B. C. R. 404, followed. *British Columbia Timber and Trading Co.* v. *Leberry*, 22 C. L. T. 273.

Preservation of lien — *Work done after final certificate and acceptance of building—Sub-contractor — Alteration in work—Personal liability of owner—Request of husband—Proof of agency.*]—Where a plaintiff claims to revive a mechanic's lien by means of material supplied and work done after the completion of a building, and after the architect has given the final certificate, it is incumbent on him to prove clearly that the material was supplied and the work done in pursuance of and as a part of his original agreement. The defendant built a house, which she supposed was completed on the 15th September, 1909, when her architect accepted it, and 40 days later issued his final certificate. The final payment was made on the 8th November. On the 26th January, 1910, the plaintiff, a plumber, changed a register, the original one not being according to specifications. A month before that the contractor had left Victoria, and the plaintiff knew it. The architect and the defendant were not aware that anything further was to be done, and the defendant did not know, until served with the summons in this plaint to enforce the lien, that the register had been changed:—*Held*, that the change in the register was not to be regarded as part of the work to be done under the plaintiff's sub-contract so as to keep the lien alive.—It was sought to make the defendant personally liable because her husband

had requested the plaintiff to do the work:—*Held*, that the facts shewn were not sufficient to justify a finding that the husband was the wife's agent. *Lawrence* v. *Landsberg* (1910), 14 W. L. R. 477.

Preservation of lien — *Work done by sub-contractor after time for filing lien expired — Attempt to preserve lien — Sub-contractor going on premises in spite of notice forbidding him — Trespass — R. S. Mechanics' Lien Act, ss. 4, 7.*]—Plaintiff, a sub-contractor for plastering, had allowed the time for filing his lien to expire. Under the building contract the plasterer was to "fix up" after the other trades. He now attempted, against the instructions of the defendant, the owner, to do some "fixing up," worked about 4 hours and then filed his lien:—*Held*, that as he was trying to manufacture a lien his action to enforce his lien must be dismissed. *Sherritt* v. *McCallum* (1910), 12 W. L. R. 637.

Time for registration — *Completion of work—Principal and agent—Authority of agent—Limitation — Estoppel—Judgment in personam—Finding of fact—Review by appellate Court.*] — Whether material is supplied in good faith for the purpose of completing a contract, or as a pretext to revive a right to file a lien, is a question of fact for the trial Judge, and his decision on such fact should govern.—Where an agent is invested with general authority, and such authority is subsequently sought to be limited by writing, notice of such subsequent limitation must be conveyed to third parties having dealings with the agent. In the absence of such notice, the principal is estopped from setting up the limitation as against a third party acting *bona fide*.—Whether authority has been conferred on an agent is a question of fact, which may be proved by shewing that it was expressly given; or the acts of recognition by the principal may be such that the authority may be inferred.—When the relationship of debtor and creditor is established on the hearing of a claim for a mechanic's lien, the jurisdiction of the County Court Judge to give a judgment *in personam* arises under s. 23 of the Mechanics' Lien Act Amendment Act, 1909.—*Per* Duff, J.:—A finding of fact, based entirely upon the inference which the trial Judge has drawn from the evidence before him, may be freely reviewed by the Court of Appeal. *Hood* v. *Eden*, 36 S. C. R. 476, at p. 483, referred to.—A principal who, knowing that an agent with a limited authority is assuming to exercise a general authority, stands by and permits third persons to alter their position on the faith of the existence in fact of the pretended authority, cannot afterwards, against such third persons, dispute its existence. *Sayward* v. *Dunsmuir*, 11 B. C. R. 375, 2 W. L. R. 319.

Woodman's lien — *Action for wages—Pursuing both remedies—Estoppel.*] — The plaintiff was employed by G., who had a contract with the defendants, to cut logs on their land, and brought this action in a County Court under the Mechanics' Lien Act for $74.44 for wages. Before the commencement of this action the plaintiff and sixteen others obtained a joint judgment in the same Court against G., under the Woodman's Lien for Wages Act, for the gross amount of their wages. In that action G. and the company were defendants, but the action was discontinued against the company, as they released all claim to the logs seized by the sheriff:—*Held*, that the plaintiff was estopped from proceeding under s. 27 of the Mechanics' Lien Act for the balance of his wages. *Wake* v. *Canadian Pacific Lumber Co.*, 22 C. L. T. 153, 8 B. C. R. 358.

Woodman's lien — *British Columbia law—Wages—Contractor — Pay-roll — Master and Servant.*]—Under the sections of the Mechanics' Lien Act relating to woodmen's wages, a person by requiring only the production of the pay-roll is not relieved of liability to the workmen for the amounts due them from the contractor; he must have produced to him a receipted pay-roll, shewing that the wages were actually paid by the contractor. *Young* v. *West Kootenay Shingle Co.*, 11 B. C. R. 171, 1 W. L. R. 184.

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3. MANITOBA.

Action by sub-contractor against contractor — *Parties — Former owner.*]—A., an owner of property, who has employed a contractor to build a house for him, and, before the filing of a lien under the Mechanics' and Wage Earners' Lien Act by a sub-contractor for his claim against the contractor, has sold and conveyed all his interest in the land to a purchaser, is neither a necessary nor a proper party to the action afterwards commenced to realize the lien, as the plaintiff could not have any relief against him. Although the plaintiff's claim would be limited to the amount due by A. to the contractor, and he would have to prove what that indebtedness was, yet that would not justify making A. a party, as the plaintiff could prove that indebtedness at the trial or on a reference to the Master without having A. before the Court. *Christie* v. *McKay*, 15 Man. L. R. 612, 2 W. L. R. 303.

Action to enforce lien — *Costs of plaintiff and other lien-holders—Percentage of gross amount of all liens—Mechanics' and Wage Earners' Lien Act.*]—Under s. 37 of the Mechanics' and Wage Earners' Lien Act, R. S. M. 1902 c. 109, where there are several successful lien-holders besides the plaintiff, the maximum of costs, exclusive of disbursements, that can be allowed to the plaintiff is 25 per cent. of the total amount awarded to him and the other lien-holders, reduced by the total sum of costs awarded to the other lien-holders, so that in no event shall the defendant have to pay in costs, exclusive of disbursements, a sum greater than 25 per cent. of all sums awarded against him to lien-holders in the action. *McDonald Dure Lumber Co.* v. *Workman*, 18 Man. L. R. 439, 10 W. L. R. 87.

Action to enforce lien — *Pleading—Defence—Time for filing lien and instituting proceedings—Right to lien.*]—Under s. 45 of the Mechanics' and Wage Earners' Lien Act, R. S. M. 1902 c. 110, and the form No. 7 in the schedule of forms appended to the Act, it is permissible for a defendant, in an action under that Act, to plead that the lien asserted by the plaintiff was not filed, and that the proceedings had not been instituted, within the time required by law, but not that the

plaintiff was not entitled to said lien, which is only an allegation of a conclusion of law. *Imperial Elevator Co.* v. *Welch*, 4 W. L. R. 51, 16 Man. L. R. 136.

Costs — "*Actual disbursements*" — *Counsel fees.*]—Counsel fees not shewn to have been actually paid should not on taxation of costs be treated as actual disbursements within the meaning of s. 37 of the Mechanics' and Wage-Earners' Lien Act, R. S. M. 1902 c. 110.—*Cobban Manufacturing Co.* v. *Lake Simcoe Hotel Co.*, 5 O. L. R. 447, 2 O. W. R. 310, followed. *Leibrock* v. *Adams*, 7 W. L. R. 700, 17 Man. L. R. 575.

Costs subsequent to judgment — *Taxation* — *Powers of taxing officer.*] — "Costs" in s. 37 of the Mechanics' and Wage Earners' Lien Act, R. S. M. 1902 c. 110, refers to the costs up to and including the trial, and means the costs which are allowed by the Judge at the hearing and entered in the judgment and the provisions of that section limiting the costs to be allowed do not apply to the subsequent costs of sale and proceedings before the Master; and where the judgment pronounced empowered the Master to tax and add to the plaintiffs' claim the costs of the subsequent proceedings, and the Master under it allowed the ordinary costs of a sale conducted in his office, and there was no appeal from the judgment, the Court could not on an appeal from the taxation interfere with the provisions of the judgment. The alternative procedure provided by s. 31 cannot be assumed to be any less expensive than the ordinary, so as to constitute a case for the application of s. 39, and at any rate the question of the least expensive course is one to be dealt with by the trial Judge, and one with which, without special direction in the judgment, the taxing officer has no right to interfere. *Humphrey* v. *Cleave*, 24 C. L. T. 374, 15 Man. L. R. 23.

Lien of material man — Right to maintain claim as against owner—Payment—Waiver of lien—Acceptance of promissory note—Agreement not to file lien. *John Arbuthnot Co.* v. *Winnipeg Manufacturing Co.* (Man.), 4 W. L. R. 48.

Lien of sub-contractor — Oral agreement by owner with sub-contractor—Work done on faith of agreement—Personal judgment against owner. *Wasdell* v. *White* (Man.), 4 W. L. R. 562.

Lien of sub-contractor — Settlement between contractor and owner—Payment in cash and by promissory note—Time at which lien comes into existence—Mechanics' Lien Act, s. 32—Construction. *McCauley* v. *Powell*, 7 W. L. R. 443.

Lien of "workman" for wages—*Employment "by the day"—S. 3—Priority.*]—A workman employed at a rate per hour is not a workman employed "by the day" within the meaning of s. 3 of the Builders' and Workmen's Act, R. S. M. 1902, c. 14, and can have no direct claim against the proprietor, under s. 4 of the Act, for his wages earned in the erection of a building by his employer for the proprietor. *Dunn* v. *Sedziak*, 7 W. L. R. 563, 17 Man. L. R. 484.

Manitoba Mechanics' and Wage Earners' Lien Act, s. 22 — *Certificate of lis pendens, form of—Commencement of action to enforce lien—Time—Preservation of lien.*]—Under s. 22 of the Mechanics' Lien and Wage Earners' Lien Act, R. S. M. 1902 c. 110, in order to preserve a mechanics' lien, it is necessary, besides commencing an action, to register a certificate of *lis pendens* in respect thereof, according to form No. 6 in the schedule, in the proper registry or land titles office, within the time prescribed, and a certificate that some title or interest in the land is called in question, without any reference to a mechanics' lien, is not a sufficient compliance with the statute.—Although the lien may be registered before commencing or during the progress of the work, yet an action thereon cannot be commenced before completion. *Curtis* v. *Richardson*, 18 Man. L. R. 519, 10 W. L. R. 310.

Materials furnished — *Drawback* — *Non-completion of work* — *Occupation of building—Estoppel.*]—Persons supplying materials to the contractor for the building of a house are not entitled to the benefit of the provisions of s. 12 of the Mechanics' and Wage Earners' Lien Act, R. S. M. 1902 c. 110, by which, in the event of the contract not being completed, wage earners may enforce liens against the percentage of the contract price which the owner is required to hold back under s. 9 of the Act; but, if the contract price is payable by instalments, the general lien-holders may enforce their liens *pro rata* to the extent of any earned instalments in so far as the same remain unpaid in the hands of the owner, although the work is not completed. *Brydon* v. *Lutes*, 9 Man. L. R. 465, followed. 2. The occupation of the uncompleted house by the owner, and the mortgaging of it, for a sum to be paid to the contractor in accordance with one of the terms of the contract, do not estop the owner from setting up against the lien-holder that the house has not been completed, and that, consequently, no more money is due under the contract. *Pattinson* v. *Luckley*, L. R. 10 Ex. 330, and *Sumpter* v. *Hedges*, [1898] 1 Q. B. 673, followed. *Black* v. *Wiebe*, 15 Man. L. R. 290, 1 W. L. R. 75.

One claim of lien registered against two lots — *Separate houses on each lot—Separate contracts — Registration too late as regards building on one lot, not saved by later operations on the other.*]—Action to enforce mechanics' liens. An agreement was made with plaintiffs to instal plumbing and heating in two houses, one to be built on each lot, for $820 each. The work on A. was finished on 29th July, on B. on 15th January, following. While plaintiffs were working on A, it was bought by H. who, 30 days after completion of plaintiffs' work on A, paid the defendant the full purchase price, having no notice of any lien. On 1st February, plaintiffs registered a lien against both lots:—*Held*, the contract was divisible, and that there was no lien against A. *Lee* v. *Hill*, 11 W. L. R. 611.

One lien against two owners — *Encroachment on wrong lot.*]—A mechanic's lien registered against two lots of land owned by different persons in respect of work done upon two houses, one on each of the lots, on the order of one of the owners and for an

amount claimed to be due for the work on both houses, without apportioning the amount as between the two, cannot be enforced under the Mechanics' and Wage Earners' Lien Act, 1898, nor can effect be given to the lien against one of the lots only for the proper amount. *Currier* v. *Friedrick*, 22 Gr. 243, *Oldfield* v. *Barbour*, 12 P. R. 554, and *Rathbun* v. *Hayford*, 87 Mass. 406, followed. *Fairclough* v. *Smith*, 21 C. L. T. 447, 13 Man. L. R. 509.

Payments by owner to workmen — Deduction from percentage to be retained by owner. *McArthur* v. *Martinson* (Man.), 3 W. L. R. 2.

Payments made by owner to contractor without notice of liens previously attached — Contract — Credit — Final certificate of architect withheld—Effect on liens—Liquidated damages for delay in completion—Deduction from contract price—Extension of time—Onus. *Lundy* v. *Henderson*, 9 W. L. R. 327.

Reserve of percentage of contract price — *Payments to material men and wage-earners out of the reserve—Liability of owner for full amount of reserve.*]—The owner of a building in course of erection, when the contract price exceeds $15,000, being required by s. 9 of the Mechanics' and Wage Earners' Lien Act, R. S. M. 1902 c. 110, to keep back fifteen per cent. of the amounts from time to time earned by the contractor and retain such percentages until thirty days after the completion or abandonment of the contract for the benefit of sub-contractors who may become entitled to file liens under the Act, must reserve such percentages at his peril, and cannot afterwards, in an action by a person who has supplied materials, deduct therefrom any payments he may have made under s. 10 of the Act for wages or materials in order to prevent the filing of liens therefor, as s. 19 at the end expressly says in effect that payments made under it are not to "affect the percentage to be retained by the owner as provided by" s. 9.—*Carroll* v. *McVicar*, 15 Man. L. R. 379, followed. *McArthur* v. *Martinson*, 3 W. L. R. 2, 16 Man. L. R. 387.

Right to lien — *Discount of promissory note.*]—Notwithstanding s.-s. (*c*) of s. 24 of the Mechanics' and Wage Earners' Lien Act, R. S. M. 1902 c. 110, if a person claiming a lien under the Act takes a promissory note for the amount, and discounts it, he thereby forfeits his right to a lien. *Arbuthnot (John) Co.* v. *Winnipeg Manufacturing Co.*, 4 W. L. R. 48, 16 Man. L. R. 401.

Right to lien — *Discount of promissory note.*]—The provision in s.-s. (*c*) of s. 24 of the Mechanics' and Wage Earners' Lien Act, R. S. M. 1902 c. 110, that the acceptance, by a person claiming a lien under the Act, of any promissory note for the claim shall not merge, waive, pay, satisfy, prejudice, or destroy any lien created by the Act, unless the lien-holder agrees in writing that it shall have that effect, does not protect the lien-holder if he discounts or transfers such note, and in that event his lien is lost. *Edmonds* v. *Tiernan*, 21 S. C. R. 406, followed. *National Supply Co.* v. *Horrobin*, 4 W. L. R. 570, 16 Man. L. R. 472.

Sub-contractor — *Liability of owner—Failure to retain percentage—Entire contract—Time for filing lien.*] — Where nothing is payable under a building contract until the whole of the work is completed, but the owner voluntarily makes payments to the contractor as the work progresses, to the extent of the value of the work done, a sub-contractor who has not been paid is entitled, under s. 9 of the Mechanics' and Wage Earners' Lien Act, R. S. M. 1902 c. 110, as against the owner, to a lien for the amount due him, to the extent of 20 per cent. of such payments. *Russell* v. *French*, 28 O. R. 215, followed. The plaintiff's claim consisted of charges for different jobs, all in his line of business, but ordered at different times, and, as to the first job, if considered separately, his lien was not filed within the time required by the statute: —*Held*, that, in such circumstances, a mechanic should not be required, in order to secure payment, to file a lien after completing each piece of work, and that filing his lien after he has completed all of his work is sufficient. *Carroll* v. *McVicar*, 15 Man. L. R. 379, 2 W. L. R. 25.

Time for filing — *Completion of contract—R. S. M. c. 110, s. 36, limiting appeal to Supreme Court, ultra vires—R. S. C. Act, 1867, ss. 92 and 101.*] — The plaintiff quit work on an elevator, it being understood that he should return and finish his contract when the elevator was far enough advanced to allow him to test the machinery which he had placed in it. When the plaintiff's men returned to finish the contract they were stopped by the company. Then the plaintiff registered a mechanic's lien within thirty days from the attempt to finish his contract, but more than thirty days after his last work had been done on the elevator:—*Held*, upon the evidence, that the lien was registered in time and could be enforced:—*Held*, upon appeal, that the time limited for the registration of liens under R. S. M. 1902, c. 110, s. 29, does not commence to run until there has been such completion of the contract as would entitle the contractor to maintain an action for the whole amount due him:—*Held*, also, that R. S. M. 1902, c. 110, s. 36, which enacted that the judgment of the Court of King's Bench of Manitoba, should be final, in suits relating to liens, and no appeal should lie therefrom, is *ultra vires;* the right of appeal to the Supreme Court of Canada being a matter within the jurisdiction of the Parliament of Canada under the B. N. A. Act, 1867, s. 101, is regulated by the R. S. C. c. 139, ss. 35 and 36, even in matters placed by s. 92 of that Act, within the exclusive jurisdiction of the Provincial Legislature. Judgment of the Supreme Court of Canada, 39 S. C. R. 258, affirmed; judgment of the Court of King's Bench for Manitoba, 16 Man. L. R. 308, 3 W. L. R. 545, discharged; judgment of Richards, J., at trial, 2 W. L. R. 142, restored. *Day* v. *Crocs Grain Co.*, C. R., [1908] A. C. 150.

Time for registration — Time when last work done and last materials supplied—Trivial but not merely colourable work—*bona fides* — Complete contract — Separate contracts. *Steinman* v. *Koscuk* (Man.), 4 W. L. R. 514.

Unpaid vendor — *Lien subject to claim of* —*Notice.*]—The purchaser of a lot of

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land under an agreement of sale, fixing 15th August, 1901, for payment of the purchase money, was allowed to enter into possession on 15th June, 1901, and to commence building on the land. He continued the expenditure of money upon the premises after the date fixed for payment, with the knowledge and concurrence of the vendors, but eventually abandoned the purchase, without having paid anything to the vendors. They then notified him that as he had not complied with the terms of the purchase as to time, his interest had ceased. The plaintiff's claim was for a lien on the interest of the purchaser in the property, for work done by him in the erection of the building, but he submitted to the lien of the vendors for the full amount of the purchase money of the land:—*Held*, that the vendors could not, under the circumstances, put an end to the rights of the purchaser by giving such a notice, and that, apart from the provisions of s. 11, s.-s. 2, of the Mechanics' and Wage-Earners' Lien Act, 61 V. c. 29, the plaintiff was entitled to the lien asked for, with the usual inquiries and directions. *Hoffstrom* v. *Stanley*, 22 C. L. T. 337, 14 Man. L. R. 227.

Vict. c. 29 (Man.) — *Priorities—Lienholders—Mortgagees — Notice—Subrogation —Unpaid vendor — Defects in statement of lien registered—Costs—Counsel fees.*] — At the trial of an action under the Mechanics' and Wage-Earners' Lien Act, 61 V. c. 29 (Man.), which was not defended by the debtor, it became necessary to determine the respective rights and priorities as between the plaintiff, whose claim was for work and labour, another lienholder whose claim was for lumber and other materials supplied at different dates, and several mortgagees. These parties had been served pursuant to s. 32 and s. 27 (2) of the Act with notice of the trial, but had not been otherwise made parties to the action:—*Held*, that, although an account for materials supplied may consist of items for different lots supplied at different dates on separate, and distinct orders, the lien filed within the required time after the delivery of the last lot will be good to cover all the orders if given in pursuance of a general arrangement previously entered into. *Morris* v. *Tharle*, 24 O. R. 159, followed. *Chadwick* v. *Hunter*, 1 Man. L. R. 39, distinguished. — 2. The claims of subsequent incumbrancers and other lienholders may be disposed of at the trial without their being made parties to the action, and although the notice of trial has been served after the time limited for bringing the action. *Cole* v. *Hall*, 13 P. R. 100, followed.—3. The lienholder who registers his lien in time has priority, from the date of the commencement of the work or from the placing of the materials, over every conveyance, mortgage, or charge made thereafter, although registered first, and such priority is not affected by s. 11 of the Act, which applies only to payments or advances made subsequently to the taking effect of the lien under conveyances or mortgages otherwise having priority.—4. The effect of s. 17 of the Act is, that only substantial compliance with the directions as to the contents of the claim and the registration of it is required, and no failure in such compliance, in however substantial a degree, is to invalidate the lien unless some other party is prejudiced thereby, and then only to the extent to which he is thereby prejudiced.—5. The lien for materials supplied as against a mortgage has priority over the mortgage only to the extent of the materials placed on the ground before the mortgage money was advanced.—6. Under s. 14, if a mortgagee has notice in writing of the fact that there is an indebtedness for which a lien may be claimed, that is *prima facie* notice of the lien itself, and he cannot claim priority for moneys advanced after such notice.—7. The first mortgagee having applied his last advance in payment of the purchase money of the lots to the unpaid vendor, who then conveyed the land in fee to the defendant owner, and, having thus secured the title to the property, claimed to be entitled to be subrogated to the position of the original vendor in respect of such purchase money; but, having had actual notice of one of the liens and constructive notice of the other before making this payment, following *Parry* v. *Wright*, 1 Sim. & Stu. 369, 5 Russ. 142, that he could not have priority over either lienholder for such advance. *Brown* v. *McLean*, 18 O. R. 535, and *Abell* v. *Morrison*, 19 O. R. 672, distinguished.—8. Counsel fees actually paid are to be included among the "actual disbursements" referred to in s. 37 of the Act, whether or not the counsel is a solicitor or a partner of a solicitor in the cause. *Maguru* v. *Maguru*, 10 P. R. 570, followed. *Robock* v. *Peters*, 20 C. L. T. 262, 421, 13 Man. L. R. 124.

Work done on building — Authority of husband of owner—Work reasonably well done—Priorities—Mortgagees—Other lienholders — Evidence. *Gillies* v. *Gibson* (Man.), 7 W. L. R. 243.

Workman — *Liability of owner—Failure to retain percentage—Pay list—Builders' and Workmen's Act (Man.) — "Claim" under s. 2.*]—1. A workman under a contractor engaged in the repair of a building for the owner is entitled, under ss. 9 and 12 of the Mechanics' and Wage Earners' Lien Act, R. S. M. 1902 c. 110, to a lien on the building for his unpaid wages, to the extent of the 20 per cent. of the payments made that the owner should have held back from the contractor but did not. *Carroll* v. *McVicar*, 51 Man. L. R. 379, followed.—2. A workman who has brought his action under the above Act, can not in that action avail himself of the personal remedy given by the Builders' and Workmen's Act, R. S. M. 1902 c. 14, against the proprietor, for the full amount of his claim in cases where a pay list is not kept, and the proprietor neglects to see that the workmen are paid.—3. The word "claim" in the second paragraph of s. 4 of the first named Act, providing that no lien shall exist under the Act for any *claim* under 820, means the amount actually due to the claimant under his contract or employment, and not the amount to which his right or remedy against the land may on inquiry be found to be limited. *Phelan* v. *Franklin* 15 Man. L. R. 520, 2 W. L. R. 29.

Workman for material man.] — *Held*, that plaintiff, a blacksmith working for defendant A., who was quarrying stone on the property of his co-defendant B., with which to build a lime-kiln, is not entitled to a lien. *Allen* v. *Harrison*, 9 W. L. R. 198.

See RAILWAY—STAY OF PROCEEDINGS — WRIT OF SUMMONS.

4. North-West Territories.

Statement of claim — Amendment — Time—Judgment. *Nelson* v. *Brewster* (N. W.T.), 3 W. L. R. 362.

Time for registering lien — Time of completion of work—Repairing trifling defects—Colourable work to save lien. *Kilbourne* v. *McEwan* (N.W.P.), 6 W. L. R. 562.

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5. Nova Scotia.

Judgment for enforcement of lien—*Prior incumbrancers—Necessity for notice to —Amendment of judgment—"Mine"—"Appurtenances."*]—An application to set aside an order for judgment under the Mechanics' Lien Act was made on the ground that the order was taken without notice to prior incumbrancers. These prior incumbrancers had been served with notice of trial under s. 31, but did not attend the trial. It was, therefore, contended that it was not necessary to give any further notice to them:—*Held*, that the provisions of ss. 28 and 31 required that notice of taking the order for judgment should be given to prior incumbrancers, so as to protect their rights.—It is competent for a Judge to amend an order granted on judgment after trial, when he sees that the order does not correctly represent his decision, or exceeds in terms what has been decided.—The word "mine" used in the Mechanics' Lien Act, R. S. N. S. c. 171, includes areas and the deposit of ore, and the word "appurtenances" refers to articles of movable property used in working the mine. *Pelton* v. *Black Hawk Mining Co.*, 40 N. S. R. 385.

Lien of sub-contractor — *Special agreement between owner and contractor — Failure to retain percentage — Absence of notice — Ascertainment of price—Time for commencement of lien.*]—B. contracted with the defendant company to transfer to them a quantity of land, and to erect and equip a mill and to do other work, for an agreed sum in bonds and shares of the company and other considerations. It was subsequently agreed, orally, that a portion of the proceeds of the bonds and shares transferred to B. should be retained by a trust company as security for the performance by B. of his contract for the erection of the mill, to be paid out as the work progressed. In an action against the company by the subcontractor by whom the machinery for the mill was supplied:—*Held*, that, in the absence of notice, the company were not liable to the plaintiff for failure to retain out of the moneys paid to B. the percentage required to be retained under the provisions of the Mechanics' Lien Act; that the transaction which took place when the title to the property was transferred to the company, and the bonds and shares, the consideration therefor, were delivered to B., was not one within the provisions of the Mechanics' Lien Act, s. 8, and that the company were not required to retain anything on that date for the benefit of future sub-contractors; that, as the bonds and shares constituted the price or consideration not only for the construction of the mill, but for the land and other property transferred to the company, the price to be paid for the construction of the mill could not be ascertained so as to enable the claim for work or machinery to be enforced against the property; that the lien for goods or materials placed or furnished under s. 3 of the Act, commences when the goods or materials are so placed or furnished, and that, as against the owner, this cannot be said to have occurred until they have reached his property. *Smith Co.* v. *Sissiboo Pulp and Paper Co.*, 36 N. S. R. 348.

Lien of sub-contractor — *Validity — Payment—Amount due by owner to contractor.*]—W. & M., sub-contractors, supplied work and material to D. & G., other subcontractors, for the defendants, and D. & G. failed to pay them. Within the time allowed by the Act, W. & M. registered a lien on the property of the defendants. D. & G. had been already paid in full by R., the contractor with the defendants, but the defendants held money due R. on the contract:—*Held*, that under the Mechanics' Lien Act, R. S. N. S. c. 171, the plaintiffs' lien was valid, and that the funds due R. and in the hands of the defendants were liable. *Wood & McBeth* v. *Bank of Montreal*, 40 N. S. R. 317.

Machinery furnished — *Contract price.*]—Under the Mechanics' Lien Act of Nova Scotia, R. S. N. S. 1900 c. 171, a lien for machinery for a mill does not attach until it is delivered, and if the contractor for building the mill has then been fully paid, there is nothing upon which the lien can operate, as, by s. 6 of the Act, the owner cannot be liable for a sum greater than that due to the contractor. B., holder of more than half the stock of a pulp company, for which he had paid by cheque, and also a director, offered to sell to the company land to build a mill, and furnish working capital, on receipt of all the bond issue and cash on hand. The offer was accepted, and all the stock issued as fully paid up was deposited with a trust company, and the cash, his own cheque, and the price of five shares handed to B. The stock was sold, and from the proceeds the land was paid for, the working capital promised given to the company, and the balance paid to B. from time to time as the mill was constructed. The machinery was supplied by an American company, but when it was delivered all the money had been paid out as above: — *Held*, affirming the judgment appealed from, 36 N. S. R. 348, that as all the money had been paid before delivery, the company were not liable under the Mechanics' Lien Act to pay for the machinery.—*Held*, also, that s. 8 of the Act, which requires the owner to retain 15 per cent. of the contract price until the work is completed, did not apply, as no price for building the mill was specified, but the price was associated with other considerations from which it could not be separated. *S. Morgan Smith Co.* v. *Sissiboo Pulp & Paper Co.*, 24 C. L. T. 283, 35 S. C. R. 93.

Mortgage to director of "owner" company — *Indemnity against indorsements—Priority over lien—Preference — Trial — Validity of claims—Pleading.*]—A mortgage of the real estate of the defendant company was given by the directors to S., one of the directors, to secure him and his co-directors against their indorsements on the notes of the company which had been

made to raise money for the purposes of the company. This mortgage was recorded prior to the registration under the Mechanics' Lien Act of a lien by the plaintiff, an employee of the company, for work done for the company. The trial Judge held that S. was an "owner" under that Act, and that the security so taken and held by S. for the protection of the company could not be given priority over the plaintiff's lien for wages:—*Held*, on appeal, that the mortgage was valid, and its prior registration must prevail over the lien of the plaintiff; that, under a by-law authorising the directors to exercise all the powers of the company excepting those which were by the charter or by general law conferred exclusively upon the stock-holders, the directors could mortgage the corporate property; that the mortgage was not invalid merely because it was given to indemnify the directors against their indorsements on the notes, or because, in the result, it might give the directors a preference over the plaintiff and other creditors of the company, or because of any other circumstances appearing in this case. Appeal allowed, and judgment varied, so far as it gave the lien of plaintiff priority over the mortgage.—*Semble*, that the trial Judge in proceedings under the Mechanics' Lien Act may inquire into the validity of the claims of all parties to the action and all parties served with notice of trial, irrespective of the pleadings. *McDonald* v. *Consolidated Gold Lake Co.*, 40 N. S. R. 363.

Practice in action to enforce — *Statement of claim—Service out of jurisdiction.*]—The plaintiff registered a mechanic's lien against the defendant company, and subsequently filed his statement of claim. He obtained an order for the service of the statement of claim out of the jurisdiction, and service was effected in pursuance thereof. The defendant company applied to have the order and service thereunder set aside, on the ground that there was no statutory authority therefor; s. 28, s.-ss. 1, 2, 6, of the Mechanics' Lien Act, R. S. N. S. c. 171:—*Held*, that the service was good by reason of s. 28 of the Act, the ordinary procedure of the Court with respect to the service of a writ having been followed in serving the statement of claim. *Macdonald* v. *Consolidated Gold Mining Co.*, 21 C. L. T. 482.

Sub-contractor — *Material man — Notice to owner—Failure to retain percentage—Identification of premises.*]—C. & W., who were awarded a contract to place heating apparatus in a hotel building owned by the defendant D., ordered materials required from the plaintiffs in a letter stating, "We have secured contract for hotel which requires above goods. The sub-contract was made on the 29th September, 1902, and the final payment was made by D. to the principal contractor on the 21st November, 1902, when the work was all done, without retaining 15 per cent. for 30 days, as required by the Mechanics' Lien Act, R. S. N. S. 1900 c. 171, s. 8:—*Held*, that the letter sufficiently identified the building for which the goods were required; and, distinguishing *Smith* v. *Sissiboo Pulp Co.*, 30 N. S. R. 348, that D. was required to retain the percentage whether he had notice of the sub-contract or not, and that he paid it at his own peril, if there was a sub-contractor in existence who was prejudiced by the payment. *Dominion Radiator Co.* v. *Cann*, 37 N. S. R. 237.

Sub-contractors — *Proceedings to realise lien—Time.*]—One Rhuland had a contract with Wright for the construction of some houses. Dempster & Co. were the sub-contractors, and supplied Rhuland, on his credit, with materials for the work, the whole of which was delivered before the 28th April, 1900. On the 18th May, 1900, Dempster & Co. registered a lien against the property under the Mechanics' Lien Act, 1899, but no proceedings were instituted by them to realise the claim until the 13th August, 1900. On the application to set aside Dempster's lien:—*Held*, that the word "contract" in s. 20 of the Act means the original contract with the owner, and not the contract between the contractor and the sub-contractor. If no claim had been registered, Dempster & Co. could have registered one at any time within thirty days after the completion of that contract. In view of s. 9, an abandonment would be equivalent to a completion, and no claim could be registered after thirty days from the abandonment of a contract. In this case no period of credit was mentioned in the claim, and Dempster swore in the affidavit attached to the claim, that none was given, nor was the lien claimed upon materials or machinery, as provided by s. 2), s.-s. 2. The difficulty arose in construing the words "after the work or service has been completed" in the cases of sub-contractors. *Dempster* v. *Wright*, 21 C. L. T. 88.

Workmen of sub-contractor — *Amount due to contractor—Payment out of percentage retained.*]—R. had a contract from the D. Co.; H. was a contractor under him; and the plaintiff was a sub-contractor under H.—H. abandoned the contract when it was only partly performed. The sum of $1,691.25 due him was paid into Court by the company, but it did not appear whether or not this sum included the 15 per cent. which the owner is required to retain for 30 days. The plaintiff claimed to be paid out of this fund, and so did his workmen. There were other claimants. The trial Judge directed that the amount due to the workmen of the plaintiff should be a first charge on this fund:—*Held*, on appeal, that under s. 7 of the Mechanics' Lien Act, the lien is limited to the amount owing to the contractor or sub-contractor for whom the work has been done, but the plaintiff's workmen, under the Act (s. 11, s.-s. 4), occupied a better position than the plaintiff, and were entitled to be paid out of the 15 per cent. required by s. 8 to be retained. *McDonald* v. *Dominion Iron and Steel Co.*, 40 N. S. R. 465.

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6. Ontario.

Action — *Affidavit verifying statement of claim — Particulars of residence.*]—In the case of an action under the Mechanics' and Wage-Earners' Lien Act, R. S. O. 1897 c. 153, the affidavit verifying the statement of claim, required by s. 31 (2), may be made by the plaintiffs' solicitor as agent. The plaintiffs were day labourers, who did work for the defendants on a railway in an unorganised district, and it was set forth in the

statement of claim that they resided in that district: the name and address of the plaintiffs' solicitor was also stated therein:—*Held*, that it was not necessary to give more precise particular of the places of residence of the plaintiffs. *Crerar* v. *Can. Pac. Ry. Co.*, 23 C. L. T. 171, 5 O. L. R. 383, 2 O. W. R. 187.

Action — *Parties — Execution creditor —Incumbrance arising pendente lite — Notice of trial—Judgment—Vacating.*]—Under s. 36 of the Mechanics' and Wage-Earners' Lien Act, R. S. O. 1897 c. 153, it is the persons who are incumbrancers at the time fixed for service of notice of trial, and those only, who are required to be served, service of notice of trial on them being the mode by which incumbrancers not already parties to the proceedings are brought in. After service of notice of trial in an action to enforce a mechanic's lien against the lands of the defendants, but before the trial, the petitioners, who were judgment creditors of the defendants, placed a *fi. fa.* against goods and lands in the hands of the sheriff of the county in which the lands of the defendants lay. The petitioners were not served with any notice of trial, and did not appear at the trial nor prove any claim, but the judgment given upon the trial recited that it appeared that they had some lien, charge, or incumbrance on the lands, created subsequent to the commencement of the action, and declared that the plaintiffs and others were entitled to liens:—*Held*, that the names of the petitioners and all reference to their claims should be stricken out of the judgment. *Haycock* v. *Sapphire Corundum Co.*, 24 C. L. T. 50, 7 O. L. R. 21, 2 O. W. R. 1177.

Action begun by statement of claim —*Service out of Ontario — Jurisdiction to allow.*]—There is no authority in the Courts of this province to allow service out of Ontario of a statement of claim filed as the initial step in an action. In *Re Busfield, Whaley* v. *Busfield*, 32 Ch. D. 123, followed. Such service is not a matter of practice, but of jurisdiction, and Rule 3 does not enable the Court to apply the analogous procedure as to writs of summons.—*Semble*, that if there were power to allow service of such a statement out of Ontario, it could not be allowed *nunc pro tunc* after it had been effected without an order. Service out of Ontario of a statement of claim, the initial proceeding in an action to enforce a mechanics' lien, under R. S. O. 1897 c. 153, upon foreigners resident in a foreign country, and all subsequent proceedings, set aside. History of the legislation in Ontario as to service out of the jurisdiction. *Pennington* v. *Morley*, 22 C. L. T. 183, 3 O. L. R. 514, 1 O. W. R. 246.

Action to enforce lien — *Judgment—Sale of land—Arrears of taxes—Vendor and purchaser — Rescission of sale—Plaintiffs' right to costs of resisting appeal—Costs of sale proceedings — Costs of lien-holders — Priority — Master's report — Appeal.*]—The right, title, and interest of certain parties under a lease of lands was offered for sale by the Court, pursuant to a judgment in a mechanics' lien action. The lands were, at the time of the sale, subject to a tax imposed by the Supplementary Revenue Act, 1907, though this was not known either to the vendors or purchaser:—*Held*, that the purchaser took subject to the tax, and the utmost relief to which he was entitled was to have the contract wholly rescinded. — Where, in a mechanics' lien action, the defendants unsuccessfully appealed to a Divisional Court from the judgment at the trial, upholding the liens:—*Held*, *per* Anglin, J., that the Master upon a reference for sale of the lands, with a direction that the proceeds of the sale should be applied in payment of the liens and incumbrances, as the Master should direct, with subsequent interest and costs to be computed and taxed by him), should have added to the amount allowed the plaintiffs the costs of the appeal successfully opposed by them; also that, the judgment in the action having directed the Master to compute and tax subsequent interest and subsequent costs, the Master should have taxed to the plaintiffs their costs in connection with the sale proceedings, the same not exceeding 25 per cent. of the judgment recovered (R. S. O. 1897 c. 153, s. 41), and not merely the disbursements; that the Master properly directed that the costs not only of the plaintiffs, but also of the other lien-holders, should be paid in priority to the judgment debts of both for principal and interest; and that an appeal lies from the Master's report in a mechanics' lien action. *Wesner Drilling Co.* v. *Tremblay*, 18 O. L. R. 439, 13 O. W. R. 544, 1017.

Action to enforce lien — *Statement of claim—Computation of time for filing — Commencement of action—Long vacation.*]—The 90 days allowed by s. 24 of the Mechanics' Lien Act, R. S. O. 1897 c. 153, for commencing an action to realise a claim, are not to be computed exclusively of long vacation. Although such an action is begun by a proceeding called a "statement of claim," the Rules of Court with respect to the filing of the statement of claim in an action begun by writ of summons, are not applicable to it.—Where the last of the materials in respect of which the plaintiffs claimed a lien were furnished on the 30th May, 1907, and the lien was registered within a month, but the action for the enforcement was not begun by the filing of a statement of claim until the 23rd September, 1907, it was held that the lien had ceased to exist. *Canada Sand Lime & Brick Co.* v. *Ottaway*, 10 O. W. R. 686, 788, 15 O. L. R. 128.

Action to enforce lien — Statement of claim — Motion to set aside—Affidavit sworn before plaintiff's solicitor—Rule 322 —Expiry of time for filing statement of claim—Practice. *Canada Sand Lime and Brick Co.* v. *Poole*, 10 O. W. R. 1041.

Action to enforce lien — Statement of claim—Particulars—Unnecessary motion —Practice—Costs. *Rowlin* v. *Rowlin*, 9 O. W. R. 397.

Assignment — *Debt "due" — Consideration—Lien-holder — Priority—When lien attaches—Mechanics' Lien Act, 1897 c. 153, ss. 4, 13—Judicature Act, s. 8 (5).*]—E., a sub-contractor, commenced work on the 19th August, 1903, completed it on the 11th October, 1904, and registered his lien on the 12th October, 1904. On the 14th November, 1905, the contractor by whom E. was employed assigned $2,588.32 of the amount "due" to him

from the owner of his contract, to D., another sub-contractor, who duly gave notice thereof to the owner. At the time of this assignment $2,588.32 had been earned under the contract, but it did not become payable until the giving of the architect's certificate on the 14th November, 1904:—*Held*, that under the Mechanics' Lien Act, s. 4, E.'s lien related back to the commencement of his work, and under s. 13 it was entitled to priority over D.'s assignment, for the full amount of the lien, and not merely for that portion thereof actually earned by E. up to the date of the assignment:—*Held*, also, that the assignment was valid, and bound the debt assigned, though it was not payable at the date of the assignment.—*Held*, also, that a debt due and owing is a sufficient consideration for an assignment of a chose in action, and that the assignment was, therefore, not revocable or impeachable as being voluntary. *Ottawa Steel Castings Co.* v. *Dominion Supply Co.*, 25 C. L. T. 58, 5 O. W. R. 161.

Claim of lien — *Validity — Statement of claimant's residence and description of goods supplied—Sufficiency of—Date of lien —Owner—Belief of claimant.*]—A claim for a lien under the Mechanics' and Wage-Earners' Lien Act, R. S. O. 1897 c. 153, was made out on a printed form, and was against the contractor for the erection of certain buildings, whom the claimant believed to be, although another person was the owner. The claim was for "material supplied" on or before a named date, no description of the materials being given and no mention being made of the commencement of the lien, words for that purpose contained in the printed form having been struck out. The claimant's residence was given as "of Toronto.;" —*Held*, (1) that the claimant's residence was sufficiently designated; (2) that the claim against the contractor was sufficient, the Act merely requiring it to be made against the owner or person believed to be the owner; (3) that it was not necessary to give the date of the commencement of the lien; and (4) that, while the statement "materials supplied" was not a substantial compliance with the Act, yet under s. 19 it did not invalidate the lien, no prejudice being occasioned thereby; and that the lien was therefore valid. *Barrington* v. *Martin*, 12 O. W. R. 324, 16 O. L. R. 635.

Claim of material man or sub-contractor — *Time when last material furnished—Material furnished under contract—Mechanics' Lien Act, ss. 4, 22.*]—Plaintiffs furnished material to defendant under a contract, the last delivery thereon being on 16th September. Between 1st August and 8th October, plaintiffs furnished other material. Lien proceedings were commenced on 4th November. The action was on a claim for a mechanics' lien on defendants' property for $1,125.98, tried before J. A. C. Cameron, an official referee, who gave judgment for plaintiff, holding him entitled to a lien for $1,075.17. Defendants appealed to a Divisional Court on ground that action had not been commenced within 30 days from delivery of materials therein mentioned to amount to $1,700:—*Held*, that there is no lien as to material supplied under the contract, but there is as to the other material. *Lindop* v. *Martin* (1883), 3 C. L. T. 312, and *Morris* v. *Tharle* (1893), 24 O. R. 159, distinguished. *Rathbone* v. *Michael* (1900), 14 O. W. R. 389, 19 O. L. R. 428. Afterwards on application therefor the Divisional Court re-opened the judgment, received further evidence, reversed their former judgment and dismissed defendants' appeal. — Court of Appeal affirmed the later decision of the Divisional Court and dismissed the appeal with costs. *Rathbone* v. *Michael* (1910), 15 O. W. R. 639, 20 O. L. R. 503.

Claim of owner against contractor —Lien-holders — Pleading — Amendment— Percentage of value of work—Costs of appeals. *Ontario Paving Brick Co.* v. *Bishop*, 2 O. W. R. 520, 1063, 4 O. W. R. 34.

Claims of wage-earners — *Abandoned contract—Ascertainment of sum upon which percentage to be computed — Mechanics' Lien Act, ss. 14, 14 — History of legislation.*] — The defendant P. contracted to build a house for the defendant T., but abandoned the contract when the work was not half done. Liens were claimed by wage-earners, and proceedings were had under the provisions of the Mechanics' Lien Act. It was contended that s. 14 (3) lays down a rule for wage-earners, in a case in which the contract has not been completely fulfilled, different from the rule in any other set of circumstances, and that the only thing to be looked at is the value of the work done and the materials furnished by the contractor:—*Held*, that the interpretation of the words of s. 14 (3), "the percentage aforesaid shall be calculated on the work done and materials furnished by the contractor," is to be found from an examination of the course of legislation, and there is nothing therein to indicate that "the percentage aforesaid" is not the same percentage as that in s. 14 (1) and in s. 14 of the present Act; and, therefore, in ascertaining the amount upon which is to be computed the 20 per cent. provided by the Act the value of the work done and materials furnished is to be calculated upon "the basis of the price to be paid for the whole contract." *Cole* v. *Pearson*, 12 O. W. R. 111, 17 O. L. R. 46.

Claims of wage-earners — Abandoned contract—Uncompleted work — Mechanics' Lien Act, s. 14 (3)—Percentage— Contract price. *Brienzi* v. *Samuel*, 12 O. W. R. 1233.

Contract for excavation — *Plaintiffs stopped from completing contract—Assignment of part of claim for work done—To bank as collateral security—Judicature Act, s. 58 (3)—Payment into Court—Damages— Quantum meruit—Findings of trial Judge— Reversed on appeal — Costs.*] — Plaintiffs brought action to recover $21,834.87 from Can. Stewart Co. for work done and materials supplied in connection with excavation of the site and foundation of an elevator at Fort William, under an agreement with said company. Plaintiffs entered upon the work, and in course procured advances from the Union Bank. Later the work was taken out of plaintiffs' hands. Later plaintiffs assigned to the bank $5,371.79 out of the $21,834.87 for which they claimed a lien under the Act as collateral security. Bank caused a lien to be registered. The company paid $24,000 into Court. At the trial the Dis. Co. J. *held*, that the agreement did not express all

the terms of the agreement between parties; that their minds were not agreed, and there was no contract. He found plaintiffs entitled to $20,265.04 for their work done upon *quantum meruit* for which he entered judgment with costs and declared plaintiffs entitled to a lien upon the lands in question and the money paid into Court.—Court of Appeal *held*, that there was a valid contract; that plaintiffs should be paid for amount of yardage excavated by them amounting, at contract price, to $9,028.85, to which sum the judgment should be reduced.—That it was more than doubtful whether an assignment for part of a claim was valid under s. 58 (5) of the Judicature Act.—*Forster* v. *Baker*, [1910] 2 K. B. 636, favourably considered.—That Union Bank's claim should be allowed to be deducted from sum awarded plaintiffs.—No costs to bank except counsel fees as upon a watching brief. Plaintiff allowed costs except such as were incurred in respect of claims not allowed. Defendants allowed costs of appeal to be set-off against plaintiffs' costs. *Seaman* v. *Can. Stewart Co.* (1911), 18 O. W. R. 56, 2 O. W. N. 576.

Contract in writing — *Additional work — Authorised in writing — Work well done — Liquidated damages for delay.*]— Plaintiff brought action to establish and enforce his lien under the "Mechanics' and Wage-Earners' Lien Act," which arose out of two contracts in writing and for additional work. Defendant denied that the work was authorised in writing or properly done, or done in the time specified, and claimed $500 as liquidated damages for each week of delay. The referee gave judgment for plaintiff for $3,250.21, and dismissed defendant's claim for damages. This judgment was affirmed by the Divisional Court. *Hutchinson* v. *Rogers* (1909), 14 O. W. R. 768, 1 O. W. N. 89.

Costs — "*Actual disbursements.*"]—The "actual disbursements" which by s. 42 of the Mechanics' Lien Act, R. S. O. 1897, c. 153, may be allowed as against an unsuccessful claimant, in addition to an amount equal to twenty-five per cent. of the claim, do not include counsel fees paid by the defendant's solicitor to counsel retained in the course of the proceedings, and *a fortiori* not counsel fees charged by the solicitor himself when acting as counsel. *Cobban Mfg. Co.* v. *Lake Simcoe Hotel Co.*, 23 C. L. T. 168, 5 O. L. R. 447, 2 O. W. R. 48, 310.

Failure of contractor to complete work—*Amount due by owner—Ascertainment of—Ruling of architect — Report of Official Referee—Appeal to Divisional Court —Report varied—Leave to appeal to Court of appeal refused.*]—An action to recover balances alleged to be due on the erection of a dwelling house for defendant Gallagher in the city of Toronto. The Official Referee gave judgment for plaintiffs, Farrell and McCarthy, for $783.90, and for other plaintiffs for $793.90.—Divisional Court *held*, that the report of the Official Referee should be varied by reducing the amount due the contractor to $369, which should be applied in payment of the amount due the wage-earners, $282.91. No personal orders should be made against the lien-holders for costs. The amount paid into Court in excess of $369 should be returned owner. The difference between $282.91 and $369 should be applied on owner's costs and the contractors should pay the owner's costs, subject to the statutory restrictions as to amount throughout (less the credit). The personal order for payment by the owner to the contractor should stand.—Moss, C.J.O., refused leave to appeal to the Court of Appeal. *Farrell* v. *Gallagher* (1911), 18 O. W. R. 446, 2 O. W. N. 635, 815.

Failure to pay for materials — *Notice to owner of land.*]—*Held*, the formality in the notice in Art. 2033*g* C. C. (59 V. c. 46, s. 2), in order to give to the person supplying material the privilege of Art. 2033, the stoppage of Art. 2033*i*, and the lien of 2033*b*, is obligatory whether it deals directly with the owner of the land or by a sub-contract with a principal contractor. *Ravicot* v. *Rutherford Sons* (1909), O. R. 35 S. C. 97.

Interest on claim — Right of lien-holder — Computation. *Metallic Roofing Co.* v. *Jamieson*, 2 O. W. R. 316.

Liability of owner — Admission of claim—Costs — Payment into Court—Discharge of lien. *Gold Medal Furniture Co.* v. *Craig*, 6 O. W. R. 954.

Lien of material-man — *Notice to owner—Art. 2033g, C. C. — Materialman dealing directly with owner—Agreement for sale — Registration — Notice of — Time.*]—1. Art. 2033*g*, C. C., which obliges the material-man, for the preservation of his lien, to give notice of it to the owner of the property on which the materials are used, does not apply where the material-man deals directly with the owner of the property.—2. The material-man is not bound to give notice to one who, at the time of the delivery of the materials, had made to a third party a formal agreement for sale, before the completion of the work.—3. The material-man who registers his lien must give notice of the registration to the owner of the property subject to the lien within three days of the registration, on pain of absolute nullity. *Duncan* v. *Brunelle*, 10 Que. P. R. 268.

Lien of material man — *One claim against three separate owners—Amendment.*]—A material-man is not entitled, under the Mechanics' Lien Act, R. S. O. 1897, c. 153, to register, as one individual claim, a lien for the amount due for materials supplied by him to a contractor, against all the lands jointly of the owners of different parcels of land who have made separate contracts with the contractor for the erection of houses on their respective parcels. Neither can the registered lien nor the statement of claim in such a lien proceeding be amended so as to claim against each parcel the amount entering into the construction of the building thereon.—The owners of separate parcels of land made separate contracts with a contractor for the erection of houses on their respective parcels, and materials were furnished by a material-man to the contractor, which were used by him in the erection of the houses:—*Held*, that the material-man was not empowered, under the Mechanics' Lien Act, to register a lien for the total

amount against all the lands jointly. *Dunn* v. *McCallum*, 9 O. W. R. 33, 315, 756, 14 O. L. R. 249.

Lien-holders — Mortgagees — Priority —Increased selling value of land—Agreement —Construction. *Boake Mfg. Co.* v. *McCrimmon*, 6 O. W. R. 979.

Material man — *Registration of lien —Time—Material not actually used in building or placed on land—R. S. O. 1897, c. 153, ss. 4, 22.*]—The plaintiff contracted with E. to supply him with lumber to be used in the construction of a building which he was erecting for the defendant on lands in Port Arthur, at the price of $454.82. The lumber was sent in different shipments, the last of which arrived at Port Arthur on the 11th November, 1907, and was taken possession of by E.'s foreman, but was not in fact used in the defendant's building or placed upon his land. E. having made default in payment, the plaintiffs on the 10th December registered a claim for lien on the lands under the Mechanics' Lien Act for the price of the lumber:—*Held*, reversing the judgment of Britton, J., at the trial, 12 O. W. R. 1270, that the lien was registered too late, as it was not registered until more than thirty days had elapsed since any material furnished by the plaintiffs had been placed upon the land or used in the construction of the building. *Bunting* v. *Bell* (1876), 23 Gr. 584, and *Hall* v. *Hogg* (1890), 20 O. R. 13, considered:—*Semble*, that the lien would have attached if the material had been placed upon the land, under the control of the owner, within thirty days, even although not incorporated in the building. *Ludlam-Ainslie Lumber Co.* v. *Fallis* (1909), 14 O. W. R. 273, 19 O. L. R. 419.

Material men — *Agreement between owner and contractor—Drawback—Value of plant—Completion of work — Judgment — Estoppel.*]—The plaintiffs furnished materials to the contractors for certain works, and the action was brought against the contractors and the owner to realize a lien under the Mechanics' Lien Act. After work to the value of $24,290.88 had been done, the owner took possession of the works, the materials on the ground, and the plant and machinery of the contractors, and no work had since been done by them under the contract. An action by the contractors against the owner for damages for improperly taking the works out of their hands and to recover the value of the materials, machinery and plant, and some supplies taken by the owner, and also to recover a large sum on account of work done, had been dismissed: — *Held*, that the 15 per cent. which, under s. 11 of the Act, R. S. O. c. 153, the owner was required to deduct from any payments made in respect of the contract and to retain as a fund for the discharge of liens, was to be computed on the value of the work and materials, but not upon the value of the plant as well, notwithstanding that for the security of the owner the plant was declared to be for the purposes of the contract his property:—*Held*, that, if the judgment dismissing the action brought by the contractors were binding on the plaintiffs, they would not be benefited by a postponement of the trial until the final completion of the works, for the effect of that judgment was that the contractors had forfeited all right to payment for any work which they had performed and for which they had not been paid; and, even if the judgment were not binding on the plaintiffs, the case should not be sent back for a new trial. *Brickell* v. *Browder*, 22 C. L. T. 93, 1 O. W. R. 62.

Material supplied — *Request, privity or consent or credit of owner—R. S. O. 1897, c. 153, s. 2, ss-s. 3, and s. 4.*]—Under the Mechanics' Lien Act, in order to create a lien on the property of the owner in favour of the material man, there must in all cases be a request of the owner and the furnishing of the materials in pursuance of that request, either upon the owner's credit or on his behalf or with his privity or consent or for his direct benefit. In the circumstances of this case, it was held that the person who had furnished the materials had a direct lien upon the land as against the owner, and not a sub-lien upon the moneys owing by the owner to the contractor or upon the statutory drawback. *Graham* v. *Williams*, 8 O. R. 478, 9 O. R. 458; *Blight* v. *Ray*, 25 O. R. 415; *Gearing* v. *Robinson*, 25 A. R. 364, considered. *Slattery* v. *Lillis*, 10 O. L. R. 697, 6 O. W. R. 543.

Mining location — *Blacksmith—Cook.*] —A blacksmith, employed for sharpening and keeping in order tools used for the work of mining, is entitled to a lien for his wages on the mining location, but a cook who does the cooking for the men employed is not. Adjoining mining locations even when they are water lots, if "enjoyed with" the mining location on which the mine is situated, are subject to liens for work performed in the mine. *Davies* v. *Crown Point Mining Co.*, 22 C. L. T. 52, 3 O. L. R. 69.

Motion to vacate certificates of lien and lis pendens.] — Defendant was sole owner of the lots covered by plaintiffs' lien at the time the contract was made. Later defendant sold part of the land without notice to plaintiffs. Plaintiffs registered certificates of lien and *lis pendens* against all the property. Defendant moved to vacate the registry.—Master in Chambers (16 O. W. R. 929, 2 O. W. N. 25) *held*, that if above procedure could operate as a discharge, the Act would be rendered useless and dismissed the motion with $12 costs to plaintiff in any event.—*Dunn* v. *McCallum*, 14 O. L. R. 249, distinguished.—Middleton, J., dismissed an appeal from above, costs of appeal and below in the cause. *Ontario Lime Assoc.* v. *Grimwood*, 2 O. W. N. 51, 22 O. L. R. 17.

Municipal lands actually required for municipal purposes exempt — *Are they under the Act?*]—MacTavish, Co. C.J., *held*, 14 O. W. R. 749, that lands of a municipality actually required for the use of the municipality such as for fire halls, police stations, etc., are exempt from the operation of the Mechanics and Wage Earners' Lien Act, on the grounds of public policy and public convenience.—*R.* v. *Alford* (1885), 9 O. R. 643, discussed.—Divisional Court allowed an appeal from above judgment and remitted the action to His Honour for trial. —Court of Appeal affirmed the order of Divisional Court on the ground that the lang-

nage of some of the sections of the Act seems to imply an intention to bring at least some classes of municipal property within its provisions. *General Contracting Co.* v. *Ottawa* (1910), 16 O. W. R. 479, 1 O. W. N. 911.

Notice in writing to owner—*Letter.*]—A letter to the owner, from sub-contractors furnishing materials, asking him, when making a payment to the contractor for the building in question, to "see that a cheque for at least $400 is made payable to us on account of brick delivered, as our account is considerably over $700, and we shall be obliged to register a lien if a payment is not made today," is sufficient "notice in writing" of a claim of lien under the Mechanics' Lien Act, R. S. O. c. 153. Judgment in 32 O. R. 27, 29 C. L. T. 255, affirmed. *Craig* v. *Cromwell*, 21 C. L. T. 13, 27 A. R. 585.

"Owner" — Lease — Covenant by lessee to erect buildings. *Webb* v. *Gage*, 1 O. W. R. 327.

"Owner" — *Relation to contractor.*]—A person is not an "owner," within the meaning of s.-s. 3 of s. 2 of the Mechanics' Lien Act, R. S. O. c. 153, and as such liable in mechanics' lien proceedings for work done or materials placed upon land in which he has an interest, unless there is something in the nature of a direct dealing between the contractor and the person whose interest is sought to be charged. Mere knowledge of, or consent to, the work being done or the materials being supplied, is not enough; there must be a request, either express, or by implication from circumstances to give rise to the lien. *Gearing* v. *Robinson*, 20 C. L. T. 302, 27 A. R. 364.

Parties.]—In mechanics' lien proceedings against the trustees of a church and an encumbrancer, it was sought to add the building committee as parties. This was refused, they having no interest in the land. *Litton* v. *Gunther*, 12 O. W. R. 1122.

Preservation of lien by delivery of materials — *Registry of lien — Time — Contract — Last delivery — Articles for temporary purpose — Mechanics' and Wage Earners' Lien Act—R. S. O. c. 153, s. 4.*]—Plaintiffs brought action to have it declared that they had a lien for $325.92 upon the estate or interest of defendants, owners of certain lands, and for judgment against the contractors to whom they had supplied materials used in the construction of a building for defendants. The last delivery was within 30 days of the filing of the lien. It was 84 cents worth of expansion bolts. The action against the owners was dismissed by the Official Referee, who ordered that the lien registered against the lands should be vacated, but he gave judgment against the contractors for $325.92.—Divisional Court (15 O. W. R. 243, 20 O. L. R. 303, 1 O. W. N. 385), allowed plaintiff's appeal against the owners of the land as the bolts were supplied to be used and were actually used in the construction of the building, and a lien therefore attached under s. 4 of the Ont. Act. *Rathbone* v. *Michel* (1900), 14 O. W. R. 389, 19 O. L. R. 428, distinguished. *Edmonds* v. *Tierman* (1892), 21 S. C. R. 406, has no application in Ontario owing to the provisions of s. 28 of the Ont. Act, and a plaintiff's lien is not destroyed or prejudiced by taking a note and discounting it, and if the note is returned unpaid, the plaintiff is entitled to rely on the original accounts and file a lien for the amount of the note as well as for goods supplied after taking of the note.—Court of Appeal reversed judgment of Divisional Court and restored judgment of Official Referee with costs. *Brooks-Sanford Hardware Co.* v. *Telier Const. Co.* (1910), 17 O. W. R. 167, 2 O. W. N. 138, O. L. R.

Priority and preservation.] — Divisional Court, *held*, that materials furnished after the work is completed will not keep a mechanics' lien alive so as to prejudice others. *Rennex* v. *Dempster* (1911), 19 O. W. R. 644, 2 O. W. N. 1303.

See *Day* v. *Crown Grain Co.*, C. R. [1908] A. C. 150. Digested col. 2676, *ante*.

Proceeding to enforce lien—Motion for summary judgment against defendants personally liable—Practice—Scheme of Mechanics' Lien Act. *Robertson* v. *Bullen*, 13 O. W. R. 56.

Proceeding to enforce lien — Statement of claim—Late service—Extension of time—Rule 353. *Pease Heating Co.* v. *Bulmer*, 12 O. W. R. 258.

Proceedings to enforce lien—*Motion for summary judgment against defendants personally — Practice.*] — Plaintiffs instituted proceedings under Mechanics' Lien Act and also issued a writ for the same relief. Motion by defendants to have latter action stayed, was dismissed on the ground, that the two procedures are quite different, for, in the personal action there may be a more speedy recovery and a different and fuller judgment than in the other proceeding, therefore it was not right to interfere. *Mellory* v. *Lewis* (1882), 22 Ch. D. 397, distinguished. *Hamilton Bridge Works* v. *General Contracting Co.* (1900), 14 O. W. R. 646, 1 O. W. N. 34.

Registered against insolvent company — *Action against liquidator to enforce liens.*] — A liquidator represents no higher claim than that of the insolvent company. Therefore liens registered, within 30 days after their commencement, for materials supplied and for work done, prior to the service of the petition to wind up the company, are to be paid in priority to ordinary creditors. *Re Clinton Thresher Co.* (1910), 15 O. W. R. 318.

Registered owner — Contract with—Transfer of property after registration of lien—Previous agreement — Notice—Parties. *Fraser* v. *Griffiths*, 1 O. W. R. 141.

Registry of lien against lands of company in liquidation — Winding-up order—Vacating lien — Costs — Set-off. *Re Haileybury Rink Co., Berlinguette's Claim*, 12 O. W. R. 197.

Several buildings — *Lien for work on one — Registration—Time—Extent of work done.*]—Where a contract is made with the

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respective owners of adjoining lands, on which two separate buildings are erected, but included under one roof, for the repair thereof, at one entire price, separate accounts being kept of the work done and materials furnished on each building, a lien attaches and can be enforced under the Mechanics' Lien Act, against the lands of each of such owners for the price of the work done and the materials provided on each respective building. The finding of the Local Master who tried a mechanic's lien action, as to the fact of the work being done and the materials furnished within thirty days prior to the lien being registered, and as to the extent of such work and materials, was upheld, for, though the evidence was contradictory, there was evidence to support such findings. *Booth* v. *Booth*, 22 C. L. T. 131, 3 O. L. R. 294, 1 O. W. R. 49.

Statutory action to realize—*Joining other causes of action—Parties—Architect.*]—In an action begun under s. 31 of the Mechanics' and Wage Earners' Lien Act, R. S. O. 1897, c. 153, by the filing of a statement of claim, to realise a lien created by the Act, the plaintiff cannot include other causes of action and other matters. Where the plaintiff in such an action claimed to be entitled to a lien against the owner of land who had erected a building thereon, and joined as a defendant the architect of the building, whom he charged with fraudulently refusing to give a certificate for the amount which the plaintiff claimed to be entitled to recover, and asked that the architect might be ordered to pay the amount claimed, with damages for his fraudulent breach of duty, and the costs of the action, the name of the architect was struck out.—*Semble*, that, as against the owner, the claim to a proper certificate might be maintained in this action as one of the matters involved in the claim to a lien. *Bayshaw* v. *Johnston*, 22 C. L. T. 33, 3 O. L. R. 58.

Time for registration — *Completion of work—Satisfaction of architects—Work done after registration of lien.*]—Under a contract made with a railway company for the erection of a building, the work was to be done to the entire satisfaction of certain architects. The plaintiffs, who were subcontractors for a part of the building, ceased work on the 20th May, under the belief that their contract was completed, and their secretary-treasurer, on the 8th June, made an affidavit stating such to be the fact, with a view of having a lien registered, which was done on the 24th June. The architects, however, were not satisfied, and required further work to be done, and this was accordingly done in June, and again in August, and it was not until the 4th August that the architects were satisfied and accepted the work:—*Held*, that under the contract the architects being the persons to determine when the work was completed, it was not so completed until they had signified their approval, and therefore the lien was registered in time. *Vokes Hardware Co.* v. *Grand Trunk Ry. Co.*, 12 O. L. R. 344, 7 O. W. R. 537, 8 O. W. R. 24.

Trial — *Procedure* — *Parties* — *Mortgagee—Materials on land—Conversion.*] — The procedure for the trial of an action under the Mechanics' and Wage-Earners' Lien Act, R. S. O. c. 153, is the ordinary procedure of the High Court, which is not affected by ss. 35 and 36 of the Act; and therefore a mortgagee against whom relief is sought must be made a party to the action within the time limited by s. 24, s.-s. 1. Materials were placed on the land by the owner thereof and paid for by the mortgagee, to be used in the construction of buildings being erected thereon, but not actually incorporated therein. The materials were taken by the owner to a planing mill to be planed for placing in the buildings, and having been left there for some time, and storage charges incurred, the owner sold them to the mill-owners:—*Held*, *per* Meredith, C.J., that no lien attached on such materials, the incorporation thereof in the building being an essential element.—*Per* Rose and MacMahon, JJ., that such lien would attach, notwithstanding the absence of such incorporation, but, there having been a conversion, no relief could be granted, for there is nothing in the Act which enables the Court to assess damages which could be made applicable to lienholders. *Larkin* v. *Larkin*, 20 C. L. T. 256, 375, 32 O. R. 80.

Twenty per cent. reserve — *Payment before thirty days.*]—All work on a building was finished on the 11th August, 1899. On the 14th August, 1899, four workmen, whose wages remained unpaid, and who were entitled to liens for the amount, threatened to register their liens unless paid at once. The owner thereupon paid the amount; and afterwards treated the same as deducted from the twenty per cent. retained under R. S. O. c. 153, s. 11, and proceedings having been commenced, the owner paid the balance of the twenty per cent. into Court. The balance so paid in, however, was more than sufficient to pay all remaining wage-earners in full:—*Held*, that, under the above circumstances, the owner was justified in making the payments out of the twenty per cent. before the expiration of the thirty days mentioned in the Act, and could not be required to pay the sum over again into Court. By making such a payment, however, the owner takes the responsibility of shewing that he has placed the other lienholders in no worse position by his action, as had been shewn in the present case. *Torrance* v. *Cratchley*, 20 C. L. T. 74, 31 O. R. 546.

Work and labour — Defect in building—Assent—Estoppel. *Holtby* v. *French*, 1 O. W. R. 821.

Work and materials supplied for building hotel — *Work to be paid for upon architect's certificate.*] — Plaintiffs sought to enforce a lien claimed for work done and materials supplied in building an hotel. Defendants, according to agreement, were to make payments each month, upon production of architect's certificates that such payments were due. Nine progress estimates were given plaintiffs by the acting architect, the last of which was dated 1st June, 1908. In February or March defendants refused to make further payments on ground that plaintiff had failed to furnish a satisfaction bond "for and conditional

upon" the performance of their agreement. Pending the action ten days before trial the architect gave plaintiffs another progress certificate shewing a balance due plaintiffs of $6,730.13. The Local Master at Kenora held that defendants were not justified in refusing to make further payments, nor were plaintiffs justified in discontinuing their work. He gave plaintiffs judgment for amount certified due on 1st June, after deducting payments on account and $991 for insurance on hotel after 1st January. The Divisional Court varied the judgment of the Master by increasing plaintiffs' judgment by $991, the amount of the insurance, and added to the judgment an order that any surplus which may be realised by sale of the hotel after payment of sums directed to be paid out of the proceeds, shall be paid into Court subject to further order, and reserving leave to plaintiffs to apply in respect of the lien, which they have and for which payment has not been provided for by the judgment. *Sherlock* v. *Powell* (1899), 26 A. R. 407, specially referred to. *Kelly Bros. & Co.* v. *Tourist Hotel Co.* (1910), 15 O. W. R. 29, 20 O. L. R. 267.

Writ of summons — *Service out of jurisdiction—Statement of claim—Time for delivering defence—Trial—Appointment in writing—Notice of trial.*] — An order permitting service out of the jurisdiction of the writ of summons should also authorise service of the statement of claim at the same time, and fix a time for delivery of the statement of defence. *Young* v. *Brassey*, 1 Ch. D. 277, followed. Where the order makes no provision as to the statement of claim or defence, the defendant should have eight days from the last day for appearance within which to deliver his statement of defence, and the pleadings cannot be noted closed before the expiry of such eight days. Under s. 35 (1) of the Mechanics' Lien Act, R. S. O. c. 153, the Judge or officer fixing a day for the trial of an action brought under that Act, is to do so in writing; and a notice of trial under that section given by a party who has not obtained a signed appointment from the Judge or officer, is not effective. The notice of trial must be served at least eight clear days before the day fixed, as provided by s. 36. *McIver* v. *Crown Point Mining Co.*, 21 C. L. T. 127, 19 P. R. 335.

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Agreement to build *in consideration of so much per day—C. C. 2012.*]—A carpenter who has installed the woodwork in a house in execution of a verbal agreement with the proprietor in consideration of receiving two dollars for each working-day, is a builder within the meaning of 2013 C. C., and is entitled, on compliance with the required formalities, to the right of preference mentioned in that article not only for the daily wage agreed upon but also for his outlay for materials supplied and for the pay of workmen engaged by him. *Letellier* v. *Blanchette* (1910), 17 R. de J. 1.8.

Builder's privilege — *Contract with owner—Right to lien—"Additional value."*] —A contractor who contracts directly with the proprietor of a building which is being constructed, is entitled to register a privilege under the terms of Art. 2013, C. C., as amended by 59 V. c. 42 (Q.)—2. The "additional value," referred to in the article, is the additional value given to the immovable by the work at the time it is done. *Galarneau* v. *Tremblay*, 22 Que. S. C. 143.

Builder's privilege — *Promissory note—Principal contractor — Sub-contractor — Notice to owner—Registration—Time for—Delay—Default.*]—The holder of a promissory note guaranteed by a builder's privilege may, in suing to recover the amount of such note, demand that the existence of this privilege be recognized in his favour.—2. The principal contractor may take, in his own name, a builder's privilege, not only for work which he has himself done, but also for work done by his sub-contractor and it is not necessary, in such circumstances, to notify the owner of the contract between the principal contractor and the sub-contractor. —3. The point of commencement of the time for registration of a builder's privilege is the date at which all work on the building has been completed and ended, and not that of beginning to use the building before its completion.—4. The owner who has caused the building in question to be erected cannot complain of delay in registering a builder's privilege, nor even of absolute default of registration. *La Banque Jacques Cartier* v. *Picard*, 18 Que. S. C. 502.

Claim of lien — *Registration — Description of land.*]—The description of an immovable, in the notice for registration of a workman's privilege, as "part of lot 4101 of the cadastre of the parish of Montreal," but omitting the conterminous properties, does not comply with Art. 2168 of the Civil Code, which provides that in any place where the official plans are in force the true description of a part of a lot is by stating that it is a part of a certain official number upon the plan and in the book of reference, and mentioning who is the owner, and the properties conterminous thereto; and such notice does not create any privilege. *Therrien* v. *Beault*, 21 Que. S. C. 452.

Claim of lien — *Rights against owner — Proceedings against "debtor."*] — The plaintiff, having contracted to furnish materials to a builder to be used in the construction of a building, gave written notice to the defendant, owner of the land, under Art. 2013g, C. C., and subsequently registered a memorial that he had furnished materials to the amount stated, and he then notified the defendant of such registration. The present action was brought against the owner of the immovable more than three months subsequently, asking that he be condemned to pay the amount. No proceedings had been taken against the purchaser of the materials:—*Held*, that the privilege created in favour of the supplier of materials, and his recourse against the owner of the land, by the registration of the memorial, lapse unless legal proceedings are taken, within three months following the notice, to have the debtor condemned.—by the "debtor," in Art. 2013i, being meant the purchaser of the materials. *Lalonde* v. *Labelle*, 16 Que. S. C. 573.

Claims of workmen in service of sub-contractor — *Notice to owner — Registration of claims.*]—The lien upon immovables provided for by Arts. 2033 *et seq.*, C. C., may exist for the benefit of workmen in the service of sub-contractors, without notice of the sub-contractor to the owner. It is sufficient to give to the owner verbal notice, in the presence of a witness, that the workmen have not been paid at and for each time a payment becomes due to them. Therefore, they may register their claims in the manner and for the purposes provided in Art. 2033c., C. C.—*Cf. Frichette* v. *Guimet & Bell Telephone Co.*, 28 Que. S. C. 4; *Rousseau* v. *Toupin*, 32 Que. S. C. 228.

Conservatory attachment — *Privilege of the workman — Burning of the house — Is there a lien on the insurance money?*]—A plaintiff who has a legal privilege on a property in connection with the work by him done thereon, cannot, in the event of a fire, claim by a conservatory attachment the proceeds of policy covering the building, because these proceeds do not represent the property, but represent a debt resulting from a contract of insurance. *De Anna Isaacs & Vir* v. *Samuel Taffer & Guardian Assce Co.* (1910), 11 Que. P. R. 359.

Enforcement by assignee of privileged debt — *Necessity for notice to debtor—Action not maintainable after notice to land-owner only.*]—The assignee of a privileged debt, registered by virtue of the provisions of Arts. 2013a *et seq.*, C. C., cannot maintain an hypothecary action against the owner of the land affected to realise the lien until after service of notice of the assignment on the person contractually liable for the debt. Service on the owner of the land will not suffice. *Demers* v. *Byrd*, 17 Que. K. B. 303.

Increased value — *Vendor of owner—Estimate of increase—Registration of lien—Contestation—Pleading.*] — The question of the increase in value of an immovable by reason of work done by a workman can only be raised by the vendor of the owner and his creditors.—2. The increase in value is fixed by an estimate, at the time of the decree, when the money is insufficient to pay a workman who has registered a lien or in case of a contestation of the increase by those interested.—3. When there is a contestation it should be by means of a plea on the merits and not by inscription in law.—4. The defendant being the owner of the immovable, the workman is not bound to allege increase in value. *Therien* v. *Hainault*, 5 Que. P. R. 61.

Labourer's lien and lien for supplying materials — *Wherein they differ — Nature of the action to preserve the labourer's lien.*]—The labourer's lien and that of the furnisher of materials (Art. 2013, C. C., amended by 4 Edw. VII., c. 43), are distinct; they are acquired and kept valid by different means; the lien for furnishing materials, notably, as different from that of the labourer, is not liable to be set aside under the provisions of Art. 2013b, C. C. The action provided in 2013b, C. C., may be a personal action, nothing in the context indicating that it must be of any other kind to preserve the lien of the creditor or the labourer; there must be a judgment against the debtor, with recourse reserved to maintain the lien. *Tremblay* v. *Simard* (1909), D. R. 36 S. C. 398.

Lien of contractor — *Registration by husband of claimant—Sufficiency.*]—Where a contractor's lien has been registered by the husband of the claimant, duly authorised to this effect, it fulfils the requirements of the law that the lien shall be registered by the claimant himself. *Camirand* v. *Durand*, 10 Que. P. R. 174.

Lien of material man — *Notice to owner.*]—The lien of a person furnishing materials does not attach upon the property in which they became incorporated unless the essential condition of a notice served upon the owner before delivery, specifying the contracts of furnishing, the price of the materials, and the description of the property affected, is fulfilled.—Judgment in 33 Que. S. C. 423, affirmed. *Carriere* v. *Sigouin*, 18 Que. K. B. 176.

Material man — *Action — Time.*] — An action in which a material man claims from the contractor the price of materials furnished by him, and asks against the owner of the land upon which buildings have been erected with the plaintiff's materials that the land shall be declared to be charged with the amount of the plaintiff's claim unless the owner prefers to pay the price of the materials, will be dismissed upon demurrer by the owner if it does not appear that the plaintiff has begun his action within the three months following the notice mentioned in Art. 2033g, C. C. *McLaren* v. *Loyer*, 3 Que. P. R. 69.

Material man — *Manufacturer — Sale or hiring of labour.*]—A manufacturer who makes a contract with a contractor to deliver to him a certain number of presses destined to form part of a building of which the contractor has undertaken the construction, is not a workman, but a furnisher of materials. The registration by such manufacturer of a workman's lien against the land of the owner as security for payment of the price of the presses is void under the circumstances, the manufacturer having no other remedies than those given him by Arts. 2013 (g), (h), (i), (l), and 2103, C. C.—2. The contract between the manufacturer and the contractor is a sale and not an employment of labour.—3. In order that a workman shall have a workman's lien upon the land of the owner it is indispensable that he should be employed thereon. It is not sufficient that he works and fashions materials intended to form part of the building which the owner is erecting. *Montmorency Cotton Mills Co.* v. *Gignac*, 10 Que. Q. B. 158.

Material man — *Notice — Registration.*]—The hypothec or lien of the material man is distinct and independent of the *saisie-arrêt* mentioned in Art. 2013 (h) and (i), C. C., and is not subject to the conditions of notice mentioned in cl. (g), nor to the condition of registration. Ouimet, J., dissenting. *Maclaren* v. *Villeneuve*, 4 Que. P. R. 322, 11 Que. K. B. 131.

Material man — *Notice to mortgagee —Registration of lien—Description of land—Several purchasers.*] — When the owner of land builds thereon, the furnisher of materials who wishes to obtain a right of lien, must, before the delivery of the materials, give notice to the person who lends the owner the money for building, and a notice given later to the owner will be insufficient to give a right of lien to the material man. —2. When two portions of the same lot have been sold by separate contracts to two purchasers, and buildings have been erected thereon, a person furnishing materials for such buildings must, in the statement of claim which he registers pursuant to Art. 2105, C. C., indicate the portion of the land which belongs to each purchaser, and his registration will be without effect if he describes the whole lot as being the property of the two purchasers. *Paquette* v. *Mayer*, 18 Que. S. C. 563.

Material man — *Notice to owner — Pleading.*]—Under the provisions of ss. 2 and 3 of 57 V. c. 46 (Q.), and before the amendment of 59 V. c. 42, s. 2, a material man ought, in order to preserve his lien, in the three days after the registration of the memorandum of his claim, to give a written notice to the owner or his agent. Where the declaration did not allege that the notice had been given, a demurrer was allowed. *Paquette* v. *Houston*, 2 Que. P. R. 558.

Material men — *Priorities.*]—Although the right of the supplier of materials is called in Art. 2013 (*b*), C. C., (59 V. c. 42), in the French version "*un droit d'hypothèque*" and in the English version "a hypothecary privilege," the right is nevertheless of the nature of a privilege and not of the nature of a hypothec, and all suppliers for the same building who have availed themselves of the privileges of the Article and registered their claims, rank concurrently. *Jamieson* v. *Charbonneau*, 17 Que. S. C. 514.

Material men dealing with owner —*Non-existence of lien.*]—The law does not confer a lien on a material man except where he furnishes material to the contractor and not to the owner. A labourer, workman, architect, or builder, dealing directly with the owner, has a lien, but a merchant or manufacturer who sells material for construction to the owner has, as against him, only a personal action, unless he has agreed to a conventional hypothec. *Harris* v. *Charbonneau*, 25 Que. S. C. 180.

Notice by sub-contractor to owner —*Art. 2013c, C. C. — Service — Time — Architect — Agent of owner.*] — A notice given by a sub-contractor after the expiration of the delay of eight days prescribed by Art. 2013c, C. C., is not of any avail to preserve the lien provided by that article.—The architect charged with superintending the construction of a building is not an agent of the owner upon whom service of the notice can be made so as to bind the owner. *Sharpe* v. *Budd*, 17 Que. K. B. 17.

Parties — *Owner — Debtor.*] — In an action against the purchaser of land for a declaration that it is bound by a mechanics' lien registered thereon and for realization of such lien by a sale, it is not necessary that the vendor, who is personally liable for the debt sought to be charged, shall be made a party. *Pouliot* v. *Pelletier*, 3 Que. P. R. 236.

Prescription — *Statute — Amendment —Claim of lien — Registration—Notice.*]—*Held*, affirming the judgment in 14 Que. S. C. 473, that where a privilege, both by the pre-existing law and by the statute amending the same, is made to depend upon and to date from its registration, the effects of the registration of such privilege effected only after the coming into force of the amending statute are governed, as to the duration of the privilege and the time by which it is prescribed, by the provisions of the amending Act; consequently, the prescription applicable to a builder's privilege which was only registered after the coming into force of the amending Act, 59 V. (Q.) c. 42, is that of one year from the date of the registration, although the work for which the privilege was sought was done before the amending Act came into force.—2. In order to obtain the hypothecary privilege of a supplier of materials under Art. 2013, C. C. (59 V. c. 42), the formalities prescribed by law, as to notice to the proprietor, *must* be complied with, and the memorial or *bordereau* mentioned in Art. 2013, C. C., must state the cost of the materials furnished. *Hochelaga Bank* v. *Stevenson*, 9 Que. Q. B. 282; [1900] A. C. 600.

Registration of claim — *Failure to institute action — Cancellation of registration.*]—A workman who causes his claim to be registered on the immovable on which his work is performed in order to secure a privilege or hypothec under Art. 2013 (*b*) C. C., but neglects to bring suit within the delay prescribed in the article, is not bound to cause the registration to be cancelled at his expense. The owner of the immovable must put him in default (*en demeure*) to sign the discharge, attend to the cancelling and pay the costs. *Roy* v. *Garicpy* (1880), 30 Que. S. C. 298.

Registration of claim — *Quebec law —Error in description of lands—Claim duly recorded — Value of land — Acquiescence— Notice.*] — The description in a registered claim for a workman's privilege of the lands affected by the privilege as, "two lots of land known and designated under numbers two C. and three C. of the official subdivision of lot number 907," instead of, in accordance with the plan, as "two lots of land known and designated under numbers two, subdivision C., and three, subdivision C., both of the subdivision of official lot number 907," is not an irregularity sufficient to nullify the registration of the privilege, especially where the description in the claim is identical with that contained in the title deed of the owner (who had acquired the lands from the respondent), and in the *procès-verbal* of seizure, and where the registrar, upon presentation of the claim, had registered it against the lands as they were described in his office. The circumstances of the case shewing acquiescence by the respondent in an allegation that the value of the property was $3,000, and in an arrangement by which the

parties claiming *privilèges d' ouvriers* were to rank against the balance of the purchase money (the property as improved having been sold for $5,000 after payment of a charge thereon), he being *dominus litis* could not be heard to complain that the increased value of the property, by reason of the work done by such claimants, had not been determined by a valuation. The omission by such claimant to give notice to the owner of the property within three days after registration of his claim (Art. 2103, C. C.) does not affect the validity of such registration or privilege. *Daniel* v. *Macduff*, 13 Que. K. B. 361.

Rights to lien — *Work or material supplied to sub-contractors — Arts. 2013 et seq., C. C.*]—The privilege or lien provided by Arts. 2013 *et seq.*, C. C., is for the benefit only of workmen, etc., who bargain with the owner or the contractors with whom the owner has contracted; those who do work or furnish materials for sub-contractors who have not contracted with the owner, and are therefore unknown to him, cannot have the benefit of the privilege. *Fréchette* v. *Ouimet*, 28 Que. S. C. 4.

Supplier of materials — *Notice to the proprietor of the immovable — An unregistered promise of sale.*] — The supplier of building material only acquires a privilege for the amount of his claim provided, before delivery, he gives a notice to the proprietor of the immovable in which are contained the costs of the materials and the building for which they are intended. *Cf. Carrier & Sigouin*, 18 K. B. 176.—A promise of sale of the property by the proprietor to the contractor to whom the materials have been supplied and delivered, and which has not been registered, is without effect as to third parties in so far as the creation of the privilege is concerned. *Rutherford & Sons Co.* v. *Recicot* (1909), 19 Que. K. B. 428.

Time for registering lien — *Completion of work.*]—The point of commencement of the 30 days given by Art. 2013b of the Civil Code for the registration of the lien of a labourer, workman, or contractor, is the moment at which the work upon the building in the construction of which they have laboured is completed, and not the date at which the use of the building has been begun. *Quintal* v. *Benard*, 20 Que. S. C. 199.

Woodman's lien — *Quebec law—Person cutting wood at so much a cord—Saisie-conservatoire.*]—The persons mentioned in Art. 1994 (c), C. C., are not confined to those whose remuneration is fixed according to the time they work, but it also includes all persons who engage to cut wood for so much a cord. A motion to quash a writ of *saisie-conservatoire* obtained by a person claiming a lien upon wood cut, was dismissed. *St. Onge* v. *Ross*, 7 Que. P. R. 108.

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8. Saskatchewan.

Action to enforce — *Statement of claim — Form of prayer.*]—The prayer of the statement of claim in an action to enforce a mechanic's lien should be for a declaration of a lien "pursuant to the Mechanics' and Wage Earners' Lien Act." *Whitman* v. *Harvey* (1910), 13 W. L. R. 287.

Amount of claim — *Contract for painting — Credits — Saskatchewan Mechanics' Lien Act — Jurisdiction of Supreme Court.*]—Action to enforce a mechanics' lien. The questions involved are entirely questions of fact. The action should have been brought in the District Court. *McKenzie* v. *Murray*, 11 W. L. R. 123.

Claim for lien of sub-contractor —*Promise of owner to pay sub-contractor—Evidence of — Compliance with provisions of Mechanics' Liens Ordinance (Sask.) — Time for filing lien — Notice to owner — Amount due to contractor — Non-performance of contract — Acceptance of part of work performed — Architect's certificate — Waiver — Extras — Setting off damages for delay — Forum — District Court—Parties —Joinder of contractor as defendant.*] — *Held*, (1) no express promise by owner to pay sub-contractor; (2) not several contracts but one; (3) that notice under s. 11 of above Ordinance was waived; (4) that there was something due the contractor; (5) that although contract an entire one, yet, part performance accepted, owner sold and made a settlement with the contractor; (6) that there was a waiver of the production of an architect's certificate, and (7) that action should not have been brought in District Court. No order made against contractor. Judgment for plaintiff. *Smith* v. *Bernhart*, 11 W. L. R. 623.

Claim of lien — *Sufficiency — Separate properties — Saskatchewan Mechanics' Lien Act, ss. 17, 18, 19 — Saskatchewan Rule, 458.*]—Action for sale under a mortgage. On the reference a claim was made by C. under a lien registered against three separate properties of which only one was in question in this action. As the claim of lien shewed how it was made out and the amount claimed against each property, *held*, that the claim was sufficient under s. 19 of above Act. *Crapper* v. *Gillespie*, 11 W. L. R. 310.

Enforcement against school lands and building — *Public policy — Saskatchewan Public Schools Ordinance — Liability of school lands to sale under execution — Saskatchewan Mechanics' Lien Act —Saskatchewan School Assessment Ordinance, 1901, c. 30, s. 97.*]—Action to enforce a mechanic's lien against a school house and the land upon which it is situated:—*Held*, that the lien attaches. Execution may also be issued against these lands. It is not against public policy. The method of levying a rate under s. 97 above is permissive, and purely an alternative method. *Lee* v. *Broley*, 11 W. L. R. 38.

Equitable mortgage — *Sums advanced by mortgagee before liens registered — Sale of land — Distribution of proceeds — Increase in selling value — Priority of claim on mortgage — Notice — Mechanics' Lien Act, 1907, secs. 2 (3), 7 (3), 13 (1).*] — The defendant B. was an equitable mortgagee of land the title to which was subject to a mechanics' lien registered by the plain-

tiffs in December, 1907, and to other liens afterwards registered. The action was brought by the plaintiffs to enforce their lien; and by an order made on the 21st May, 1908, the amount which the plaintiffs were entitled to recover was fixed at $750.55, and it was directed that, in default of payment of that sum, the land should be sold, and the proceeds of sale applied: first, in payment of B.'s claim; second, in payment of the expenses of the sale; third, in payment of the costs of the action; and the balance was to be paid into Court, to be distributed among the lien-holders as their interests might appear. On the 6th May, 1909, an order was made directing the Local Registrar to ascertain and report the facts relevant to the determination of the question of the right of B. against the land and his right to priority over the plaintiffs. The Local Registrar reported that the land was sold to B. on the 16th April, 1910, for $1,725; that the materials in respect of which the plaintiffs were entitled to a lien were delivered between the 26th September and the 12th December, 1907; and that the sums advanced by B. for the purchase of the land and improvements thereon amounted to $1,189.60, and was advanced in various sums between May and October, 1907—$500 being for the purchase of the land—and that B. also advanced to his co-defendants the further sum of $783.40, no part of which was expended for work or materials which enhanced the value of the lands. The Local Registrar did not find, nor was there any evidence to establish, to what amount the selling value of the land was increased by the placing of the materials supplied by the plaintiffs:—*Held*, upon consideration and construction of sub-sec. 3 of sec. 7 of the Mechanics' Lien Act, 1907, that the onus of proving that the selling value of the land was increased by the materials furnished and placed above what it was before they were so furnished and placed, was on the plaintiffs, and they had failed to establish it. It did not follow from the mere fact that materials were furnished and placed upon the land by the plaintiffs and other lien-holders, that the selling value of the property had been thereby increased to the extent of the materials furnished or at all. *Kennedy* v. *Haddow*, 19 O. R. 240, applied and followed.—*Held*, also, that paragraph 3 of sec. 2 of the Act deals simply with the definition of the word "owner," and does not apply to a mortgagee, or at any rate to one who has registered his mortgage prior to the registration of the lien. The right of priority as between the lien-holder and the mortgagee is fixed by paragraph 1 of sec. 13 of the Act; and, so far as a mortgage, equitable as well as legal is concerned, it would have priority over a lien, if registered before the lien. *Richards* v. *Chamberlain*, 25 Gr. 402; *McVean* v. *Tiffin*, 13 A. R. 1, and *Reinhart* v. *Shutt*, 15 O. R. 325, specially referred to. Notice cannot affect the question of priority. Where the lien-holder has not registered his lien, the mortgagee need not hesitate to advance money legitimately under his mortgage, because possibly the lien-holder might thereafter register his lien. The whole amount advanced by B., $1,973, was found to be a charge on the land under the mortgage; and as all the sums making up that amount were advanced or expended before any of the liens were registered, and the question of an increased value was out of the road, and the land was sold for only $1,725, B. was entitled to the whole of that sum. *Independent Lumber Co.* v. *Boez* (1911), 16 W. L. R. 316, Sask. L. R.

Materials supplied to person as "owner" — *Erection of building—Sale of building by "owner"* — *Removal by purchaser—Claim to enforce lien against building—Failure to show ownership or possession of person ordering materials—Acquisition of land by claimants of lien—Merger of lien—Pleading.*]—In an action to enforce a mechanics' lien, the plaintiffs, by their statement of claim, alleged that they furnished materials to the defendant McK. for the purpose of erecting a building on land described, that McK. erected a building on the land, and that they registered a lien under the Mechanics' Lien Act against the land and building, and thereby acquired a valid lien against the estate and interest of McK. in the lot. The claim was to enforce the lien against the building. The evidence shewed that McK. ordered materials from the plaintiffs, to be delivered on the land described, that they were delivered there, and went into the erection of the building; but the evidence did not shew that McK. ever had any interest or estate in the land except such possessory interest as was to be presumed from the erection of the building on the land. On the 3rd July, 1909, the plaintiffs registered their lien. On the 30th November McK. executed a chattel mortgage on the building in favour of the defendant company. By the statement of claim it was alleged that on the 7th December, 1909, the plaintiffs became owners of the land, and this was not denied by the defendants. On the 17th December McK. gave the defendant company a bill of sale of the building, and on the 20th December the defendant company removed the building from the land and sold it:—*Held*, that the plaintiffs were not entitled to enforce their alleged lien. Per Wetmore, C.J.:—A person in actual possession of land has a title thereto as against all the world except the true owner; and a person so actually in possession has a sufficient interest in the land to come within the meaning of "owner," as defined by paragraph 3 of sec. 2 of the Mechanics' Lien Act, 1907; but, in order to amount to an interest which would support a lien under the Mechanics' Lien Act, the actual possession or interest must exist at the time the materials were ordered, because sec. 4 of the Act provides that the work has to be performed or the materials furnished for the owner (as in this case) or the contractor or sub-contractor; and there was no evidence to establish that, prior to the time that McK. ordered these materials, he had ever been in actual possession of the lands, nor that he was so at the time he ordered them; there was no evidence that McK. had any interest or estate when he ordered the materials, and he could not be held to have acquired such an estate or interest by the wrongful act of causing the materials to be placed upon the property. *Per* Lamont, J.:—Assuming that the plaintiffs had a valid lien on the lot and building, the action was not maintainable, because on the 7th December the plaintiffs (as must be taken to be admitted) became owners of

the land on which the building was then standing, and whatever interest they could claim in the property under their lien merged in their title as owners, no contrary intention appearing. If the building was part of the freehold when the plaintiffs acquired title, their action should have been for trespass *quare clausum fregit*, as the acquisition of the freehold necessarily carried with it all buildings that were a part thereof. *Per* Johnstone, J.:—The plaintiffs wholly failed to establish an interest in McK. sufficient to satisfy the statute during the time the materials were being placed on the land, or even that McK. had ever been in possession of the land, rightfully or otherwise. *Galvin-Walston Lumber Co.* v. *McKinnon* (1911), 16 W. L. R. 310, Sask. L. R.

Saskatchewan Mechanics' Lien Act, 1907 — *Proof that material supplied actually used in building — Application of Act —Retroactive effect — Sections 17, 18, 19 of said Act—Lien attaching on equitable interest in land.*]—Action to enforce a lien under the above Act by a sub-contractor:—*Held*, that sub-contractor is in same position as contractor, and is only required to have furnished materials with the intent and expectation that materials are going into the building. The time of the filing of lien determines the law to be applied. A reduction in the amount of the claim will not render the lien void. Defendants held the land under an agreement to purchase: — *Held*, that they had an interest or estate on which the lien would attach. *Montjoy* v. *Steward School District Corporation* (Sask.), 10 W. L. R. 282.

MEDIATORS.

See ARBITRATION AND AWARD.

MEDICAL ACT.

See STATUTES.

MEDICAL EXAMINATION.

See DISCOVERY.

MEDICAL HEALTH OFFICER.

See MUNICIPAL CORPORATIONS — PUBLIC HEALTH.

MEDICINE AND SURGERY.

Advertising to give advice in medicine — *Unregistered practitioner — Osteopathy — Evidence — Police magistrate — Jurisdiction — Depositions not taken before summons issued — Criminal Code, s. 655, as amended — Medical Profession Act (Sask.), s. 64.*]—Depositions were not taken before summons issued, as required by s. 655, as amended:—*Held*, that this section refers to indictable offences only and that at any rate "shall" is enabling. The defendant was charged with advertising to give advice for gain, etc., contrary to s. 64 above. — *Held*, that there was no evidence of any diagnosis, giving advice or prescribing medicines. Case dismissed. *R.* v. *Raffenberg* (No. 1) (1909), 12 W. L. R. 419.

Alberta Medical Profession Act, s. 44—*Improper conduct of physician — Finding of Discipline Committee of College Council—Erasing name from register.*]—Appellant having learned there was dissatisfaction among miners at a certain place with regard to their physician, wrote to a miner previously known to him if he could get the recognition of the union as their physician, offering his friend some remuneration in case of success:—*Held*, that this did not warrant erasure of applicant's name from college roll, and his name was ordered to be reinstated thereon. *Re Becktel*, 10 W. L. R. 473.

Contract — *Services of physician to servants of defendants — Payment according to number of men employed — Computation —Evidence — Average.*] — A doctor was given 75c. per month by defendants for attending men in their camp. He obtained the number of men from an employee of defendants, made up his account and assigned it to plaintiff. At the trial it appeared that for two months included in his account the doctor had rendered no services, and that for these two months by the statement furnished by the employee there was an average of 50 men in the camp:—*Held*, that as defendants were aware of this statement and were not prepared at the trial to shew that there were more men employed during these two months they are bound by it. *Mackenzie* v. *Newman* (1910), 12 W. L. R. 631.

Expulsion of registered member of college—Unprofessional conduct—Evidence —Appeal—Costs. *Re Telford* (B.C.), 2 W. L. R. 405.

Expulsion of registered members of college—Unprofessional conduct—Intoxication—Evidence—Acquittal by medical council—Reversal by Judge on appeal—Restoration by full Court—Duty of appellate Court. *Re Hanington* (B.C.), 6 W. L. R. 37.

Fees of physician — *Action for—Pleading — Irrelevant allegations.*]—The plaintiff, a practising physician, sued the defendant for $3,000 for professional services. In his declaration he set up the fact that the case was notorious, and that the public had been daily kept aware of the defendant's condition, and of all details connected therewith, thus putting the plaintiff's professional reputation at stake. These facts were alleged as partly justifying the large amount of the fee claimed. The defendant inserted in law against these allegations:—*Held*, that the allegations complained of could not be connected with the amount of the fee due to the plaintiff. The inscription was, therefore, maintained, and the allegations complained of were struck out of the declaration. *Marien* v. *Lussier*, 22 C. L. T. 418.

Illegal practice of medicine.] — Repeated and continued care, even if it be gratuitous, given to a person by one who

is not a duly registered doctor in medicine, is an infringement of Art. 4002, rr. of 9 Edw. VII. c. 55, Que. *Society of Physicians & Surgeons of Que.* v. *Hebert*, 16 R. de J. 223.

"Infamous and disgraceful conduct in a professional respect" — *Medical council — Erasure of name from register — Advertising secret remedy — Charge merely advertising, while finding deceitful and fraudulent advertising — Mistrial — Appeal to Divisional Court — Setting aside finding.*]—A charge was laid before the Medical Council under s. 33 of the Ontario Medical Act, R. S. O. 1897 c. 176, against a medical practitioner, that he was guilty of "infamous and disgraceful conduct in a professional respect," in advertising a secret remedy called "grippura," which the advertisement asserted would cure grippe or influenza, and would assist in curing a number of other diseases, while the finding against him was, that he was guilty of deceitful and fraudulent advertising, for which his name was ordered to be struck off the register:— *Held*, on appeal to a Divisional Court, under s. 36 of the Act, that the order could not be supported, and must be set aside; and his name, if struck off, restored to the register. — What constitutes "infamous or disgraceful conduct in a professional respect," considered and commented on, as well as the evidence submitted with reference thereto, and the course pursued by the prosecution on the hearing of the charge. *Re Crichton*, 8 O. W. R. 841, 13 O. L. R. 271.

License to practise — *College of Physicians and Surgeons — Mandamus.*] — The College of Physicians and Surgeons cannot refuse to grant license to practise medicine, to a student who has passed the necessary examinations, or has been legally exempted from passing them, and who has obtained the degree of Doctor of Medicine. 2. Upon such refusal a writ of *mandamus* may issue to enforce the issuing of a license. *Gosselin* v. *College of Physicians & Surgeons*, 19 Que. S. C. 175.

Malpractice — *Limitation of Actions —Ontario Medical Act — Termination of services — Trial—Jury.*]—An action against surgeons for malpractice was held to be barred by s. 41 of the Ontario Medical Act, R. S. O. 1897 c. 176, not having been commenced within one year from the date when, in the matter complained of, the defendants' professional services terminated, although the plaintiff had twice visited the defendants at their offices within the year, the Court finding that on these occasions she did not go as a patient, but as a person with a grievance, she having previously consulted another surgeon and also a solicitor. Actions of malpractice are now more properly tried without a jury. Upon the evidence, it was *held*, also, that the plaintiff upon whom the burden rested, had failed to make out a case of negligent malpractice; and the action was dismissed. *Town* v. *Archer*, 22 C. L. T. 258, 4 O. L. R. 383, 1 O. W. R. 391.

Malpractice — Negligence — Evidence. *Bennett* v. *C———*, 1 W. L. R. 740.

Malpractice — *Negligence — Failure to detect dislocation.*] — The plaintiff, who had been severely injured as the result of a fall, sought to recover damages from the defendants, three medical men, by whom he was attended, for their failure to discover an injury to one of the bones of his left hip and to adopt suitable measures to relieve him of the pain and suffering caused thereby. When the defendants were first called to attend the plaintiff, they found several of his ribs broken and a dislocation of his right hip, and treated him for these injuries. On a subsequent examination his left hip was found to be dislocated, and the dislocation was reduced. The left hip became again dislocated some days later, and another physician, who was then called in, and to whom the history of the case was stated, inferred that there was a fracture of the rim of the cup or socket, and applied splints as a means of treating this injury. The evidence shewed that, at the time the defendants made their first and second examinations, there was no reason to suspect the existence of this fracture, and that it was only when the hip came out again after having been reduced that the existence of the fracture was suspected, and the other treatment adopted: —*Held*, that there was no evidence of negligence on the part of the defendants making them liable to damages. *Stamper* v. *Rhindress*, 2 E. L. R. 186, 41 N. S. R. 45.

Malpractice — *Questions for jury.*]—In action against a surgeon for malpractice, the plaintiff has the right to a decision by a jury of a fact in controversy—not where that decision involves the consideration of difficult questions in the region of scientific inquiry, but where the fact to be found is as to what actually took place in the history of the plaintiff's malady, and the defendant's treatment, for example, where there is a conflict of testimony as to what the surgeon did or did not do in the process of reducing or attempting to reduce a fracture. In the present case there were facts in dispute as to which the plaintiff was entitled to the jury's findings. *Jackson* v. *Hyde*, 28 U. C. R. 284, explained. *McNulty* v. *Morris*, 21 C. L. T. 591, 2 O. L. R. 656.

Malpractice — *Trial without jury — Negligence — Evidence — Costs.*] — It is now the general rule, as recognized in *Town* v. *Archer*, 4 O. L. R. 383, that actions against physicians or surgeons for malpractice, where the facts are not so much in dispute as the deductions of skilled witnesses upon the method of treatment disclosed, shall be tried without a jury. — The negligence complained of in this case was in setting and treating a fracture of the plaintiff's leg, the result being a shortened leg and a slightly everted foot:—*Held*, that this result could not be invoked as sufficient evidence of negligence, on the doctrine of *res ipsa loquitur*; and that the defendant's treatment was not to be condemned because somebody else of perhaps equal skill would have pursued another course; and there being no lack of care and attention on the defendant's part, and the evidence not disclosing any piece of negligence or ignorance which could be classed under the head of malpractice, the action was dismissed.—Upon consideration of a number of circumstances, one of them

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being that the action was defended by a medical protection society, the plaintiff was relieved from payment of the costs of the defence upon condition of the proper fees of the defendant for his treatment being paid. *Hodgins* v. *Banting*, 12 O. L. R. 117, 7 O. W. R. 707.

Malpractice — *Want of care and skill — Evidence — Nonsuit.*]— In an action against a surgeon for not exercising ordinary care and skill in treating the plaintiff for an injury to his arm, caused by his being accidentally thrown from a sleigh, the trial Judge non-suited the plaintiff on the ground that, as neither the plaintiff nor any of his witnesses were able to say that the arm was dislocated as a result of the accident, and as both the defendant and another surgeon, who was called in by the defendant and examined the arm three weeks after the accident, swore that it was not dislocated, and as the dislocation, which was sworn to exist a year and nine months after the accident by a third surgeon, whom the plaintiff consulted, and which was admitted to exist at the time of the trial—more than three years after the accident—might have been the result of disease, as was shewn by the evidence of several expert witnesses, there was no evidence to leave to the jury upon which they could properly find a verdict for the plaintiff:—*Held*, Hanington, J., discenting, that the nonsuit was right; and that, even if the dislocation was the result of the accident, the mere fact that the defendant did not discover it and treat the plaintiff accordingly, was not of itself evidence of want of ordinary care and skill on the part of the defendant. *James* v. *Crockett*, 34 N. B. R. 540.

Medical Act, B. C. — *Registered practitioner — Charge of unprofessional conduct — Inquiry by private tribunal — Mandamus — Action.*]—Under s. 36 of the Medical Act, 1908 (previous to its amendments in 1903) the council may hold an inquiry into a charge of unprofessional conduct made against a registered medical practitioner:—*Held*, that *mandamus* did not lie to compel the council to hold an inquiry. Charges of unprofessional conduct may be investigated by the council notwithstanding that the acts complained of may be the subject-matter of an action at law. *Re Medical Act, Ex p. Inverarity*, 10 B. C. R. 268.

Medical Act, Manitoba — *Practising for reward — Electro-therapeutics — Massage.*]—According to standard dictionaries electro-therapeutics, consisting in the treatment of diseases by means of electricity, is a breach of medicine, and it is unlawful under s. 62 of the Medical Act, R. S. M. 1902 c. 111, for a person not registered under the Act to practise as an electro-therapeutist for hire, gain, or hope of reward; and under s. 63 such person cannot recover any fees or charges for such treatment. Massage although a branch of therapeutics, is merely a skilled manipulation of external pressure of the muscles and tissues, and, not depending for its efficacy upon the introduction or application of any other element, cannot be considered to be a branch of medicine. *Regina* v. *Valleau*, 3 Can. Cr. Cas. 435, followed. *Bergman* v. *Bond*, 24 C. L. T. 152, 14 Man. L. R. 503.

Medical attendance — *Action for services rendered — Defence of excessive charge — Reasonableness — Evidence — Dismissal of action.*]—Action for medical services rendered defendant's wife. As to the proper scale of fees the reasonable rule is to pay the charges current in the locality where the services were rendered. Action dismissed, the amount the plaintiff is entitled to recover being below the jurisdiction of the Court. *Bisset* v. *Stewart*, 8 E. L. R. 82.

Medical Health Act, s. 93 — *Medical Health Officer attending smallpox patients — No agreement as to remuneration — Quantum meruit — Inability of patients to pay — No proof of.*]—Plaintiff, a physician and medical health officer of defendant township, brought action against the township and the persons who, in 1908, constituted their local board of health, to recover $2,300. Plaintiff alleged that he was requested, by the individual defendants, to attend smallpox patients, within said township, at $100 per week, which he did from 14th November, 1908, to 24th April.—Meredith, C.J.C.P., *held* (15 O. W. R. 685, 20 O. L. R. 578, 1 O. W. N. 612), that there was no agreement concluded between the parties as to remuneration plaintiff was to receive therefore, not entitled to be paid $100 per week, but only to *quantum meruit*, and, having regard to the fact that while attending the smallpox patients he carried on his ordinary practice, the payment of $25 would be a proper allowance for each visit; — *Held*, further, that plaintiff's case failed as he had failed to shew inability of his patients to pay for his services, and that was a condition precedent to the liability of the municipality under s. 93 of the Medical Health Act.—*Logan* v. *Hurlburt* (1896), 23 A. R. 628, at p. 657, approved.—*Bibby* v. *Davis* (1902), 1 O. W. R. 189, distinguished. — *Toronto Public Library Board* v. *Toronto* (1900), 19 P. R. 329, referred to.—Court of Appeal dismissed plaintiff's appeal with costs. *Ross* v. *London* (1911), 18 O. W. R. 82, 2 O. W. N. 583, 23 O. L. R. 74.

Medical Professions Ordinance, N. W. T. — *Practising medicine or surgery — Midwifery.*]—Section 60 of the Medical Professions Ordinance (C. O. 1898 c. 52) provides: "No unregistered person shall practise medicine or surgery for hire or hope of reward; and if any person not registered pursuant to this Ordinance, for hire, gain, or hope of reward, practises or professes to practise medicine or surgery, he shall be guilty of an offence, and upon summary conviction thereof be liable to a penalty not exceeding $100:"—*Held*, that midwifery is not included within the terms "medicine and surgery," and therefore no penalty can be imposed for the practice of it by unlicensed persons. *Rex* v. *Rondeau*, 5 Terr. L. R. 478.

Ontario Medical Act — "*To practise medicine*" — *Use of drugs and other substances — Construction — Reference by Lieutenant-Governor — "Practical question."*]—*Held* (Meredith, J.A., dissenting), that the words "to practise medicine" in s. 49 of the Ontario Medical Act, R. S. O. 1897 c. 176, cannot be construed except as concrete cases arise, further than in some

such way as follows: if it were shewn that a person not registered under the Ontario Medical Act attempted to practise the cure or alleviation of disease by methods and courses of treatment known to medical science, and adopted and used in their practice by medical practitioners registered under the Act, or advised or prescribed treatment for disease or illness such as would be advised or prescribed by registered practitioners, — then, although what was done, prescribed, or administered, did not involve the use or application of any drug or other substance having or supposed to have the property of curing or alleviating disease, he might be held to be practising medicine within the meaning of this section.—*Per* Garrow, J.A.:—A person may always do his own diagnosing, and buy and use what he chooses (except certain poisons) upon himself. The patient may legally go, under such circumstances, not only to a druggist, but to the Christian Scientist, the osteopath, the medical electrician, the masseur, etc., and obtain and pay for the treatment which these persons give, so long as he does his own diagnosing and prescribing. So also *per* Maclaren, J.A.—*Per* Meredith, J.A.:—The words "practise medicine" in s. 49 should be given their primary and popular meaning, namely, practising the art of healing the sick by means of medicines or drugs.—*Held*, also, (Garrow, J.A., doubting, and Meredith, J.A., dissenting), that a reference to this Court to determine the construction of the above section was competent to the Lieutenant-Governor in council, under R. S. O. 1897 c. 84, s. 1, being "An Act for Expediting the Decision of Constitutional and other Provincial Questions."—*Per* Moss, C.J.O., and Garrow, J.A.:—Under such a reference as this, the Court is to be guided, in giving its opinion, by the settled decisions, and, unless in the case of conflicting decisions, it is not to pronounce upon whether they ought or ought not to have been decided as they were. The decisions cannot be reviewed by the Court as if the reference was an appeal from them or any of them. *Re Ontario Medical Act*, 8 O. W. R. 766, 13 O. L. R. 501.

Ontario Medical Council—*Right to enquire into physician's unprofessional conduct—Physician charged with abortion—Acquitted at Court of General Sessions—Right of Medical Council to enquire into conduct of physician after acquittal.*] — Riddell, J., *held*, (17 O. W. R. 565, 2 O. W. N. 288), that when a physician has been charged with the offence of abortion, the Ontario Medical Council has power to enquire into the professional conduct of that physician, with a view to striking his name off the rolls of the college register, although he had been tried and acquitted by a Court of General Sessions.—Divisional Court affirmed above judgment, holding, that while defendant's acquittal might be a defence, yet it should be presented to the tribunal, whose duty it was to make the enquiry: That it would be improper to stop the enquiry at the threshold, as the Court ought not to assume that effect would not be given to the answer to the charge when it was made to appear that the acquittal had taken place: That defendant would have the right of appeal from the findings of the college council and the appellate Court could be depended upon to see that no injustice was done to the defendant. *Re College of Physicians & Surgeons, Dr. Stinson's Case* (1911), 18 O. W. R. 38, 2 O. W. N. 512, 22 O. L. R. 627.

Osteopathy—*Practising medicine without license.*]—Morson, Co.C.J., *held*, that practising osteopathy was not a violation of the provisions of the Ont. Medical Act, R. S. O. (1897), c. 176, s. 49. *R. v. Henderson* (1910), 16 O. W. R. 1021, 1 O. W. N. 543.

Physician—Sale of professional practice —Breach — Damages. *Smith* v. *Steel*, 12 O. W. R. 31.

Physician, whose attention is absorbed in giving urgent and immediate care to a patient in danger of death as the result of an operation, cannot be held responsible for fault if he relies upon some one else who is present to discharge some necessary duty, *e.g.*, giving hot applications. The person so aiding him is in no sense the agent of the physician and the latter is not responsible for any act on the former's part if it was committed at a time when it was impossible for the physician to be present. *Marchand* v. *Bertrand* (1910), 39 Que. S. C. 49.

Physicians and surgeons — *Expulsion of registered member of college — Unprofessional conduct — Evidence — Appeal—Costs.*]—A young unmarried woman, being pregnant, having to the knowledge of T. endeavoured to effect a miscarriage, asked him to perform on her a criminal operation for abortion. T., supposing that it might be necessary to expel the contents of her uterus owing to the patient's condition arising from these unsuccessful attempts, inflicted a wound on her body with the object of enabling him and his patient the more effectually and easily to deceive her parents and others with respect to her real condition, by causing them to believe that she had been operated upon for appendicitis. This was done in a private sanitarium, under T.'s exclusive control, and without professional or other consultation. T. informed her father (whom she resided with and was dependent upon) in answer to inquiries as to his daughter's condition, that she was suffering from appendicitis. The incision made by T. could serve no purpose relating to the health of the patient. The woman died from the effects of attempts at abortion. T. was afterwards prosecuted on a charge of manslaughter, but was acquitted. The medical council, however, after a formal inquiry by a committee of council, resolved to erase his name from the register of medical practitioners. From this decision he appealed to a Judge of the Supreme Court:—*Held*, reversing the decision of Morrison, J., that T. was guilty of unprofessional conduct, and that the order of the medical council, erasing his name from the register, should be restored.—*Held*, as to costs, that the proceedings being in substance *ad vindictam publicam*, in the absence of express enactment, the legislature did not intend to confer the power to award costs. *Re Telford*, 11 B. C. R. 355, 2 W. L. R. 405.

"Practising" — *Choice of remedies — Statutes.*]—The statutes against the illegal practice of medicine are for the benefit of the public, and should be interpreted and

applied as such.—2. The oath of the father of the child who has received treatment ought to prevail over that of defendant.—3. It is practising medicine illegally to engage with a man to treat his daughter. — 4. Illegal medical treatment consists especially in the choice of remedies applicable to the disease. —5. The fact that the remedies are patented does not make in favour of the defendant.—6. The choice of remedies necessary on the part of the defendant, which he himself sells as well, indicates that he does not sell purely and simply, but practises medicine illegally. —7. The simple profit which the defendant makes upon the sale of his remedies may be the consideration which he obtains for the practice of medicine. *College of Physicians & Surgeons of Que.* v. *Blake*, 2 Que. P. R. 567.

"Practising" — *Diagnosis — Evidence —Informers.*]—One who, not being a registered physician, sells remedies to a person who comes to him and asks for a remedy for a disease which he says he has, but without diagnosing such disease, is not guilty of illegally practising medicine.—The testimony of persons who are engaged, on condition of sharing in the penalty fixed by law, to make a case against a person who is suspected of illegally practising, is such testimony as will be viewed with suspicion, and will not be regarded if it is contradicted by the oath of the accused. *College of Physicians & Surgeons of Que.* v. *Tucker*, 17 Que. S. C. 70.

"Practising" — *Diagnosis — Ontario Medical Act.*]—Diagnosing only, or professing to diagnose, without prescribing a remedy or medicine, is not a "practising of medicine." *Regina* v. *Howarth*, 24 O. R. 51, and *Regina* v. *Coulson*, 27 O. R. 59, distinguished. Conviction for practising medicine without registration quashed, where the evidence shewed that the alleged practising consisted in asking the complainant what his symptoms were and then rubbing his body and suggesting that he was cured. *Regina* v. *Valleau*, 20 C. L. T. 310.

Practising medicine without license —*Ontario Medical Act, R. S. O. (1897), c. 176, s. 49—Oculist—Treatment of eyes — Conviction—R. S. O. (1897), c. 90, s. 8—1 Edw. VII. c. 13, s. 2—Criminal Code ss. 761 to 769.*]—The Ontario Medical Act, R. S. O. (1897), c. 176, s. 49, did not grant to the medical profession a monopoly of supplying, for gain, such things as go to make life easier for those who suffer from physical defects. That Act relates only to the "practice of medicine," as is understood in its primary and popular meaning, and does not cover all kindred and cognate arts.—Defendant, an oculist, was convicted on a charge of having charged $13 for treatment of the eyes and $10 for glasses, and was fined $50 and $23 costs.—Middleton, J., quashed the conviction, informant to pay costs of appeal, as well as of the proceedings before the magistrate. *R.* v. *Harvey* (1910), 16 O. W. R. 433, 1 O. W. N. 1002.

Practising midwifery — *Unregistered practitioner — Evidence — Isolated Act.*]—Defendant was charged under above section with practising midwifery, etc. By the evidence it appeared she had charge of the case from the beginning and was paid for her services:—*Held*, that there was a continuous series of acts even if an isolated instance, and defendant was convicted. *R.* v. *Raffenberg* (No. 2) (1909), 12 W. L. R. 241.

Public Health Act (N.S.) — *Violation —Contagious disease—Quarantine—Removal of warning on house.*]—Defendant was convicted for not submitting himself for examination under above Act. On appeal conviction sustained. *R.* v. *David*, 7 E. L. R. 564.

Qualification of medical practitioner—Registration — False certificate — Resolution of medical board to cancel registration—Appeal. *Re Dyas*, 5 E. L. R. 545.

Services—Operations and medical attendance — *Quantum meruit*—*Poor* patients —Promise of defendants to pay for services — Scale of remuneration — Payment into Court—Costs. *Gibson* v. *Mackay*, 10 O. W. R. 1081, 11 O. W. R. 449.

Services abroad — *Illegal practising —Payment for.*]—A contract made by a physician and surgeon duly qualified by the laws of the Province of Quebec, where he has his domicil, to render professional services in the State of Vermont, by the laws of which State he is prohibited from practising, is illegal, and he cannot recover his charges for such services before the Courts of this Province. *Rugg* v. *Lewis*, 17 Que. S. C. 206.

MEETINGS.

See COMPANY.

MEETINGS OF COUNCIL.

See MUNICIPAL CORPORATIONS.

MEMBER OF LEGISLATIVE ASSEMBLY.

See TRIAL.

MEMBER OF PARLIAMENT.

See DISCOVERY.

MERCANTILE AGENCY.

See SOLICITOR.

MERCHANT SHIPPING ACT.

See SHIP.

MERGER.

Equitable right to charge — *Subsequent acquisition of fee.*]—In taking the accounts under the judgment reported 27 O. R. 511 and 24 A. R. 543, it was held that the defendant Lye had no right to an equitable charge, in priority to the plaintiff's claim, for sums paid by Lye to prior incumbrancers before the conveyance of the land to him, his potential equity not bringing him within ss. 8, 9, and 13 of R. S. O. c. 121, and there being no evidence of intention to reserve the right to the equitable charge. *Armstrong* v. *Lye*, 20 C. L. T. 203, 27 A. R. 287.

See ANNUITY—BILLS OF SALE AND CHATTEL MORTGAGES—COVENANT—DISTRIBUTION OF ESTATES—GUARANTY—JUDGMENT—LAND TITLES ACT — LANDLORD AND TENANT — MORTGAGE — SALE OF GOODS—VENDOR AND PURCHASER—WAY.

MESNE PROFITS.

See ASSESSMENT AND TAXES—EJECTMENT—LANDLORD AND TENANT—PARTITION — TRESPASS TO LAND.

MILEAGE.

See SHERIFF.

MILEAGE PAYMENTS.

See STREET RAILWAYS.

MILITARY LAW.

Militia Act—*Relations of officers and privates—Obeying orders—Arrest—Liability for.*]—Persons belonging to the regular army are always subject to military law and regulations, and they are obliged to obey orders which their superiors give them, the sole condition being that such orders relate to militia affairs and are not so evidently illegal that they lead to the belief that the person giving them is mentally incompetent.—2. It is otherwise in the case of those who belong to the volunteer militia; they are not subject to military law and regulations and are only obliged to obey their superiors in the cases expressly enumerated in the Militia Act. Outside of such cases, they are only ordinary citizens, and their superiors have no more right to give them orders than they have to give orders to persons who do not belong to the militia.—3. A militia officer who causes to be illegally arrested a man who belongs to the militia, makes himself liable to damages. Judgment in 22 Que. S. C. 25, affirmed. *Cole* v. *Cooke*, 12 Que. K. B. 519.

Obstruction of regiment on the march—*Diligence — Negligence — Conviction.*]—The defendant, the motorman of an electric street car, was convicted of unlawfully obstructing a regiment of His Majesty's troops while on the march. It appeared that the regiment were coming out of the drill-hall and crossing the street, when the car approached. The defendant stopped the car to allow the regiment to pass in front of it, but the regiment protruded over the crossing; a scuffle ensued, and the car was afterwards, but accidentally, moved in the same direction over the crossing:—*Held*, that the defendant used such diligence in stopping the car as was reasonable in the circumstances; he could not be said to have been guilty of negligence; and he was not responsible for what afterwards occurred.—Conviction quashed. *R.* v. *McIntosh* (1910), 15 W. L. R. 113.

Permanent militia of Canada—*Re-enlistment — Refusal to take oath—Militia Act, 1906, s. 3—Arrest—Habeas corpus.*]—Applicant had been in the permanent corps of the active Canadian militia. His term expired, but he continued in the service. Having misconducted himself he was arrested. Being urged to re-enlist, he finally took oath of allegiance, but refused to complete his enlistment or sign the service roll. On *habeas corpus* application, his release was refused, and he was remanded to the custody of the military authorities. On trial by court martial he was subsequently acquitted. *Re Harris*, 10 W. L. R. 706.

Riot—*Troops called out to quell—Expenses of troops—Liability of municipal corporation to pay—Militia Act—Authority of district commanding officer — Protection of Crown property.*]—The Crown and others brought action to recover the costs, charges, and expenses incurred by calling out troops to quell a riot during a strike of the employees of the Lake Superior Corporation, at the town of Sault Ste. Marie, in September and October, 1903. Plaintiffs claimed $7,293.28. Defendants disputed the regularity of the requisition for troops and the necessity of any other than the local regiment, whose claims were paid by the defendants:—*Held*, that the requisition complied sufficiently with the requirements of the Militia Act, R. S. C. (1906), c. 41, s. 34. Judgment as prayed with costs. *R.* v. *Sault Ste. Marie* (1910), 16 O. W. R. 871, 1 O. W. N. 1144.

MILITARY RESERVE.

See CONSTITUTIONAL LAW—CROWN.

MILITIA ACT.

See CONSTITUTIONAL LAW—MILITARY LAW.

MINERS' LIENS.

See CONSTITUTIONAL LAW — CONTRACT — LIENS—MINES AND MINERALS—STATUTES.

MINES AND MINERALS.

1. Abandonment of Claim.

By insufficient staking.]—Insufficiency of staking works an abandonment of a claim and leaves the lands open to be staked by another licensee. *Re Milne & Drynan* (1909), M. C. C. 455.

By insufficient staking.]—Failure to go around the claim, omitting the planting of 3 of the corner posts, and the blazing of the lines, and failure properly to mark the discovery post, renders the staking of a mining claim invalid.—*Held*, also, by the Commissioner, following the judgment of Britton, J., in *Re Cashman and the Cobalt & James Mines, Ltd.*—contrary in this respect to his own decision therein—that the existence of a claim which was invalid by reason of insufficient staking prevented until it was disposed of the staking out of a valid claim upon the same lands by another licensee; but *held* by the Divisional Court, overruling the judgment of Britton, J., and the Commissioner's decision following it, that it did not. *Re Milne & Gamble* (1908), M. C. C. 249.

By insufficient staking.]—Where, in surveyed territory, the alleged discovery and the discovery post were outside the limits of the claim as applied for and as required by the Act to be applied for, though within the boundaries as actually staked out on the ground, the boundaries through want of reasonable care having been erroneously located, the claim was held invalid.—*Held*, also, that the above defects in staking and the failure to mark the name and license number of the staker or the description of the lot on any of the posts worked an abandonment under s. 83 (Act of 1908) and left the lands open to restaking. *Re Burd & Paquette* (1909), M. C. C. 419.

By insufficient staking.]—A staking in which two of the corner posts were not numbered and none of the lines were freshly blazed and half of one boundary had never been blazed, was held in the circumstances to work an abandonment and to leave the land open to restaking, the staker being at all events disqualified by a prior staking which he failed to record. *Re Kollmorgen & Montgomery* (1909), M. C. C. 397.

By insufficient staking.]—L., on 26th February, 1907, staked out 17 acres of the prescribed 40 acre portion of the lot which he applied for, placing his discovery post in the unstaked part, marking it for another portion of the lot, and failing to connect it by a blazed line with his No. 1 post, and as a fact had no real discovery of valuable mineral at the post or on the claim. C., on 21st June, 1907, discovered valuable mineral on the unstaked part of the claim and staked out and applied for the 40 acres.—*Held*, by the Commissioner that L.'s claim was invalid, and that as it was not staked out as provided by the Act nor in substantial compliance therewith, it must be deemed to be abandoned under s. 106, and that the lands were therefore, notwithstanding that it was upon record, open within the meaning of s. 131, as amended in 1907, to be staked out by another licensee, and that C. was entitled to stake out the property as he did and that his claim was valid and should be recorded.—An appeal to the Divisional Court was dismissed.—*Held*, *per* the Court, that as the appellant company had no right in the property it was not competent for it to attack the claim of C., when if successful the only result would be to throw the land open to the public. (Overruled by *Re Smith & Hill*, M. C. C. 349).—*Held*, *per* Britton, J., that the claim of L. was not an abandoned claim within the meaning of the statute. (Overruled by *Re McNeil & McCully & Plotke*, M. C. C. 262, and *Re Milne & Gamble*, M. C. C. 249.) *Re Cashman & Cobalt & James Mines* (1907), M. C. C. 70, 10 O. W. R. 658.

By insufficient staking.]—*Held*, that it might not be too strict a ruling in the circumstances to hold that failure to blaze a discovery line worked an abandonment of the staking. *Re Munro & Downey* (1908) M. C. C. 193, 14 O. W. R. 523, 19 O. L. R. 249.

Delay in staking.]—A discoverer who fails to stake out his claim within proper time, in at least substantial conformity with the Act, abandons or forfeits his rights where another discoverer intervenes with a valid discovery and completes staking before him. *Re McDermott & Dreany* (1906), M. C. C. 4.

Delay in staking.]—T. made a discovery and planted a discovery post on 10th September, doing nothing further till the 24th, when he completed the staking out of his claim; F. meanwhile made a discovery and on the same day, 14th September, completed the staking of his claim (being as a fact ignorant of T.'s discovery).—*Held*, that F. was entitled to the property, T.'s delay working an abandonment and leaving the lands open to F.—It seems doubtful whether anything except inability to complete the actual

staking out of a claim will excuse delay. *Re Trombley & Ferguson* (1908), M. C. C. 189.

Delay in staking.]—Delay in staking is fatal only where someone else effectively intervenes, and a person disqualified cannot do so or in any way prevent another claim accruing to the property. *Re Munro & Downey* (1908), M. C. C. 193, 14 O. W. R. 523, 19 O. L. R. 249.

Lack of discovery.] — *Held*, by the Commissioner, that a claim invalid for lack of sufficient discovery is not an abandoned one within the meaning of ss. 166 and 137 (1907), and does not until disposed of leave the lands open to a subsequent staking. *Re McCrimmon & Miller* (1907), M. C. C. 79.

Lack of discovery.] — *Held*, by the Divisional Court, that a prior staking which is invalid for lack of a real discovery is deemed to be abandoned within the meaning of the Act, and so does not stand in the way of another staking or prevent the making of the necessary affidavit as to the lands being open. (But see amendment to s. 83 made in 1909 by c 26, s. 31 (1).) *Re McNeil & McCully & Plotke* (1908), M. C. C. 262, 13 O. W. R. 6, 17 O. L. R. 621.

Location—*Abandonment — Defects in title—Certificates of work—County Court — Evidence.*]—The "Trilby" mineral claim lapsed by abandonment in July, 1896. Before lapse the same ground was located as the "Old Jim" by the defendant's predecessor in title, and certificates of work were recorded in respect of it in 1897, 1898, and 1899. In February, 1899, the plaintiffs located the same ground as the "Herald Fraction" claim:—*Held*, that the defects in the defendant's title were cured by the recording of the certificates of work. Unless objection is taken to the jurisdiction of the Court below at the trial, it will not be considered an appeal. At the trial evidence tendered by the defendant as to abandonment of the "Trilby" claim by its locator was rejected. *Per* Martin, J.: As abandonment was not pleaded, the rejection of the evidence was proper. In mining cases especially the parties should know beforehand the case they have to meet. *Gelinas* v. *Clark*, 21 C. L. T. 261, 8 B. C. R. 42.

Location — *Abandonment—Overlapping — Evidence — Certificate of work — Irregularities.*] — The Parrot mineral claim, located in February, 1895, lapsed by abandonment in February, 1899. In March, 1895, part of the same ground was located by the plaintiff as the Townsite claim, and certificates of work were recorded in respect of it in 1896, 1897, 1898, and 1899. In December, 1899, the ground covered by the original Parrot claim was re-located as the Defiance No. 1 Fraction, by the defendants' predecessor in title:—*Held*, in adverse proceedings, that so much of the Parrot claim as was overlapped by the Townsite claim was not unoccupied ground at the time of the location of the Townsite, and as such was not open to location. At the trial the plaintiffs attacked the validity of the defendants' location, and the defendants sought to put in evidence a certificate of work issued the day before.—*Held*, not admissible, as it was obvious that such certificate was to be used to cure irregularities. *Rammelmeyer* v. *Curtis, Powers* v. *Curtis*, 8 B. C. R. 383.

Notice under the Act—Abandonment by. See *Wright & Coleman Devel. Co. & Sharpe* (1909), M. C. C. 373.

Partnership—*Abandonment — Evidence of — Equitable relief — Laches.*] — The plaintiff and the defendant, as partners, acquired a lease of forty gold mining areas at Mahone. For convenience, the title was taken in the name of one of the defendants. The partnership expended some moneys on the areas, but was unsuccessful in finding gold. In 1887 the plaintiff decided to leave Mahone to study medicine. There was contradictory evidence as to whether he did or did not at this time abandon his interest in the areas. The defendants at all times subsequently treated the areas as theirs alone. The plaintiff took no further interest in the areas apparently until January, 1899, some twelve years after first leaving Mahone, and, although he had made several visits thereto in the interval and had seen the defendants, he made no enquiries. The defendants all along by regular payments to the Mines Office had kept the lease alive until 1894, when the lease was forfeited by the Mines Office. An agreement was then made by which the defendants received $2,400 and conveyed the areas to one F. The plaintiff hearing of this brought an action to recover one-third of the $2,400:—*Held*, that the plaintiff, when he left Mahone in 1887, gave up and abandoned to the defendants all the interest he had in the areas; and, although he did not do so in writing, the Court would not assist him after such laches as he had shewn. *Dunlop* v. *Nicoll*, 21 C. L. T. 84.

Subsequent applications by same person.]—C. staked out a mining claim 1st June and recorded it 15th June, 1906; W. made a discovery upon the same lands 16th July, but the Recorder would not receive his application because C.'s was on record; W. had formed a partnership with S., who was a foreman of the C. D. Co. which had had men prospecting on the lot; on 9th August the Co. staked on W.'s discovery but its application was also rejected. On 14th Sept., W., by giving C. a half interest, got C.'s claim abandoned and his own on record. The Co. staked again on 6th October and 21st November, 1906, and 17th January, 1907, on an alleged discovery of 29th June, which was not in reality a discovery within the meaning of the Act making successive applications which the Recorder rejected at the time but which were afterwards recorded under mandamus. — *Held*, by the Commissioner, following Australian and United States authorities, that the Co.'s subsequent stakings and applications on a different discovery worked an abandonment of its first staking and application, and that as the subsequent ones were admittedly not founded upon a real discovery all its applications were invalid; and he declined to deal with its equitable claim to the W. discovery and application until S. should be made a party and proceedings taken in the form prescribed by the Act.—*Held*, by the Divisional Court, that the subsequent

applications did not work an abandonment, and (Riddell, J., dissenting), that the whole claim should be awarded to the Co.—*Held*, by the Court of Appeal, that an abandonment should not be construed from the making of the subsequent stakings and applications, but that Sharpe must be made a party and the matter remitted to the Commissioner for determination of the rights of all concerned. *Re Wright & Coleman Devel. Co.* (1909), M. C. C. 103, 12 O. W. R. 248, 13 O. W. R. 900.

See 16 O. W. R. 826, 1 O. W. N. 1129.

Unoccupied ground — *Overlapping — Abandonment.*]—In adverse proceedings the party locating over a claim alleged to have been abandoned must produce clear evidence of abandonment, and it is not enough for this purpose to rely upon the non-production of certificates of work.—*Semble*, a locator cannot after abandonment by a prior locator rest on a location made before such abandonment, but must relocate. *Cranston* v. *English Canadian Co.*, 7 B. C. R. 266.

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2. APPLICATION FOR CLAIM.

Deponent not present at discovery—An application on a discovery and staking of a non-licensee sworn to by an applicant who was not present at the discovery or staking is fraudulent and void. *Re Dennie & Brough* (1908), M. C. C. 211.

Deponent personating licensee.] — A claim staked out in the name of a licensee by a non-licensee and non-holder of a forest reserve permit, the recording of which was procured by the latter personating the former and swearing the affidavit in his name, cannot stand, though a certificate of record has been issued for it, and where the facts appeared incidentally in another proceeding to which all persons interested were parties, the claim was declared invalid, and the guilty person reported for prosecution. *Re McDonald & Casey* (1908), M. C. C. 219.

False affidavit.]—Procuring the recording of a mining claim by a false affidavit will invalidate the claim. *Re Reichen & Thompson* (1907), M. C. C. 88.

Re Wright & Coleman Devel. Co. & Sharpe (1909), M. C. C. 373.

False statements.]—False and deceptive statements in the application and affidavit, and attempting to blanket the land in disregard of the law, disentitle the applicant to sympathy even where he has a discovery, and may be sufficient to invalidate his claim. *Re Smith & Kilpatrick* (1908), M. C. C. 314.

Mistake in date of discovery and staking.] — A application for a mining claim is not invalidated by a mistake in giving the date of discovery and staking, at least where the mistake is explained by the circumstances and no one is misled or prejudiced thereby. *Re Thompson & Harrison* (1906), M. C. C. 35.

Mistake in date of discovery and staking.]—A *bona fide* mistake in giving the date of discovery and staking in an application for a mining claim will not invalidate the claim, the correct date having been put upon the posts. *Re Gosselin & Gordon* (1908), M. C. C. 254.

Slight defects.] — Slight unintentional defects or inaccuracies in an application will not invalidate a claim. *Re Reichen & Thompson* (1907), M. C. C. 88.

Untruth and deception.] — Untruth and deception in an affidavit and application for a mining claim will invalidate the application. *Re McNeil & Plotke* (1907), M. C. C. 144.

Who may make.]—It is only the licensee who was actually on the ground staking out the claim or personally superintending the staking, that is qualified or able properly to make the affidavit required to accompany a mining claim application. *Re McNeil & Plotke* (1908), M. C. C. 144, 13 O. W. R. 6, 17 O. L. R. 621.

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3. BOUNDARIES OF CLAIM.

Adjoining claims — *Boundary.*]—Two persons having located mining claims in British Columbia near the United States boundary line, it turned out that a piece of ground was included in both, and an action was brought to determine the title thereto. On the trial it was proved and conceded that the initial post of the defendant's claim was south of the boundary line, and so in foreign territory:—*Held*, affirming the judgment in 6 B. C. R. 531, that, in consequence of this situation of the defendant's initial post, his location was utterly void. *Madden* v. *Council*, 20 C. L. T. 39, 30 S. C. R. 109.

Application for extension of boundary *of placer mining claim — Application pending under-staking of same ground — Abandonment and restaking—Assistant gold commissioner—Jurisdiction—Orders in council—Placer Mining Act—Advertised boundaries — Protest — Jurisdiction of Territorial Court.*]—Action for a declaration of plaintiff's rights in respect of a mining claim:—*Held*, (1) that the Assistant Gold Commissioner has power to make an order extending the boundaries of a mining claim; (2) that 88 below discovery, sulphur, is a good description; (3) that as plaintiff's application for an extension was pending when defendant abandoned his fractional claim and restaked, plaintiff is prior and entitled to the grant. Judgment for plaintiff. *Robertson* v. *Stahl*, 11 W. L. R. 401.

Boundaries of mining claims on creek—Plan of survey—Amendment—Original survey—Evidence. *Syndicat Lyonnais du Klondike* v. *McDonald* (Yuk.), 4 W. L. R. 189.

Crown grant of mining lands—*Construction—Reservation of railway right of way—Evidence—Description—Plan—Actual exception of strip of land and not mere easement — Title — Declaration.*]—Plaintiffs brought action against the Railway Commissioner, the Right of Way Mining Co., and certain individuals, for an injunction and other relief in respect of the mining rights

upon a strip of land in the Cobalt district. The plaintiffs contended that a Crown grant issued to their predecessors in title and purporting to convey mining location J.S. 14, as shewn to them on a plan, conveyed to them the right of way of defendants' railway subject to an easement in the defendants for the use of the right of way. The plan in question shewed the railway lands in green running through a 40-acre tract, and on either side 36 95/100 acres described by metes and bounds in a description accompanying the plan. It was also contended that under the Mines Act a mining location could not consist of less than 40 acres, and that the reference in the description to mining location J.S. 14 meant the 40 acres. At trial Mabee, J., *held*, that this contention could not, under the circumstances, prevail, and that only the 36 95/100 acres were conveyed to the plaintiffs. Besides, were it otherwise, the Act 6 Edw. VII. c. 12, s. 2 (O.), destroyed any vestige of hope that plaintiffs could have of obtaining relief. Court of Appeal for Ont. affirmed judgment of Mabee, J., and the Judicial Committee sustained the Court of Appeal. Judgment of the Court of Appeal for Ontario, 10 O. W. R. 516, and of Mabee, J., at trial, 9 O. W. R. 513, affirmed. *La Rose Mining Co.* v. *Temiskaming & Nor. Ont. Rw. Com.*, C. R., [1909] A. C. 347.

Followed in *Temiskaming & Nor. Ont. Rw. Com.* v. *Alpha Mining Co.*, 13 O. W. R. 804.

Enlarging boundaries in survey.]— A survey of a mining claim which (without authority) enlarges the boundaries beyond the area originally staked out and applied for, gives the holder of the claim no right to the added land, and does not prevent the valid staking out and recording of such land by another licensee.—The holder of the claim who employs the surveyor, must be held responsible for the way the survey is made. *Re Green* (1908), M. C. C. 293.

Excessive area.] — Staking more than the prescribed acreage will not, in the absence of fraud, invalidate the claim except as to the excess, and in any event a certificate of record would, in the absence of fraud or mistake, preclude attack upon this ground, the claim having with the permission of the Recorder been reduced to the proper size. *Re Balfour & Hylands* (1909), M. C. C. 430.

Location—*Record.*]—Two strips of land unconnected with each other, although within the statutory limit of 1,500 feet, cannot be embraced in one location and record. *Dart* v. *St. Keverne Mining Co.*, 7 B. C. R. 56.

Mining lease — *Boundaries of area — Starting point — Evidence — Plan.*]—In an action brought by the plaintiff to recover damages for the mining and removal of iron ore, claimed by him, under a lease from the Crown, judgment was given in favour of the defendant company, on the ground that, in order to recover, it was necessary for the plaintiff to establish the south line of land originally granted to G. The starting point in the plaintiff's lease was a marked stone, located a given distance from a marked maple tree, "on the south line of lands originally granted," etc.:—*Held*, following *Fielding* v. *Mott*, 6 R. & G. 339, 14 S. C. R. 254, that the trial Judge erred in holding that the plaintiff could not recover unless he established the south line of the land granted to G., as such line, if shewn to be in a different place from the marked tree, would be rejected as *falsa demonstratio*. A copy of a plan from the Crown lands office, as to which one of the plaintiff's witnesses was cross-examined, and which was put in by the defendants' counsel, without restriction, as part of his general evidence, was in for all purposes to which the plaintiff might apply it, and was properly used for the purpose of proving measurements made on the ground. *Bartlett* v. *Nova Scotia Steel Co.*, 35 N. S. R. 376.

Placer claim—*Location under obsolete Act — Relocation under existent Act—Formal abandonment — Representation—Work done on adjoining claim—Placer Mining Act.*] —Where a placer claim has been erroneously located pursuant to the provisions of an obsolete statute, it is permissible to relocate it in accordance with the existent statute, and no formal abandonment is necessary.—Adopting the principle of *Woodbury* v. *Hudson*, 1 B. C. (pt. 2) 39, work done by a miner making a cut through an adjoining claim, with the consent of the owners, for the better working of his own claim, must be held to be a representation of his own claim.—Where one post was made to do joint duty on the common boundary line of two claims, the names of the two claims being written on the side of the post facing the respective claims:—*Held*, that the object of the statute requiring due marking had been accomplished. *Wheelden* v. *Cranston*, 12 B. C. R. 489.

Placer mining—*Disputed title — Trespass pending litigation — Colour of right—Invasion of claim—Adverse acts — Sinister intention—Conversion—Blending of materials —Accounts—Assessment of damages—Mitigating circumstances — Compensation for necessary expenses — Estoppel—Standing by —Acquiescence — Measure of damages.*] — After a favourable judgment by the Gold Commissioner in respect of the boundary between contiguous placer mining locations, and while an appeal therefrom was pending, the defendants, with the knowledge of the plaintiffs, entered upon the location and removed a quantity of auriferous material from the disputed and undisputed portions thereof, intermixed the products, without keeping any account of the quantities taken from these portions respectively, and appropriated the gold recovered from the whole mass.—In an action for damages subsequently brought, the plaintiffs recovered for the total value of the gold estimated to have been taken from the disputed portion of the claim, without deduction of the necessary expenses of working and winning the gold:—*Held*, affirming the judgment appealed from, *Kincaid* v. *Lamb*, 4 W. L. R. 167, Davies, J., dissenting, that a correct appreciation of the evidence disclosed a sinister intention on the part of the defendants, and that they had deliberately blended the materials taken from both parts of the location, converted the whole mass to their own use, and thereby destroyed the means of ascertaining the respective quantities so taken, and the proportionate expense of recovering the precious metal therefrom, and that, consequently, they were liable in dam-

ages for the total value of so much of the intermixed products as were not strictly proved to have come from the undisputed portion of the location.—*Quare*, does the English rule governing the assessment of damages in respect of trespasses in coal mines supply a method of assessment applicable in its entirety to placer mining locations? *Lamb* v. *Kincaid*, 27 C. L. T. 489, 38 S. C. R. 516.

Reducing claim to proper size.]—Removing No. 3 and No. 4 posts pursuant to the written permission of the Recorder, in order to reduce the claim to the proper size, will not cause forfeiture of the claim. *Re Balfour & Hylands* (1909), M. C. C. 430.

Title — *Overlapping — Measurements — Abandonment and relocations.*]—In adverse proceedings if the plaintiff wishes to attack the defendant's title he must attack it while proving his own title and not wait till rebuttal. The plaintiff must shew the measurements of the ground in dispute in order to prove overlapping of claims. An affidavit by a relocator that the ground is unoccupied may be regarded as a statutory abandonment of his former claim. *Dunlop* v. *Haney*, 7 B. C. R. 1, 305.

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4. Certificate of Record.

Effect of.]—A mining claim for which a certificate of record has issued cannot, in the absence of fraud, be impeached for any defect or irregularity in its acquisition. After the 60 days allowed for dispute have elapsed and a certificate of record has issued, the title should not be lightly interfered with. *Re Dennie & Brough* (1908), M. C. C. 211.

Effect of — *Excessive area.*]—Staking more than the prescribed acreage will not, in the absence of fraud, invalidate the claim except as to the excess, and in any event a certificate of record would, in the absence of fraud or mistake, preclude attack upon this ground, the claim having with the permission of the Recorder been reduced to the proper size. *Re Balfour & Hylands* (1909), M. C. C. 430.

Effect of — *Lack of discovery.*]—After issue of certificate of record, a mining claim is not open to attack for lack of discovery of valuable mineral unless the applicant did not *bona fide* believe he had a sufficient discovery and was therefore guilty of fraud. *Re Young & Scott & MacGregor* (1908), M. C. C. 162.

Setting aside—*Mistake.*]—M., in 1904, located lands under the Veteran Land Grants Act. On 1st March, 1907, he applied for a patent, filing the necessary proof and being entitled, as the law then stood, to both the surface rights and the minerals. On 16th March, by his attorney, he gave C. an option for purchase of such title as he would receive from the Crown. On 22nd March R. staked out a mining claim upon part of the lands. On 3rd April patent issued to M., including the minerals. On 10th April R. recorded his mining claim, and on 13th Sept., 1907, obtained a certificate of record therefor, the certificate being issued by the Recorder in ignorance of the fact that the lands were veteran lands and in forgetfulness of the fact that the matter had been in doubt in his mind at the time of recording and that he had only received the application "for what it was worth:"—*Held*, by the Commissioner, that the certificate of record was issued in mistake within the meaning of the Act and should be revoked.—That the giving of the option did not in the circumstances disentitle M. to the minerals, that the lands were therefore not open to be staked out or recorded as a mining claim, and that the mining claim was invalid and should be cancelled.—That the Commissioner had in the circumstances jurisdiction to revoke the certificate of record, and, it seemed, also to deal with the validity of the mining claim. *Re Rogers & McFarland* (1909), M. C. C. 407, 14 O. W. R. 943, 19 O. L. R. 622.

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

Where recording procured by personation and fraud.]—*See Re McDonald & Casey* (1908), M. C. C. 219.

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5. Certificate that Interest in Claim in Question.

Discussion as to issue and continuance—*Re Babayan & Warner* (1909), M. C. C. 346.

Effect of.]—J. as a friend drew up a writing for B. and K., which all understood and intended to relate to another claim, but which by mistake purported to deal with the claim in question, mentioning it as belonging to B.:—*Held*, that J. was not thereby estopped from enforcing his rights to the latter claim and that D., who, while the proceedings were pending and while a certificate under s. 77 (2) (Act of 1908) was on record, purchased from K., who had notice of J.'s

rights, was not in any better position than K. *Re Jackson & Billington* (1909), M. C. C. 428.

See, also, *Re Odbert & Farewell, Ribble & Bilsky* (1910), M. C. C. 467.

Issue and continuance of.]—It is only after a proceeding under the Act has been commenced that a certificate under s. 77 (2) (Act of 1908) (in the nature of a *lis pendens*) can properly be issued or continued against a mining claim: a *lis pendens* out of the High Court does not authorize such issue or continuance, nor should such a *lis pendens* be entered upon the record of claim. *Re Wishart & Harris* (1908), M. C. C. 305.

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6. DISCOVERY OF MINERAL.

Adopting discovery of another.]—It seems that a licensee who, on lands open to prospecting, finds valuable mineral which has been exposed but not appropriated by another, may adopt or appropriate it as a discovery. *Re Smith & McHale* (1907), M. C. C. 99.

Adopting existing discovery.]—*Held*, *per* Moss, C.J.O., that there seemed much difficulty in holding that the mere adoption by a licensee of mineral opened up on a claim by another, while the latter is still working and claiming a right to work upon the property, can be a sufficient discovery upon which to ground a claim, at all events until after there had been an actual reverter to the Crown by lapse, abandonment, cancellation or forfeiture; and, *per* Meredith, J.A., that upon the facts S. had made no discovery such as the Act contemplates. *Re Smith & Hill* (1909), M. C. C. 349, 14 O. W. R. 881, 19 O. L. R. 577.

Agreement between prospectors — Declaration of interest of co-owners—Statute of Frauds—Trust—Lease taken in name of one—Agreement of lessee with stranger—Construction — Ratification by co-owners—Notice of interests of co-owners—License to mine—Taking out ore—Share in proceeds—Fraud — Amendment — Land Titles Act — Injunction—Costs. *McLeod* v. *Lawson, McLeod* v. *Crawford*, 7 O. W. R. 519, 8 O. W. R. 213.

Appropriating abandoned discovery.]—A licensee may probably appropriate to himself a discovery laid open but abandoned by another, but his rights under it must date from the time he sees and appropriates it. *Re McDermott & Dreany* (1906), M. C. C. 4.

Appropriating discovery under subsisting staking.]—A licensee is not entitled to appropriate or base an application on an existing discovery while under a subsisting staking of another licensee. *Re Wright & Coleman Devel. Co. & Sharpe* (1909), M. C. C. 373.

Appropriation necessary.] — Unless a discovery is appropriated by at once planting a discovery post upon it and proceeding as quickly as reasonably possible to complete the staking out of a mining claim, the discoverer's rights may be lost or postponed. *Re Reichen & Thompson* (1907), M. C. C. 88.

Belief not sufficient—*Discovery after staking ineffective.*]—There must be actual discovery of valuable mineral within the definition of the Act at the time of staking out a mining claim; mere belief of it is not sufficient.—A discovery made after the staking out will not validate the claim.—Ontario and United States laws compared. *Re Lamothe* (1908), M. C. C. 167.

By diamond drill—*Evidence.*]—Where the holder of a mining claim claimed to have made discovery of valuable mineral by means of a diamond drill, obtaining as he claimed small assays from the borings, but had done nothing to open up the alleged finds or shew their extent or character,—it being in the district at that time necessary to have every discovery pass inspection—proof of discovery was held unsatisfactory. *Re Waterman & Madden* (1907), M. C. C. 86.

Deponent not present at discovery.]—An application on a discovery and staking of a non-licensee sworn to by an applicant who was not present at the discovery or staking is fraudulent and void. *Re Dennie & Brough* (1908), M. C. C. 211.

Deponent personating licensee.]—A claim staked out in the name of a licensee by a non-licensee and non-holder of a forest reserve permit, the recording of which was procured by the latter personating the former and swearing the affidavit in his name, cannot stand though a certificate of record has been issued for it, and where the facts appeared incidentally in another proceeding to which all persons interested were parties, the claim was declared invalid, and the guilty person reported for prosecution. *Re McDonald & Casey* (1908), M. C. C. 219.

Evidence—*Discovery not at post—Subsequent sinking.*]—M. and L., on 27th Feb. 1907, staked out a mining claim for B. The claim after inspection was cancelled by the Recorder for lack of discovery, entry thereof being made on the record on the evening of 20th August after the office was closed to the public; notice was given next day—the Act requiring it to be given not later than the day after cancellation; appeal to the Commissioner was filed by B. on 5th September, the Act requiring appeal to be taken within 15 days from the record of the decision.—The evidence before the Commissioner shewed that M. and L. in staking had used a standing tree cut off as the Act required for their discovery post, it being within 3 feet of a crack or small vein into which they had picked and put some shots on the day of staking, exposing a little iron pyrite; it was claimed that they had also found, and intended the post to apply to, another vein 15 or 20 feet from the post which was afterwards opened up and found to be more promising:—*Held*, by the Commissioner, that the appeal filed on the 16th day after entry of cancellation was too late and must be dismissed upon that ground, but that on the merits it would also have to be dismissed as the crack

near the post was out of the question as a discovery, and he was not satisfied on the evidence that M. and L. had discovered the second vein when they staked, and that at all events it was not until sinking had been done that anything valuable was disclosed there, the rich silver discovery of the respondent D., who staked the property on 22nd August, having meanwhile intervened:—*Held*, by the Divisional Court, that the appeal was not too late, and that there was a sufficient discovery, and that the appeal should be allowed, Anglin, J., however, holding that the staking was not sufficient, and that the appeal should be dismissed upon that ground:— *Held*, by the Court of Appeal, that the appeal was too late, and that there was no sufficient discovery, also that the burden of proof was on the appellant, and that the findings of the Commissioner who heard the evidence should not be interfered with unless for plain and weighty reasons. *Re Blye & Downey* (1908), M. C. C. 120, 11 O. W. R. 323, 12 O. W. R. 986.

See 14 O. W. R. 523, 19 O. L. R. 249.

Failure to blaze discovery line.]—Failure to blaze a discovery line may invalidate a claim. *Re Munro & Downey* (1908), M. C. C. 193, 14 O. W. R. 523, 19 O. L. R. 249.

Failure to put up discovery post.]—It seems failure to put up a discovery post will invalidate a mining claim. See *Re Smith & Kilpatrick* (1908), M. C. C. 314.

How judged.] — A discovery must be judged by the appearance and contents of what was in sight at the time of staking and not by what may have been subsequently found deeper down. *Re Munro & Downey* (1908), M. C. C. 193, 14 O. W. R. 523, 19 O. L. R. 249.

Inspection of discovery.] — In determining the sufficiency of a discovery, inspection by a competent independent person is a safer reliance than evidence of interested parties, or of ordinary expert or opinion witnesses. *Re Boyle & Young* (1906), M. C. C. 1.

Inspection of discovery.] — Where evidence in regard to the merits of the discoveries was inconclusive official inspection was ordered. *Re Smith & Cobalt Devel. Co.* (1907), M. C. C. 64.

Insufficient discovery — *Real discovery after staking.*]—Discovery of valuable mineral must be made before a valid mining claim can be staked out, and where a claim was staked on an insufficient discovery, no real discovery having been made until after the staking had been completed, and no discovery post planted upon it until after the claim had been recorded, the claim was held invalid. *Re Smith & Kilpatrick* (1908), M. C. C. 314.

Lack of original discovery.]—*Held*, by the Commissioner, that as McC. had made no original discovery but had staked upon discoveries that had been made and were at the time under staking by other parties, it could hardly be held, under s. 140 (1908), that he had any substantial merit:—*Held*, by the Divisional Court, that McC. having staked upon existing discoveries and made no original discovery of his own, his staking was invalid. *Re McNeil & McCully & Plotke* (1908), M. C. C. 262, 13 O. W. R. 6; 17 O. L. R. 621.

Mining claim invalid without.]—A mining claim staked out without a discovery of valuable mineral as defined by the Act is invalid. *Re McDermott & Dreany* (1906), M. C. C. 4.

Mining Recorder — *Appeal to Mining Commissioner—Notice—Parties adversely interested—Mines Act.*]—Persons who, alleging the discovery of valuable ore, have staked out a claim and filed an application, are "parties adversely interested" as against one who has previously staked out a similar claim on the property and filed his application, within the meaning of s. 75 of the Mines Act, 1906, respecting appeals to the Mining Commissioner from a decision of a Mining Recorder; and, if notice of such appeal has not been duly filed and served upon them the appeal must be dismissed. *Re Petrakos*, 9 O. W. R. 367, 13 O. L. R. 650.

See M. C. C. 22.

Must be made by a licensee.]—The discovery must be made by a licensee. *Re Haight & Thompson & Harrison* (1906), M. C. C. 32.

Must precede staking.]—Discovery of valuable mineral must precede staking out of a mining claim, or the claim will be invalid. *Re Haight & Thompson & Harrison* (1906), M. C. C. 32.

Re Bilsky & Devine (1909), M. C. C. 394.

Original or adopted.]—Where the evidence was not satisfactory that M. had merely adopted an existing discovery, and it was shown that the licensee who had made the former discoveries assisted him in staking, an attack on M.'s claim for lack of original discovery was dismissed. *Re Milne & Drynan* (1909), M. C. C. 455.

Outside limits of claim.]—Where, in surveyed territory, the alleged discovery and the discovery post were outside the limits of the claim as applied for and as required by the Act to be applied for, though within the boundaries as actually staked out on the ground, the boundaries, through want of reasonable care, having been erroneously located, the claim was held invalid. *Re Burd & Paquette* (1909), M. C. C. 419.

Removal of posts — *Forfeiture by.*]—Removal, by the holder of a mining claim, of his discovery post from an insufficient discovery upon which it had been planted at the time of the staking out of the claim, to a point where valuable mineral had been opened up some months later, the removal being for a deceptive and improper purpose, forfeits the claim. *Re Bilsky & Devine* (1909), M. C. C. 394.

Strict compliance of law.]—Where a claim is being set up against a prior discoverer perhaps a rather strict compliance with the law should be exacted. *Re Wellington & Ricketts* (1907), M. C. C. 58.

Subsequent discovery.] — A mining claim is invalid if discovery of valuable mineral is not made before staking, and subsequent discovery will not cure the invalidity. *Re McCrimmon & Miller* (1907), M. C. C. 79.

"**Valuable mineral.**"] — Iron stained cracks in Keewatin rock impregnated in places with a little iron pyrites and perhaps pyrrhotite, were held not to be a discovery of valuable mineral within the meaning of the Act. *Re Rodd* (1907), M. C. C. 61, 10 O. W. R. 671.

"**Valuable mineral.**"] — Reasonable probability and not mere possibility that what is found is capable of being developed into a mine likely to be workable at a profit, is required to constitute a discovery of valuable mineral under the Act. *Re Tyrrell & O'Keefe* (1908), M. C. C. 176.

"**Valuable mineral.**"] — The requirement of "valuable mineral," as defined by s. 2 (22) of The Mines Act, 1906, is not answered by a "moderate" calcite vein having a little copper pyrite, galena, sulphide of iron and zinc blend disseminated through it, and assaying an oz. of silver, but lacking the metals and indications which usually accompanied silver veins in the district, workable veins there being the exception and not the rule, and the best opinion being that it was most improbable that this vein was capable of being developed into a workable mine. "Probable" in the definition means more likely than not; and "workable" means workable at a profit, and it seems that the discovery should be judged as it stood at the time it is claimed to have been made, with the conditions and surroundings and probabilities as they then were. *Re McDonald & Beaver S. C. M. Co.* (1906), M. C. C. 7.

Within boundaries of another claim.]—A mining claim based upon a discovery which is within the boundaries of another existing claim is invalid. *Re Sinclair* (1908), M. C. C. 179, 12 O. W. R. 138.

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7. DISPUTE AGAINST CLAIM.

Action—*Affidavit—Plan — Extension of time.*]—The time for filing affidavit and plan in an adverse action under the Mineral Act may be further extended on an application made after the lapse of the time fixed by a previous order. *Noble* v. *Blanchard*, 7 B. C. R. 62.

After time for dispute elapsed.] — After 60 days allowed for a dispute have elapsed and a certificate of record is issued, the title should not be lightly interfered with. *Re Dennie & Brough* (1908), M. C. C. 211.

Applicant for Crown grant—*Certificate of improvements—Injunction—Adverse claim.*]—The plaintiff held a Crown grant dated the 8th March, 1895, of certain lands from which there were excepted "lands held prior to 23rd March, 1893, as mineral claims." The defendant held a certificate of improvements dated the 14th August, 1899, and the plaintiffs, being apprehensive as to form of Crown grant to be issued to the defendant, applied for an injunction restraining him from applying for and receiving a Crown grant:—*Held*, dismissing the motion, that the policy of the Mineral Acts is to compel persons claiming adversely to an applicant for a Crown grant to commence action before a certificate of improvements is obtained. *Nelson & Fort Sheppard Ry. Co.* v. *Dunlop*, 7 B. C. R. 411.

Application for mining lease — *Commissioner of mines—Mandamus.*]—The plaintiffs applied to the Commissioner of Mines for the province of Nova Scotia, for a coal mining lease covering an area adjacent to an area previously leased to M. A dispute having arisen in relation to the application, the Commissioner held an investigation, and announced, as the result of his inquiry, that the lease granted to M. was not to be considered as in any way void or uncertain, but was to be and remain the evidence of the contract between the Crown, represented by the Commissioner, and M.:—*Held*, that the plaintiffs' application was not disposed of by this decision, but that they were entitled to a *mandamus* requiring the Commissioner of Mines to consider their application and give a decision thereon. *Dominion Coal Co.* v. *Drysdale*, 36 N. S. R. 282.

Delay in prosecuting — *Amendment.*] —Where a dispute was filed against a mining claim, but not prosecuted until the respondent brought it to hearing 7 months later, when the evidence entirely failed to prove the allegations in the dispute, but it was suggested that the claim might if amendment were allowed be successfully attacked upon other grounds of which no intimation had previously been given and of which no sufficient evidence was offered, leave to amend was refused and the dispute dismissed, the real merits and substantial justice of the case being at all events with the respondent. *Re Silver & Pinder* (1909), M. C. C. 388.

Dispute instead of notice of claim or dispute. *Re Babayan & Warmer* (1908), M. C. C. 346.

Dispute without appeal.]—Where a claimant, who has filed an application for a mining claim which the Recorder refused to record by reason of there being a prior application upon the same property, enters a dispute against the prior application and therein claims to be entitled to the property, an appeal against such refusal is not necessary. *Re MacKay & Boyer* (1907), M. C. C. 85.

Innocent purchaser — *Merits — Evidence.*]—*Held*, by the commissioner, dismissing the dispute, that, though the fact that H. was an innocent purchaser for value without notice or suspicion of illegality or fraud did not give him immunity from attack, yet as the facts were not within his own knowledge and he was at the mercy of the witnesses who had been offered inducements to side against him, the evidence should be clear to justify the setting aside of his claim. *Re Smith & Hill* (1909), 14 O. W. R. 881, M. C. C. 349, 19 O. L. R. 577.

Location — *Adverse proceedings — Title —Action.*]—Adverse proceedings are essentially in ejectment and not in trespass, and

the plaintiff must succeed by the strength of his own title; it is, therefore, for the plaintiff to shew affirmatively the due location of his claim. *Clark* v. *Haney*, 8 B. C. R. 139.

Onus—*Duty of counsel—New trial.*]—In adverse proceedings the onus of proof is on the adverse claimant, who has to give affirmative evidence of his own title. Counsel for the adverse claimant, in deference to a remark of the trial Judge, did not complete the proof of his own title:—*Held*, that he should have pressed to be allowed to complete it, but under the circumstances there should be a new trial. *Caldwell* v. *Davys*, 7 B. C. R. 156.

Policy of Act.]—It is not the policy of the Act to encourage attacks upon mining claims after the time allowed for filing disputes against them has elapsed and a certificate of record has been issued. *Re Ball & Stewart* (1910), M. C. C. 461.

Successive disputes.]—A licensee should not be allowed to file and prosecute successive disputes against the same claim. See 10 Edw. VII. c. 26, s. 35. *Re Bilsky & Devine* (1907), M. C. C. 394.

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8. Forfeiture of Claim.

Expiration of certificate — *Special certificate.*] — Action to adverse claim in which the plaintiffs adversed the defendant's application for a certificate of improvements to the Sunrise mineral claim. The plaintiffs claimed the ground in dispute under two locations, known respectively as the Sunset and Mayflower mineral claims. These locations of the plaintiffs were good and valid up to the 31st May, 1901, upon which date the plaintiffs allowed their free miner's certificate to expire without renewal. The defendant's claim was located upon the 8th July, 1901. On the 25th October, 1901, the plaintiffs, by paying a fee of $300, obtained a special free miner's certificate, in accordance with the provisions of s. 2 of c. 35 of the statutes of 1901, and relied upon that section as reviving their rights, notwithstanding the intervening location of the defendant:—*Held*, that on the expiration of a free miner's certificate any mineral claim on which the holder thereof was the sole owner becomes open to location, and the obtaining of a special certificate under s. 2 of the Mineral Act Amendment Act, 1901, does not revive the title, if in the meantime the ground has been located as a mineral claim. *Woodbury Mines* v. *Poyntz*, 24 C. L. T. 107, 10 B. C. R. 181.

Failure to file report of work—*Forfeiture.*]—Failure to file a report of work will of itself cause forfeiture of a mining claim, as well as failure to perform the work. The Commissioner has no power to relieve against such a forfeiture unless application is made to him within 3 months after default.—Power to relieve against forfeiture for default in performance of working conditions should be very cautiously and sparingly used, especially where intervening rights have in good faith been acquired under the belief that the claim had been intentionally abandoned. *Re Kollmorgen & Webster* (1909), M. C. C. 354.

Grant of gold mining claim—*Dominion Lands Act—Order in council—Directory provisions of statute—Royalty—Imposition of tax — Recovery back.*]—The provisions of s. 93 of the Dominion Lands Act, R. S. C. c. 54, requiring all orders in council under the Act to be laid before Parliament within the first 15 days of next session, is directory only.—2. The effect of another provision of the same section, that any order under the Act shall, unless otherwise specially provided, have force only after it has been published for four successive weeks in the Canada Gazette, is that such order does not come into force until one week after the fourth publication.—3. There is no authority in the Yukon Territory Act, 61 V. c. 6, as amended by 62 & 63 V. c. 11, for changing the date upon which an order under the Dominion Lands Act shall come into force.—4. The suppliant, by right of discovery, under the Dominion Lands Act and Dominion Mining Regulations, 1889, obtained a grant of a gold mining claim in the Yukon district in December, 1896. His grant gave him for one year the exclusive right to all proceeds; and the rights which it conferred upon him were those laid down in the said regulations, and no more, and were subject to all the provisions thereof, whether expressed in the grant or not. During the currency of this grant an order in council was passed making grants of gold mining claims in the district subject to a royalty. On 7th December, 1897, the grant was renewed on the same terms:—*Held*, that the terms of the renewal should be construed by reference to their meaning in the original grant; and that the renewal was not subject to the royalty imposed by the order in council.—5. The operative words of the order in council imposing the royalty were, "a royalty shall be levied and collected:"—*Held*, that the expression contained apt words for the imposition of a tax, but that such a tax could not be levied without legislative authority therefor.—6. The evidence shewed that the suppliant had paid the amount of royalty claimed by the Crown under protest, and in the belief that payment was necessary to protect his rights.—*Held*, that he was entitled to recover it back. *Chappel* v. *Rex*, 7 Ex. C. R. 414.

Hydraulic mining lease — *Breach of contract—Construction of leases and mining regulations—Right of lessees to be heard at a judicial investigation before Crown could declare forfeiture and re-enter.*]—The two defendant companies held leases under the Crown, of hydraulic mining locations in the Yukon, with exclusive rights under certain conditions of taking all metals. The Minister of the Interior, purporting to act under powers provided in their leases, gave notice to the companies that their leases were void as they had failed to expend $5,000 in the efficient working of their rights, granted by their leases, and claimed to re-enter possession on the ground that the companies had not provided sufficient hydraulic or other machinery to permit of the working of their rights conferred:—*Held*, that while the Hydraulic Mining Regulations of 3rd December, 1898, provided that the Minister of the Interior was to be the "sole and final judge," of the fact of default by the lessees, yet the power to cancel their leases should not be exercised by the Crown without first holding an investigation of a judicial character and

giving all parties interested an opportunity of being heard in respect to the matters alleged against them. Judgments of the Supreme Court of Canada, 43 S. C. R. 281, 294 confirmed; judgment of the Exchequer Court of Canada, 11 Ex. C. R. 258 (Burbidge, J.), discharged. *Rex* v. *Bonanza Creek Hyd. Con.*; *Rex* v. *Klondyke Gov. Con.* C. R., [1908] A. C. 297.

Lease for subaqueous mining — *Breach of contract—Grant of same area for placer mining—Liability of Crown—Damages —Practice.*]—The Crown by indenture dated 23rd March, 1898, leased unto the petitioner for 20 years, the exclusive right and privilege of taking and extracting by subaqueous mining and dredging, all royal and base metals other than coal, to be found within a certain defined area on Dominion Creek, in the Yukon Territory. Subsequent to the granting of this lease, and while the same was in full force, the Crown, through the Gold Commissioner at Dawson, granted to free miners the same area covered by said petitioner's lease as placer mining claims, and placed these free miners in possession of the said area:—*Held*, that the petitioner had suffered sufficient injury by reason of the subsequent grants to support a petition of right against the Crown for damages. Judgment of the Supreme Court of Canada, 38 S. C. R. 542, affirmed; judgment of the Exchequer Court of Canada, 10 Ex. C. R. 330 (Burbidge, J.), discharged. *McLean* v. *Rex*, C. R., [1908] A. C. 252.

Leaning against.] — The leaning is against declaring a forfeiture if it can be avoided, where it would be a hardship and the adverse claimant has no substantial merit. *Re McDonald & Hassett* (1908), M. C. C. 164.

Mining lease—*Forfeiture — Notice—Statutory requirements—Compliance with—Construction of statute—Laches.*] — The Nova Scotia Mines and Minerals Act of 1892, c. 1, s. 152, requires "all applicants for leases or licenses under this chapter" to furnish the Commissioner of Mines with their address, which shall be registered, and all summonses, notices, etc., which require to be served under the Act, "shall be considered served if sent to such address." By the terms of the amending Act of 1893, c. 2, s. 10, the Commissioner of Mines is not required to send notices of default of payment to any lessee, unless previous to such default, such lessee shall have given written notice to the Commissioner of his post office address. A lease of gold mining areas held by the relator, G., was forfeited for alleged non-compliance with the provisions of s. 152 of the Act of 1892. The forfeiture was entirely *ex parte*, no notice being given to the lessee that rent was overdue, or that any proceedings would be taken to forfeit the lease. The lease was granted in 1896, at which time there was no provision in force requiring an applicant for a lease to give his residence or post office address, but the evidence shewed that, as a matter of fact, the name, address and occupation of G., were endorsed on his application, and were registered in a book kept in the office of the Commissioner for some time afterwards. No further address was given: —*Held*, that there having been a substantial, if not a literal, compliance with the provisions of the statute on the part of G., the forfeiture of his lease, without notice sent to the address given by him, was illegal and void, and must be set aside. As the Act imposed forfeiture, and affected individual rights, it must be given a strict construction, and the words "after the passage of this Act" could not be read into it so as to require G. to give a second notice, and, in default thereof, to deprive him of the rights given him under his lease. The doctrine of laches, as affecting the application to set aside the forfeiture, had no application, this not being an action invoking the equitable assistance or interference of the Court, but an official information on the relation of G., based upon his legal rights, in which he required no equitable assistance. *Attorney-General* v. *Waverley Gold Mining Co.*, 35 N. S. R. 192.

Mining lease—*Non-payment of rental—Dishonour of cheque — Forfeiture — Intervening rights — Commissioners of Mines—Equities.*] — The rental payable by the defendants for gold mining areas held by them under lease, fell due on the 2nd July, 1908, and continued unpaid for 30 days thereafter. On the last day for payment the solicitor for A., the holder of a judgment lien against the company, acting under the provisions of R. S. N. S. 1900, c. 18, s. 43, went to the mines office and made out and gave to the clerk his cheque in payment of the rental, and an entry of payment was made opposite the lease in the books in the office, and a receipt was prepared. On the following day the cheque was presented for payment and was returned endorsed "no funds," and the entry in the books and the receipt (still not delivered) were cancelled: — *Held*, assuming that payment by cheque would be good (as to which *quære*), that, the cheque having been dishonoured, the lease was forfeited, and the Commissioner of Mines could not subsequently, as against the intervening rights of third parties who had made application for the areas thus vacated, accept payment from A. or his solicitor, for the purpose of preserving the rights of A., whether by good cheque or otherwise; and, affirming the judgment of the Commissioner of Mines on this point, that he had no jurisdiction to deal with the supposed equities of A. as against H., a member of the defendant company, who had filed an application, on the theory that H., as a member of the company, could not allow the lease to be forfeited, and take a fresh title in himself as against A. *Re Hanright & Lakeview Mining Co.*, 37 N. S. R. 278.

Proof must be satisfactory.]—Proof of facts necessary to establish forfeiture of a claim must be satisfactory. *Re Young & Scott & MacGregor* (1908), M. C. C. 162.

Removal of posts.]—Removal, by the holder of a mining claim, of his discovery post from an insufficient discovery upon which it had been planted at the time of the staking out of the claim, to a point where valuable mineral had been opened up some months later, the removal being for a deceptive and improper purpose, forfeits the claim. *Re Bilsky & Devine* (1909), M. C. C. 398.

Working conditions — *Evidence.*] — Where the evidence of both sides regarding the performance of the requisite work was inconclusive and better evidence was not within the control of the holder, who had purchased the claims in good faith, declaration of forfeiture was refused. *Re Cropsey & Bailey* (1909), M. C. C. 337.

Working conditions—*Power of relief—Caution in using.*]—The power given by s. 85 (2) of The Mining Act (1908), to relieve from forfeiture for non-performance of work should be very cautiously and sparingly exercised, but where a strong case was shown an order for relief was made upon terms of liberal compensation to an intervening staker. *Re Spry & Leck* (1908), M. C. C. 259.

Working conditions—*Relief.*]—Relief from forfeiture for non-performance of working conditions was refused where no substantial reason was shewn for the default and the applicant's case was otherwise not meritorious, and it seemed that it was the subsequent general increase of value of property in the vicinity that prompted the desire to regain the neglected claims.—Remarks on the nature of such forfeiture. *Re Drummond & Lavery* (1908), M. C. C. 282.

Working conditions—*Relief.*]—Maintenance in full effect of the law of working conditions is of vital importance and the commissioner and recorders should be careful not to exceed the powers of relieving from forfeiture given them by the Act. *Re Kollmorgen & Montgomery* (1909), M. C. C. 397.

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9. Fraud and Mistake.

Bill of sale — *Fraud.*]—W. sold certain mineral claims, called the Big Four group, to A., who sold in turn to the defendants, after which W., as agent for the plaintiff, located a fraction between two of the claims in the plaintiff's name:—*Held*, that defendants had no right to the fraction, in the absence of proof of fraud by W. and that the plaintiff was a party thereto; and that the defendants could not invoke against the plaintiff a statement in a bill of sale from H. to W. that the end of the two claims between which the fraction in question was located, adjoined each other. *Gibson* v. *McArthur*, 7 B. C. R. 59.

Carelessness — *Costs.*]—Where a party had invited trouble by carelessness and inaccuracy in his staking and application costs were withheld. *Re Sinclair* (1908), M. C. C. 179; 12 O. W. R. 138.

Certificate of improvements—*Crown grant — Rectification.*]—An application was made to the Chief Commissioner of Lands and Works for a rectification of the Crown grant of a certain mineral claims, and was opposed by person who had obtained a certificate of improvements covering a portion of the ground included in the grant:—*Held*, that the applicant was entitled to have the grant rectified, notwithstanding the certificate:—*Held*, also, that the holder of a certificate of improvement is not bound to adverse any subsequent applicant for a certificate. *Re "American Boy" Mineral Claim*, 20 C. L. T. 320, 7 B. C. R. 268.

Certificate of improvements—*Fraud —Application of Minister of Mines.*]—In an action by the Attorney-General to set aside a certificate of improvements, on the ground that it was obtained by fraud, the fraud alleged was a statement in an affidavit of the defendant's agent, sworn on the 10th August, 1899, that the defendant was in undisputed possession of the "Pack Train" mineral claim. On the 10th August, 1899, an action was pending as to the title of the "Pack Train" claim, and judgment was not delivered till the 11th August, 1899, in favour of the defendant. It was after the 11th August when the affidavit reached the Gold Commissioner:—*Held*, not fraud within s. 37 of the Mineral Act. The application of the Minister of Mines under s. 10 of the Mineral Act Amendment Act, 1899, need not be in writing. *Attorney-General* v. *Dunlop*, 20 C. L. T. 422, 7 B. C. R. 312.

Certificate of improvements—*Fraud — Remedy.*]—An adverse claimant, who neglects to take the remedy provided by s. 37 of the Mineral Act, cannot sue to set aside a certificate of improvements on the ground of fraud. *Semble*, that under such circumstances the Crown alone is entitled to sue. *Hand* v. *Warren*, 7 B. C. R. 42.

Clerical error — *Correction of.*] — It seems a Recorder may correct a mere clerical error made in entering a matter in his books. *Re Munro & Dorsey* (1909), 13 B. C. W. R. 523; M. C. C. 173; 19 O. L. R. 249.

— *Re Smith & Pinder* (1908), M. C. C. 241.

Date of discovery and staking in application.] — A *bona fide* mistake in giving the date of discovery and staking in an application for a mining claim will not invalidate the claim, the correct date having been put upon the posts. *Re Gosselin & Gordon* (1908), M. C. C. 254.

Drawing up writing — *Estoppel.*]—J. as a friend drew up a writing for B. and K., which all understood and intended to relate to another claim, but which by mistake purported to deal with the claim in question, mentioning it as belonging to B.—*Held*, that J. was not thereby estopped from enforcing his rights to the latter claim, and that D., who, while the proceedings were pending and while a certificate under s. 77 (2) (Act of 1908), was on record, purchased from K., who had notice of J.'s rights, was not in any better position than K. *Re Jackson & Billington* (1908), M. C. C. 428.

Inaccuracy in measurements.] — Where in the staking and application for a mining claim the distance of the discovery from the No. 1 post was given as 1,250 feet instead of 910, the difficulty of making an accurate measurement in the circumstances being very great, it was held that this did not invalidate the claim. It would be a hardship to hold a claim invalid by reason of such inaccuracies, but by them prospectors invite trouble and run serious risk of loss. *Re Gray & Bradshaw* (1907), M. C. C. 139.

Inaccuracy in tying.—See *Re Waldie & Mattheweman* (1909), M. C. C. 451.

Issue of certificate of record.]—M., in 1904, located lands under the Veteran Land Grants Act. On 1st March, 1907, he applied for a patent, filing the necessary proof and being entitled, as the law then stood, to both the surface rights and the minerals. On 16th March, by his attorney, he gave C. an option for purchase of such title as he would receive from the Crown. On 22nd March R. staked out a mining claim upon part of the lands. On 3rd April patent issued to M. including the minerals. On 10th April, R. recorded his mining claim, and on 13th Sept., 1907, obtained a certificate of record therefor, the certificate being issued by the Recorder in ignorance of the fact that the lands were veteran lands and in forgetfulness of the fact that the matter had been in doubt in his mind at the time of recording and that he had only received the application "for what it was worth."—*Held* by the Commissioner, that the certificate of record was issued in mistake within the meaning of the Act and should be revoked. *Re Rogers & McFarland* (1909), 14 O. W. R. 943; M. C. C. 401; 19 O. L. R. 622.

Placer mining claim—Renewal grant —Fraud — False affidavit — Action for cancellation — Proof of representation work—Evidence — Credibility of witnesses — Expert appointed by Court—View of premises by trial Judge — Judgment directing cancellation — First right of location — Placer Mining Act. *Atty.-Gen. for Can. ex rel. Backe* v. *Erickson*, 9 W. L. R. 140.

Procuring recording by fraud.] — A claim staked out in the name of a licensee by a non-licensee and non-holder of a forest reserve permit the recording of which was procured by the latter personating the former and swearing the affidavit in his name, cannot stand though a certificate of record has been issued for it, and where the facts appeared incidentally in another proceeding to which all persons interested were parties, the claim was declared invalid, and the guilty person reported for prosecution. *Re McDonald & Casey* (1908), M. C. C. 219.

Recorded description — *Error* — *Adverse action* — *Certificate of works.*] — A. C. located the "Cube Lode" mining claim, describing the direction of the side line as south-easterly both on the Post No. 2 and on the claim as recorded. W. C. subsequently located the "Cody" and "Joker" fractions, whereupon A. C. claimed that a portion of the ground covered by the latter was included in the "Cube Lode," alleging that the survey of the "Cube Lode" was wrong, and that the side line ran north-easterly, instead of south-easterly. In an "adverse action" by W. C., s. 28 of the Mining Act of B. C., R. S. B. C. c. 135, was relied on by the defendant, who had recorded a certificate of work done on the ground. The trial Judge held that this section gave A. C. a perfect title to the ground in dispute, and dismissed the action; 6 B. C. R. 523. His judgment was reversed by the full Court (7 B. C. R. 422, *ante* 7), and judgment entered for the plaintiff:—*Held*, affirming this judgment that, as the plaintiff was misled by the error in the recorded description, and located the "Cody" and "Joker" fractions in consequence of such error, the same was not cured by the certificate of work done on the ground in dispute by the defendant under s. 28 of the Act. *Coplen* v. *Callahan*, 21 C. L. T. 9, 30 S. C. R. 555.

Slight unintentional defects or inaccuracies in an application will not invalidate a claim. *Re Reichen & Thompson* (1907), M. C. C. 88.

Staking and application for working permit.—See *Re Spurr & Penny & Murphy* (1909), M. C. C. 390; 14 O. W. R. 1239, 1 O. W. N. 287.

Staking and discovery sworn to by a person not present.]—An application on a discovery and staking of a non-licensee sworn to by an applicant who was not present at the discovery or staking is fraudulent and void. *Re Dennie & Brough* (1908), M. C. C. 211.

Wrong date of discovery in application.]—An application for a mining claim is not invalidated by a mistake in giving the date of discovery and staking, at least where the mistake is explained by the circumstances and no one is misled or prejudiced thereby. *Re Thompson & Harrison* (1906), M. C. C. 35.

Wrong license number on post.]—Putting a wrong license number on the posts by mistake will not invalidate the staking out of a mining claim. *Re Haight & Thompson & Harrison* (1906), M. C. C. 32.

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10. INTEREST IN CLAIM.

Accompanying expedition.] — Going with the expedition and living at the same camp does not necessarily imply a partnership for acquiring claims. *Re McDonald & Casey* (1908), M. C. C. 219.

Action to establish title to placer mining claim — Staking—Priorities—Evidence — Placer Mining Act, s. 11—Mining recorder—Jurisdiction of Territorial Court—Lands of Crown — *Mandamus*—Declaratory judgment. *Stahl* v. *Francis*, 9 W. L. R. 44.

Adverse action—*Certificate of improvements—Co-owner—Estoppel — Notice — Res judicata—Judgment in rem.*]—A judgment in an adverse action under s. 37 of the Mineral Act is not a judgment *in rem*. One co-owner of a mineral claim is not estopped by the result of such action instituted by an adverse claimant against another co-owner who has applied for a certificate of improvements. *Bentley* v. *Botsford*, 8 B. C. R. 128, followed. *Per* Martin, J.—Section 37 does not apply to co-owners of the same claim, but to owners of conflicting claims. *Fry* v. *Botsford, MacQuillan* v. *Fry*, 22 C. L. T. 421, 9 B. C. R. 234.

Adverse claim — *Death of locator — Official administrator — Performance of miner's duties — Crown — Irregularity of*

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record—Curative effect of certificate of work —Mineral Act—Validity of location.]—The official administrator administering the estate of a free miner dying intestate is a statutory officer simply, and his interest in or possession of a mineral claim in such capacity cannot be regarded as an interest or possession of the Crown.—The official administrator, not having maintained the assessment work on a mineral claim, the ground was relocated and recorded by another person under the name of the Parkside mineral claim, and assessment work done on it. The original claim, known as the "June," was, subsequently to such relocation, sold by the official administrator to the plaintiff, who performed and recorded the annual assessment work:—*Held*, in an action brought to adverse an application for a certificate of improvements to the Parkside claim, that the June claim had lapsed, and that the ground was open to location under the Mineral Act.—*Semble*, that s. 5 of the Mineral Act Amendment Act, 1898, does not affect the decision in *Peters* v. *Sampson*, 6 B. C. R. 405.—Where, before the issue of a certificate of work, a third interest intervenes to the area in question s. 28 of the Mineral Act does not apply.—In his declaration the locator of the Parkside did not set forth all the words which were put upon the initial post at the time of location.—*Held*, upon the evidence, applying the curative force of s.-s. (*g*) of s. 16 (as enacted by s. 4 of c. 33, 1898), that the defect complained of was not a substantial non-compliance with the provisions of s. 16; and that the rule to be followed in such cases is that the words on the initial post shall be quoted in the affidavit with sufficient accuracy to enable the identification of the record of the particular location to which it refers, and to prevent fraudulent substitution of other language for the language placed upon the posts at the time of location. *Windsor* v. *Copp*, 12 B. C. R. 213, 3 W. L. R. 294.

Adverse action — *Failure of plaintiff to prove claim—Inquiring into title of defendants—Jurisdiction—Mineral Act, 1898, s. 11 —Admissions—Finding of trial Judge—Credibility of witnesses — Appeal — Fraud — Abuse of process of Court.*]—At the commencement of the trial of an action brought to enforce an adverse claim under the provisions of s. 37 of the Mineral Act, the plaintiff, claiming in respect of two mineral claims, admitted inability to support the allegation that the boundaries of such claims embraced any part of the area within the limits of the claim sought to be adversed, and could not pretend to claim any right to any part of the land or minerals within the limits of such claim. The trial Judge proceeded to hear evidence as to the defendants' right to the ground, under the provisions of s. 11 of the Mineral Act Amendment Act, 1898, c. 33, and dismissed the action, but found that the defendants had not affirmatively proved their title to the adverse claim. Counsel for the defendants did not on this admission move for dismissal:—*Held*, that, as soon as this admission was made by the plaintiff, it was open to the defendants to move for dismissal, for the reason that there was no ground in controversy within the meaning of s. 11, and that they were not bound in the circumstances to bring forward their title for investigation. That s. 11 was designed, where there is a real controversy within the meaning of s. 37 of the Mineral Act, to get rid of the rule theretofore acted upon that the plaintiff must succeed on the strength of his own title, and that the defendant might rely on the weakness of his adversary's title; and to substitute as a new rule for determining the title to mining claims that each party is to bring forward the evidence of his own title, thereby putting both parties on an equality as regards the onus of proof. The section presupposes a real controversy, a genuine *lis*, and not a challenge by a party who comes into Court and admits no title in himself.—*Per* Duff, J.:—On an appeal from a judgment by a trial Judge, sitting alone, the hearing of the appeal is a re-hearing of the cause; and where, giving to the views of the trial Judge as to the credibility of particular witnesses the weight which is justly due to such views, the Court of Appeal cannot reconcile his decision with the inferences to be drawn from admitted facts, or from facts proved by credible witnesses or documents, that Court should not generally regard itself as bound by his conclusions.—*Semble*, the Court will not allow itself, by means of sham proceedings, to be made an instrument to effectuate a fraudulent design. *Voigt* v. *Groves*, 12 B. C. R. 170, 3 W. L. R. 428.

Adverse claim—*Form of plan and affidavit—Right of action—Condition precedent — Necessity for actual survey — Blank in jurat.*]—The plan required to be filed in an action to adverse a mineral claim under the provisions of s. 37 of the Mineral Act of British Columbia, as amended by s. 9 of the Mineral Act Amendment Act, 1898, need not be based on an actual survey of the location made by the provincial land surveyor who signs the plan. The filing of such plan and the affidavit required under the said section, as amended, is not a condition precedent to the right of the adverse claimant to proceed with his adverse action. The jurat to an affidavit filed pursuant to the section above referred to did not mention the date upon which the affidavit had been sworn:—*Held*, that the absence of the date was not a fatal defect, and that, even if it could be so considered at common law, such a defect would be cured by R. C. Oaths Act, and the R. C. Supreme Court Rule 415 of 1880. Judgment in 9 B. C. R. 184 reversed. *Paulson* v. *Beaman*, 23 C. L. T. 60, 32 S. C. R. 655.

Agreement for interest—*Share of proceeds—Partnership — Statute as instrument of fraud.*]—Sec. 71 (2) of The Mining Act (1908), (the equivalent of the Statute of Frauds), is a bar to a claim to an interest in a mining claim under a parol agreement entered into after the staking out of the claim; but where the claim is one for a share of the proceeds of the property when sold or where the parol evidence is merely in proof of a partnership, the statute appears not to apply. —Limits of the principle that the Statute of Frauds must not be made an instrument of fraud discussed. *Re Young & Wettlaufer* (1908), M. C. C. 296.

Camping in common.]—A claim to an interest in mining claims staked out and recorded by other licensees cannot be established merely by the fact that the stakers were at times subsequent or previous to the

staking in the employ of the claimants, and that the stakers during their operations were staying at a camp put up and maintained jointly by the claimants' foreman and other persons who were friends and relatives of the stakers. *Re Bilsky & Roche* (1908), M. C. C. 305.

Claim to a transfer — *Evidence.*]— Where it appeared that the claimants were entitled to an interest in any right M. might have in the mining claims in question, but it was not shown what was the interest of the parties in whose names the claims stood, or that the claimants were entitled unconditionally to any interest M. might have, a declaration was made that the claimants were interested in any right or title M. might have, but an order for transfer of any interest to the claimants was refused without prejudice to future proceedings. *Re Colonial Development Syndicate & Mitchell* (1909), M. C. C. 331.

Clear evidence—*Writing.*]—A claim to an interest in a mining claim under an alleged parol agreement or promise (subsequent to the staking out and recording) where the claimant's connection with the property and acts regarding it are slight and attributable to causes other than the expectation of an interest, requires clear evidence to sustain it—even apart from the lack of tangible consideration and the lack of writing to satisfy the statute. *Re Young & Wettlaufer* (1908), M. C. C. 296.

Coal areas—Application for license—Assignment—Injunction — Declaration as to rights of parties—Absolute and beneficial ownership—Absolute assignment in nature of trust. *Shaw* v. *Robinson* (1910), 8 E. L. R. 557.

Co-owners—*Action for account — Evidence.*]—Action for an account between mining partners in respect of two mining properties. *Balcom* v. *Hiseler*, 7 E. L. R. 577.

Corroboration necessary.]—A claim to an interest in a mining claim staked out in the name of another person cannot be established by the uncorroborated evidence of the claimant. (See s. 71, Act 1908.) *Re McDonald & Casey* (1908), M. C. C. 219.

Delay in staking.]—Staking out a mining claim must be proceeded with promptly after discovery, else the discoverer's rights will be lost to a subsequent discoverer who completes staking first. *Re MacKay & Boyer* (1907), M. C. C. 83.

Duration — *New stakings — Writing—Corroboration.*]—Two licensees entered into an agreement with two others for equal interests in part of a lot they were endeavouring to acquire as a mining claim, no limit of time for operations being mentioned or indicated, and none of the parties having at the time any staking or claim upon the property. Two stakings and considerable work were done in the joint enterprise. One of the stakings had been thrown out and the other was about to be inspected when disagreement arose, and one of the first mentioned licensees quit work because the last mentioned ones refused him payment to which he was entitled. The latter, after the second staking was rejected, staked the property for and acquired on it a working permit, and claimed the right to hold it for themselves. — *Held* (hesitating), that the working permit came within the intention of the agreement and belonged to the partnership, its acquisition being merely a continuation of the original purpose of acquiring a patent of the property.—The leaning in such a case should be against holding continuance of interest in new stakings.—Such an agreement made before staking out need not be in writing, if there is corroboration as the Act requires. *Re Craig & Cleary* (1908), M. C. C. 207.

Employee in partnership — *Claiming on partner's discovery.*]—W. made a valuable discovery 16th July and staked out a mining claim on it 17th July, 1906; the Recorder (erroneously) refused to record it by reason of a prior existing recorded claim of C. and W. restaked within every 15 days till he could get it recorded. G., on behalf of the company for which S. a partner of W., was foreman, staked the same discovery as having been made by himself on 30th July and staked out a mining claim for the company on it on 9th August and tendered application on 10th of August, which was refused. W. on 15th September, by procuring the abandonment of C.'s prior claim, got his own claim recorded on his discovery of 16th July and stakings of 17th July and 3rd September. The company subsequently by mandamus order of the High Court got G.'s staking recorded and also three other stakings on another alleged discovery, the latter being clearly invalid.—*Held* by the Commissioner that W. was entitled to the property; that a licensee is not entitled to appropriate or base an application on an existing discovery while under a subsisting staking of another licensee.—That, while it is desirable to discourage employees from entering into private enterprises of their own while under employment for others, an agreement by which S. paid a prospector to work with W. for a half interest in what might be discovered, there being no dishonest intent and no thought of making profit at the employers' expense, and the property acquired not being the fruit of the employers' labor or enterprise, was not invalid, and W. and S. were entitled to the claim acquired by W. Affirmed by Divisional Court. *Re Wright & Coleman Devel. Co. & Sharpe* (1909), M. C. C. 373.

Employee staking for another person —P. was in the employment of B.; B. in ignorance of this employed P. to stake out a claim upon land which B. previously knew of and desired to acquire, P. being paid by B. in money and getting no interest in the claim. —*Held*, that B. was not entitled to any interest in the claim, his remedy being against P. personally for breach of contract or money received to his use. *Re Bilsky & Roche* (1909), M. C. C. 445.

Employer and employee—*Prospecting expedition—Good faith.*]—L. agreed in writing with S. in consideration of $200 paid him to prospect "until the snow falls." After L. had staked 2 claims 2 slight snowfalls of 1 to 2 inches occurred, going off quickly and

not seriously if at all interfering with operations. After this 6 more claims were staked. —*Held*, that S. was entitled to an interest in all the claims; the words used should be interpreted reasonably having reference to the objects in view and what must have been in contemplation of the parties; and upon the real merits and substantial justice of the case S. was so entitled.—Prospecting agreements require the strictest good faith upon the part of the prospector. *Re Smith & Lauzon* (1909), M. C. C. 341.

Employer and employee — *Verbal agreement—Prospecting trip—Good faith.*]—An employee on a prospecting trip for the acquisition of claims should be held to strict probity and good faith toward his employer. —M. made a written agreement with H. to supply all necessaries, pay him a salary and furnish him an assistant for a prospecting trip, M. to have a ¾ and H. a ¼ interest in the claims acquired. S. was hired as assistant and went on the trip knowing M. understood that everything staked was to be for the employer's benefit.—*Held*, that an alleged private agreement between H. and S. that S. might stake some claims for himself could not be given effect to, and that M. was entitled to a ¾ interest in a claim staked out on the trip and recorded by S. in his own name.—*Held*, also, that the Statute of Frauds was no bar to enforcing M.'s right against S. A verbal agreement for an interest in a mining claim entered into before the staking out is valid and enforceable, if there is corroboration as required by the Act (in this case s. 159 (2) as amended in 1907). *Re McGuire & Shaw* (1908), M. C. C. 156.

Enforcing interest — *Procedure.*] — Where it is sought to establish an interest in a mining claim the proper procedure is by appointment under sec. 136 (Act of 1908), and notice according to Form 38 (obtaining and filing a certificate under s. 77 (2), if desired), and not by a dispute under s. 63, Form 8, which latter is to be used only when it is sought to have a mining claim cancelled or set aside as invalid. *Re Babayan & Warner* (1909), M. C. C. 346.

Enforcing interest — *Statute of Frauds —Ontario Mining Act, 1908, s. 71.*]—T. gave plaintiff a memorandum whereby for $50, T. agreed to transfer to plaintiff a one-half interest in any mining claim he might acquire on his prospecting trip "in or around Cobalt district:"—*Held*, that if s. 4 of Statute of Frauds has any application to right of plaintiff to maintain this action, that application has been destroyed by s. 71 above. *Cheever v. Trusts* (1909), 14 O. W. R. 101, 18 O. L. R. 547.

Free-miner's certificate — *Renewals—Voting of interest in co-owners — Sheriff—Levy under execution.*]—The sheriff seized the interest in mineral locations held by an execution debtor in co-ownership with another free-miner, and, before sale under execution, the debtor allowed a free-miner's license to lapse. A special certificate in the debtor's name was subsequently procured by the sheriff under the provisions of s. 4 of the Mineral Act Amendment Act, 1899, and it was contended that the debtor's interest had thus been revived and revested in him subject to the execution:—*Held*, that upon the lapse of the free-miner's certificate the interest in question had, under the statute, become absolutely vested in the co-owner, and could not thereafter be revived and re-vested in the debtor by the issue of a special certificate. Judgment in 22 C. L. T. 341, 9 B. C. R. 131, affirmed. *Van Norman Co. v. McNaught*, 23 C. L. T. 63, 32 S. C. R. 636.

"Jumping claims"—*When it should be discouraged.*]—Where the holder of a claim is in actual occupation of the property, doing work upon it believing in good faith that he is entitled to it, the practice known as "jumping" should be discouraged. *Re Smith & Hill* (1909), 14 O. W. R. 881; M. C. C. 349; 19 O. L. R., 577.

Lease — *Mistake in description—Large sums expended in development and operation —Charge that lease obtained by fraud — No evidence of—Rectification of lease.*]—Plaintiffs owned a mining location comprising the land covered by Peterson Lake. Defendants owned an adjoining location immediately to the east of plaintiffs' location. Plaintiffs leased 30 acres of their land to defendants, but the result of following the description in the lease was that there was a wedge-shaped portion of plaintiffs' land lying between defendants' land and part of the Nipissing Company's land, which the lease did not include. This fact was not discovered until after defendants had expended large sums in development and mining operations through this strip, and had paid large sums in royalties to plaintiffs. Plaintiffs alleged that defendants, through their executive officers, procured the lease, not for the purpose of developing and working the property for the benefit of plaintiffs as well as of defendants, but for the wrongful purpose of exploiting the portion of the plaintiffs' property for the benefit of defendants, and for their own personal use, and asked a declaration that defendants were not entitled to any interest in the lands mentioned in the agreement, on the ground that same was obtained by fraud. Defendants, by counterclaim, asked to have the lease rectified by adding to the description the lands owned by plaintiffs' company, in the wedge-shaped block. Teetzel, J., *held* (15 O. W. R. 750, 1 O. W. N. 619), that there was no evidence to support plaintiffs' claim. Judgment entered directing rectification of the lease as claimed in the counterclaim. Interim injunction obtained by plaintiffs was dissolved, and a reference to the Master-in-Ordinary directed to ascertain amount of ore mined and the amount of royalties still due thereon under the terms of the lease. Court of Appeal dismissed plaintiffs' appeal with costs. Magee, J.A., dissenting in part. *Peterson Lake Silver Cobalt Mining Co. v. Nova Scotia Silver Cobalt Mining Co.* (1911), 19 O. W. R. 43, 2 O. W. N. 970.

Location of mineral claims — *Construction of contract—Fictitious signature—Unauthorised use of a firm name—Transfer by bare trustee—Statute of Frauds.*]—Where B., acting as principal and for himself only, signed a document containing the following provision: "We hereby agree to give F. one-half (½) non-assessable interest in the following claims" (describing three located mineral claims), in the name of "J. B. &

Sons," without authority from the locatees of two of the claims which had been staked in the names of other persons, and without their knowledge or consent:—*Held*, affirming the judgment in 13 B. C. R. 20, 5 W. L. R. 487, that, although no such firm existed, and notwithstanding that two of the claims had been located in the names of the other persons, who, while disclaiming any interest therein, had afterwards transferred them to B., the latter was personally bound by the agreement in respect to all three claims, and F. was entitled to the half interest therein.—A subsequent agreement for the reduction of the interest of F. from one-half to one-fifth, which had been drawn up in writing, but was not signed by F., was held void under the Statute of Frauds. *McMeekin* v. *Furry*, 39 S. C. R. 378.

Mineral claims — *Title to* — *Foreign bankruptcy proceedings* — *Trustee in bankruptcy transferring claims of bankrupt to purchaser* — *Recording transfer* — *Chose in action* — *Domicil* — *Law of foreign state* — *Law of British Columbia*—*Immovables* — *Provisions of Mineral Act*—*Non-compliance with.*]—In an action for a declaration that the plaintiff was the owner of a one-third interest in two mineral claims in British Columbia:—*Held*, that the plaintiff must shew affirmatively that he had a good title. The defendant and S. were co-owners of the mineral claims. On the 1st July, 1909, S. filed a petition in bankruptcy in a New York Court, and was duly adjudged a bankrupt, and the Court directed a reference to a Referee. The petition did not in form assign any property; but stated that S. was willing to surrender all his property for the benefit of his creditors; and in the annexed schedule of his personal property the two mineral claims were included. On the 26th July, 1909, G. was appointed by the Court trustee of S.'s estate. It was not disputed that the proceedings were sufficient to transfer the claims to G., if those claims had been in New York. On the 4th September, 1909, S. being in default for his share of the assessment work done on the claims, the defendant, under the provisions of s. 25 B. of the Mineral Act, advertised that, if the amount due was not paid within 90 days, S.'s interest would be forfeited to the defendant. On the 18th October, 1909, G. sold the claims to the plaintiff and executed a transfer thereof. This transfer and a certificate of G.'s appointment as trustee were recorded in the Mining Recorder's office on the 4th November, 1909. The sale to the plaintiff was confirmed by the Referee, but not till the 8th October, 1910; the order of confirmation was not recorded. Before the expiration of the 90 days referred to in the defendant's advertisement, all the money due him for assessment work, etc., on account of S.'s default, was tendered to the defendant by the plaintiff; but the defendant refused to accept it, and completed his forfeiture or default proceedings. S.'s mining license expired on the 31st May, 1908, and was not renewed until the 14th June, 1909; it expired on the 31st May, 1910, and was not renewed. At the time of the transfer of S.'s interest to the plaintiff, neither the plaintiff nor G. had a free miner's license. The plaintiff obtained one on the 26th October, 1909; and G. obtained one on the 16th November, 1909. It was contended for the plaintiff that a mineral claim is a chose in action, and is governed by the law of the place where the owner is; and, therefore, S. having been declared a bankrupt in the State of New York (he being then present in that State), the sufficiency of the transfer from him must be governed by the law of that State:—*Held*, that, as no authority was cited for this proposition, it could not be accepted. If it was intended to assert that S. was domiciled in New York, some direct proof of domicil should be given, which was not done; and it was quite consistent with the bankruptcy proceedings that his domicil was elsewhere; and, *semble*, even if the claims were choses in action and movables, they were not assignable by a foreign bankruptcy. And *held*, that, as the mineral claims were not only visible and tangible, but physically immovable, and situated within the province of British Columbia, the transfer was subject to the requirements of the law of British Columbia. The Mineral Act, R. S. B. C. 1897, c. 135, says (s. 2) that "mineral claim" shall mean "the personal right of property or interest in any mine;" and (s. 34) that "the interest of a free miner in his mineral claim shall, save as to claims held as real estate, be deemed to be a chattel interest, subject to the performance and observance of all the terms and conditions of the Act:"—*Held*, that a "chattel interest" does not necessarily mean a personal chattel; it may refer to a chattel real; and in any case it is "subject to the performance and observance of all the terms and conditions of this Act." These sections cannot be read so as to give the New York Court jurisdiction over the plaintiff's interest, and as to the transfer of it, unless the other requirements of the statute are complied with; and they had not been complied with in several respects. Section 9 provides that "no person shall be recognised as having any right or interest in or to any mineral claims, unless he shall have a free miner's certificate."—*Held*, that, as neither S. nor G. had a free miner's certificate when the transfer to the plaintiff was made, the Act was not complied with; and the subsequent issue of a certificate could not help them.—*Held*, also, that all the proceedings alleged to constitute the transfer not having been recorded, s. 50 of the Act was not complied with; and the transfer to the plaintiff was not recorded within the time fixed by ss. 49 and 49.—*Held*, therefore, that the plaintiff had not shewn that he was the owner of an undivided one-third interest in the two mineral claims. *Barends* v. *Green* (1911), 16 W. L. R. 422. B. C. R.

Person interested in claim.] — C. staked out a mining claim 1st June and recorded it 15th June, 1906; W. made a discovery upon the same lands 16th July, but the Recorder would not receive his application because C.'s was on record; W. had formed a partnership with S., who was a foreman of the C. D. Co., which had not prospecting on the lot; on 9th August the company staked on W.'s discovery, but its application was also rejected. On 14th Sept. W., by giving C. a half interest, got C.'s claim abandoned and his own on record. The company staked again on 6th Oct. and 21st November, 1906, and 17th January, 1907, on an alleged discovery of 29th June, which was not in reality a discovery within the meaning of the Act, making successive applications when the Recorder rejected at the time, but which

were subsequently recorded under mandamus.—*Held*, by the Commissioner, following Australian and United States authorities, that the company's subsequent stakings and applications on a different discovery worked an abandonment of its first staking and application, and that as the subsequent ones were admittedly not founded upon a real discovery, all its applications were invalid; and he declined to deal with its equitable claim to the W. discovery and application until S. should be made a party and proceedings taken in the form prescribed by the Act.—*Held* by the Divisional Court, that the subsequent applications did not work an abandonment, and (Riddell, J., dissenting), that the whole claim should be awarded to the company.—*Held* by the Court of Appeal, that an abandonment should not be construed from the making of the subsequent stakings and applications, but that Sharpe must be made a party and the matter remitted to the Commissioner for determination of the rights of all concerned. *Re Wright & Coleman Devel. Co.* (1907), M. C. C. 103, 12 O. W. R. 248, 13 O. W. R. 900. See 16 O. W. R. 826, 1 O. W. N. 1129.

Prospecting expedition—*Finding good territory.*]—K. and L. in an expedition under a prospecting partnership agreement with B. and S. found (in company with other prospectors) promising prospecting territory—a ridge of good diabase rock—but made no discoveries of valuable mineral, and staked no claims. They reported this to S. and B., B. remarking that he did not want "rock." L., in the district, and B. and S., on the request of K. and one V., who desired to form a prospecting partnership with K., cancelled or withdrew from the agreement. K. and V., after several weeks' operations in other directions, visited the diabase ridge which K. and L. had before seen, and which had meanwhile been rendered easier to prospect by reason of fire, and made discoveries and staked claims upon it.—*Held*, that L. and B. were not entitled to any interest in the claims. *Re Laidley & Knox & Davidson* (1910), M. C. C. 478.

Prospecting partnership—*Duration of —Claims restaked—Delay.*]—In the absence of agreement to or circumstances indicating the contrary, a prospecting partnership terminates with the expedition undertaken and leaves the parties merely co-holders of the claims acquired.—Where L. and E. staked out two claims, both of which turned out invalid and were cancelled or lapsed, and E. alone subsequently restaked the same lands and acquired rights therefrom and maintained and protected them solely by his own labour and money, a claim to an interest set up by L. two years later was dismissed. *Re Libby & Ellis* (1909), M. C. C. 441.

Prospecting partnership—*Parol agreement — Grubstaking—Sharing equally where shares not agreed.*]—In the absence of statutory provision to the contrary a parol agreement entered into before the staking out, for an interest in a mining claim, is valid and enforceable notwithstanding the Statute of Frauds, where it is shewn that the person claiming the interest has contributed something toward the acquisition of the claim—a distinction being made between agreements entered into before the staking out and agreements entered into after the staking out.—Where a claim staked out under a prospecting agreement is cancelled for lack of discovery and is afterwards restaked by one of the parties on a new discovery as the result of a subsequent expedition of his own, the other party to the original staking, who stood by and offered no assistance, will not by reason merely that the new staking covers the old ground be entitled to a share in the new claim—the discovery and not the staking being the chief consideration for which the Crown grant is made.—Grubstaking agreements or prospecting partnerships usually terminate with the expedition agreed upon and result merely in a co-ownership of the claims acquired, the presumption being against the existence of a partnership generally or of a partnership for developing or working the claims.—Where the evidence establishes that one person is to share in a mining claim with another and nothing more appears it will be presumed that they are to share equally. *Re Greene & Clinton* (1908), M. C. C. 223.

Prospecting partnership — *Termination of—Delay.*]—S. and P. had entered into a prospecting partnership, S. becoming thereby interested in the mining claim in question; S., though he contributed for a time, afterwards neglected and refused on various occasions to carry out his part, and P. finally repudiated further partnership; the claim was cancelled for lack of discovery; S. to prevent his former partner reacquiring this and other claims gave other prospectors secret information to enable them to stake them for themselves; L. and P., however, succeeded in restaking the claim and from that time bore all the expense and labour connected with it, including costs of litigation, S. meanwhile standing by and offering no assistance.—*Held*, that proceedings brought by S. after the lapse of more than a year to enforce an interest should be dismissed. *Re Seymour & Logan* (1909), M. C. C. 421.

Prospectors assisting each other—*Sharing information.*]—Where the leaders of two prospecting parties assisted each other in a neighbourly way in their expeditions and each promised to let the other know if anything good was found, but did not use their men or their provisions in common, and it was found upon the evidence that there was no agreement or intention to share interests in the claims acquired, a claim by one to an interest in claims staked by the other was dismissed. *Re Hedley & Wilson* (1910), M. C. C. 476.

Purchase of interest in mining property—Payment of money—Failure to convey—Action to recover money paid—Defence —Novation—Substitution of debtor—Release —Absence of writing—Statute of Frauds—Evidence. *Irwin* v. *Kelly* (Yuk.), 8 W. L. R. 95, 855.

Refusal to contribute.]—O., who was under agreement with B. to give the latter a one-third interest in claims he might acquire, staked a claim under agreement with E. to give E., who had made the only real discovery upon the property, a one-half in-

terest. Upon O. explaining the circumstances to B. and asking him for money to record the claim as the agreement provided, B. refused to pay anything or to have anything to do with the claim unless he would be given the whole of it, and told O. he might take the claim to some one else. B. stood by while O. and E. were at much trouble and expense protecting the claim through litigation, and he contributed nothing to the performance of the working conditions, without which the claim would have lapsed.—*Held*, that a claim subsequently brought by B. to enforce an interest should be dismissed. *Re Beaudry & O'Keefe* (1908), M. C. C. 288.

Sale of—*Agreement for payment of sum out of proceeds for service—Construction of agreement—Reformation of—Amendment of pleadings—New trial on election—Otherwise judgment for plaintiff with interest and costs.* —Plaintiff brought action to recover $500 and one-twentieth of the amount paid to defendant Currie for the interest held by him in a certain mining claim under an alleged agreement between the parties and an account of the dealings of defendant with said mining property, and of the amount received by defendant for said property.—Teetzel, J., at trial, dismissed plaintiff's action with costs.—Divisional Court *held*, that the agreement must be construed as meaning that if the property, that is, the interest in the property in reference to which both plaintiff and defendant were bargaining, should be sold before the title was passed to the defendant, that $500 would be paid out of the proceeds to the plaintiff.—That if defendant would pay the costs he could have leave to amend and have a new trial, in which case the costs of former trial would be reserved to the trial Judge at the new trial and unless he otherwise disposed of them, they would be costs to plaintiff only in the cause.—That if defendant elected otherwise, judgment should be entered for plaintiff for $500 with interest and costs. *McCausland* v. *Currie* (1910), 17 O. W. R. 913, 2 O. W. N. 433.

Second agreement in fraud of first.]—O. and F. were prospecting partners. F., on an expedition agreed upon between them and for which O. furnished money and supplies, staked four claims. Before recording the claims F. by telling R., who knew of O.'s interest in the expedition, that he had not staked the claims on that expedition, induced R. to advance him money and other consideration for a half interest and recorded the claims in the names of R. and his nominee.—*Held*, that O. and R. were entitled to a half interest each. *Re Odbert & Farewell, Riable & Bilsky* (1910), M. C. C. 467.

Settlement of interest — Trust.] — Plaintiff as assignee of B. company claimed that defendants were trustees for him of a one-third interest in a mining claim. The rights which a company had to this claim depended upon agreements between the company and defendant S. Before the assignment to S., but unknown to him, the company and S. had settled certain pending litigation by the company releasing their claim to this mining claim, and S. releasing his claim against the same claim:—*Held*, that as S. stood in the place of the company it could not succeed. *Jewell* v. *Jacobs*, 13 O. W. R. 297.

Survey—*Effect of—Evidence—Made without proper investigation.*]—A claimant seeking to set aside another claim as subsequent to and overlapping his own cannot make out a case or establish title to the disputed territory by mere production of a survey including the disputed territory as part of his claim.—Where it was shewn that the surveyor for the first claimant made his survey without any investigation or examination of the records at the recording office and located his lines without any proper warranty for placing them where he did, the survey was rejected, and a survey made for an opposing claimant which was shewn to be in accordance with the latter's staking was confirmed. *Re Waldie & Matthewman* (1909), M. C. C. 451.

Trespass to placer mining claim — *Justification—Entry as of right—Grouping of mining claims—Partnership for specific purpose of doing representation work—Yukon Placer Mining Act, s. 51—Evasion of statutory duty—Payment of debt or expense—Damages—Value of ore mined—Cost of severance—Evidence.*]—The plaintiff was the owner of placer mining claim No. 37, and the defendant the owner of the adjoining claim No. 38. On the 27th April, 1907, the plaintiff, the defendant, and E., the owner of 39, entered into a partnership agreement for the purpose of doing the necessary representation work on the 3 claims. It was provided in the agreement that the work to be performed on any of the claims should be limited to the representation work required to be done to comply with the Placer Mining Act. Under this agreement the defendant performed for the years 1907 and 1908 sufficient representation work on No. 38 to comply with the mining regulations for the renewal of all three claims. In 1909, the defendant, believing that 38 was worked out, commenced operations on 37, and took out a large dump of pay dirt:—*Held*, by Macaulay, J., agreeing with the judgment of Craig, J., the trial Judge, 12 W. L. R. 455, that, although the defendant had a right to enter upon 37, he became a trespasser the moment he continued the working of the claim after a sufficient amount of work had been done thereon for the necessary representation of the 3 claims; and, as the evidence disclosed that he did so continue, he became a wilful trespasser, and the amount of damages to be assessed against him following the harsher rule, should be the full value of the gold recovered without any deduction being made for the expenses incurred in recovering the same:—*Held*, by Dugas, J., referring to the provisions of s. 51 (formerly s. 37) of the Placer Mining Act, that "the Mining Recorder may, with the approval of the Commissioner, grant permission, for a term not exceeding 10 years . . . to perform on any one or more of such contiguous claims all the work required . . . for each claim," that the policy of the legislature was to help as much as possible the opening of claims and the discovery of gold; that the plaintiff and defendant were acting in fraud of the law; that in allowing claims to be joined the Mining Recorder and the Commissioner should have de-

clared upon what particular claim or claims the work should be done; but, if the claims were properly joined, they became a unit, and each of the three claim-owners had an equal interest in the gold extracted, so that at no time would a partner become a trespasser; and therefore the defendant would be entitled to the expenses incurred for the benefit of all, subject only to an accounting:—*Held*, by Dugas and Macaulay, JJ., varying the judgment of Craig, J., that the defendant was entitled to deduct from the damages, not only the sum of $200 for the representation and renewal of No. 37 for 1908, but the additional sum of $200 for the representation work done by the defendant on No. 37 for 1909, before he became a trespasser by exceeding the amount of work that should have been done; and the damages assessed at $4,000 should be reduced to $2,455.58, the trial Judge not having arrived at a correct conclusion, on the evidence, as to the value of the gold recovered by the defendant from No. 37. *Olsen* v. *Desjarlais* (1910), 15 W. L. R. 72.

II. LICENSE.

Acts of unlicensed persons.] — The acts of an unlicensed person will not be permitted to prejudice or affect the acquisition of title by a licensee. *Re Trombley & Ferguson* (1908), M. C. C. 189.

Application for license—Coal area—Assignment — Declaration as to rights of parties. *Shaw* v. *Robinson* (1910), 8 E. L. R. 557.

Coal Mines Act, B.C.—*Prospecting licenses — Leases — Issue of more than one license for the same area—Powers of chief commissioner—Lieutenant-Governor in council—"Claim."*]—The legislature has not, by s. 12 of the Coal Mines Act, authorised the establishment of any regulations, conditions, or restrictions depriving a license granted pursuant to ss. 2 and 3 of its characteristic of exclusiveness over the area to which such license applies. The chief commissioner cannot modify the conditions precedent prescribed by ss. 2 and 3. In performing their functions under the statute, the chief commissioner and the assistant commissioner do not act as agents of the Crown, but as mandatories of the statute.—Section 12 does not contemplate the granting of licenses by the Lieutenant-Governor in council; it contemplates the application to and the granting of a license by the chief commissioner under ss. 2 and 3.—The powers of the Lieutenant-Governor in council do not extend to the prohibition of the grant of licenses over reserved lands. A grant of the power to regulate or to impose conditions or restrictions, does not import a grant of the power to prohibit. *Per* Irving, J.:—Section 9 of the Coal Mines Act is limited to disputes between adverse claimants in respect of (1) the right or title to a license acquired or sought to be acquired; or (2) in respect of right or title to any claim acquired or sought to be acquired under the Act.—*Semble*, the word "claim" stands for "area of land," and is equally applicable to the area of land included in a license as it is to that included in a lease. *Baker* v. *Smart, Leslie* v. *Watt*, 12 B. C. R. 129, 2 W. L. R. 45, 3 W. L. R. 407, 505.

Discovery—*Claim not recorded in due time — Refusal of mining recorder to receive—Claim already recorded—Re-staking not abandoned — Claim resting on original discovery.*]—Mining Commissioner *held*, that one Wright made the only real discovery of a certain mining claim, but he was unable to record it in due time owing to the refusal of the Mining Recorder to receive it, because of a claim already recorded on behalf of another party, which in Recorder's view prevented the recording of any other claim in respect to same property; a view which has since been held to be erroneous in *Munro* v. *Smith*, 8 O. W. R. 452, 10 O. W. R. 97.—The Commissioner found that Wright, being met with this difficulty, adopted the plan of periodically re-staking his claim, and succeeded finally in having it recorded on the 15th September, 1906, after his last re-staking, which took place on the 3rd of that month, and *held*, that such re-staking did not work an abandonment of the discovery in respect of which it was made, and that it followed that the claim of Wright could properly be recited on the original discovery, and allowed Wright's claim.—Divisional Court affirmed above judgment with costs. *Wright* v. *Coleman* (1910), 16 O. W. R. 826, 1 O. W. N. 1128.

—See M. C. C. 103; 12 O. W. R. 248; 13 O. W. R. 960.

Discovery.] — The discovery must be made by a licensee. *Re Haight & Thompson & Harrison* (1906), M. C. C. 32.

Forfeiture by failure to renew.—See *Re McDonald & Hassett* (1908), M. C. C. 164.

License—*Rights acquired under application—Estoppel—Amendment.*]—The respondents made application at the office of the Commissioners of Mines for a license to search for coal areas. The application contained a good description of the property in respect of which the license was desired, and was accompanied by the necessary fee. Subsequently one of the applicants received a letter from the Deputy Commissioner, stating that he could not find the starting point, and asking for additional information. A letter was sent in reply, in which the starting point was stated incorrectly, and as a different point from that mentioned in the original application:—*Held*, affirming the decision of the Commissioner of Mines, that there having been certain descriptions, and the money and application having been appropriated, the license could not be removed to another locality. The applicants were not estopped, and could not be bound, by an entry made in the registry book of the office, after the receipt of the letter sent in reply to the letter of the Deputy Commissioner, and they could not, as the result of such entry, lose the title that they had acquired by a good application. *Semble*, that applications may, subject to the rights of intervening applicants, be amended for such causes as uncertainty, but not where there is a certain description and location of the area applied for. *Re Barrington*, 35 N. S. R. 426.

Miner's license—*Legality of—Location — Re-location — Permission of Gold Commissioner — Defects—Certificate of work — Mistakes of officials.*]—In November, 1897, Cooper, having already a claim on the same

lode, locates the "Native Silver" claim in the name of Haplin, who transferred, in December, 1897, one-half to Cooper and the other half to Haller, who sold to the plaintiff in July, 1900; the usual certificates of work having been obtained in the interim. The defendant, who knew of the error in the description of the compass bearing and of the issue of such certificates, on failing to effect a purchase of the claim from Cooper and Haller, located the same ground as the "Arlington Fraction," and on obtaining the usual certificates of work applied for Crown grants. Two of the mining licenses on which the plaintiff's title depended were issued by a constable at Sandon, who, acting on instructions from the Government agent at Nelson, obtained the blank forms from the Mining Recorder at New Denver, and on issuing licenses he accounted to the Government:—*Held*, in adverse proceedings, affirming the decision of Walkem, J. (Drake, J., dissenting), that the defendant not being misled, the irregularities in the plaintiff's title were cured by s. 28 of the Mineral Act. *Callahan* v. *Copien*, 30 S. C. R. 555, and *Gelinas* v. *Clark*, 8 B. C. R. 42, specially considered. *Manley* v. *Collom*, 21 C. L. T. 602, 8 B. C. R. 153.

Mines Act, R. S. N. S. c. 18, ss. 194-195—*Commissioner of mines — Powers respecting contested applications for leases.*]—The Dominion Coal Company, who were holders of a license to search for coal, covering an area of five square miles, made application under the provisions of the Mines Act, R. S. N. S. c. 18, s. 194, for a lease of an area of one square mile of the land included within the boundaries of their license to search. The description in the application for the lease described the area applied for as situated at the south-east corner of the area originally licensed to M., and then westwardly, by the southern line of said lease, two miles. A question having arisen as to the exact location of the area under lease to M., and that applied for by the company, the Commissioner of Mines ordered a survey, as the result of which it was found that a portion of the lease granted to M. extended beyond the boundaries of his license to search, and included about one-half of the area applied for by the company. The Commissioner, in these circumstances, declined to issue the lease applied for by the company, and directed the issue of a lease the boundaries of which were described in such a way as to exclude any portion of the area under lease to M.:—*Held*, by the majority of the Court (adopting the opinion of Davies, J., in *Drysdale* v. *Dominion Coal Co.*, 34 S. C. R. 332), that the matter was one involving a legal question upon which the Commissioner had no right to pass; that no decision of his could either contract or expand the lease to M., and it was, therefore, his duty to have granted the application made by the company, excepting thereout such lands as might be found and determined to be included in the lease to M., leaving that question to be subsequently determined by the Court in a proper action.—*Held*, also, that the Commissioner exceeded his power in relation to the survey ordered by him, such power (s. 195) being confined to a survey of the tract of ground selected out of the area covered by the license to search, and giving no power to direct the survey and the preparation of a plan of another tract of ground.—*Held*, also, that the Commissioner exceeded his authority in permitting M. to go outside the boundaries of his license to search and include in his lease land already covered by a license to search issued to another party and assigned to the coal company. *Re Dominion Coal Co.*, 42 N. S. R. 108.

Mining lease—*Contest as to—Defective application—License to search.*]—An application for a mining lease made by the appellants on the 10th November, 1893, was refused by the Commissioner of Mines, on the ground that, at the date of the application, the area applied for was covered by a license to search issued by the department to W. It appeared that on the 16th July, 1890, the appellants applied for a license to search which would come into force on the 13th May, 1892, and expire on the 13th November, 1893. When the application was originally made it covered other areas, but, subsequently, on the application of the appellants, assented to by the Deputy Commissioner of Mines, and endorsed on the application, it was amended so as to cover the area in dispute. The application subsequently made by W. contained no description except one incorporated by reference to the application made by appellants:—*Held*, that, if the application made by appellants was defective, that made by W. was equally so, and that the parties relying upon it in attacking the application had no *locus standi*. Assuming the license applied for by W. to be invalid, it was competent for the appellants, under the provisions of the Acts of 1892, c. 1, s. 103, to apply for a lease without a previous license to search. *Re Grenier*, 33 N. S. R. 466.

Necessity for.]—A mining claim based upon discovery and staking of a person not holding a miner's license is invalid; a Forest Reserve Permit does not dispense with the necessity for a license. *Re Boyle & Young* (1906), M. C. C. 1.

Procuring staking by non-licensee.]—Where a licensee procured a non-licensee to stake out a mining claim, the licensee not being himself present at the staking, and the staking was not and could not legally be recorded, and was not in fact founded upon a discovery of valuable mineral, the license was held under s. 136 (1907), to be disqualified from restaking the property without a certificate from the Recorder as in that section provided, and a restaking done by him without having procured such a certificate was declared invalid. *Re Smith & McHale* (1907), M. C. C. 99.

Revocation of.—*See Re Dennie & Brough* (1908), M. C. C. 211.

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12. Practice and Procedure.

(a) Appeal.

Ontario Mines Act—Appeal from decision of Mining Commissioner — Notice of appeal — Time for — Solicitors — Next sitting of Court—Setting aside notice —Extension of time for appeal. *Hunter* v. *Bucknall*, 9 O. W. R. 817.
See M. C. C. 37.

Ontario Mining Commissioner.] — Appeals to and from, see APPEAL, Digest Can. Case Law, 1900-1911, cols. 111 to 114.
Also *ante col.* 111.

(b) Costs.

Inviting trouble — *Carelessness—Inaccuracy.*]—Where a party had invited trouble by carelessness and inaccuracy in his staking and application costs were withheld. *Re Sinclair* (1908), M. C. C. 179, 12 O. W. R. 138.

(c) Evidence.

Burden of proof.]—See *Re Western & Northern Lands Corp. & Goodwin* (1909), M. C. C. 230, 13 O. W. R. 177, 18 O. L. R. 63.
Re Smith & Hill (1909), M. C. C. 349, 14 O. W. R. 881, 19 O. L. R. 577.

Claim of discovery by diamond drill.] — See *Re Waterman & Madden* (1907), M. C. C. 86.

Claim to an interest—*Clear evidence required.*]—A claim to an interest in a mining claim under an alleged parol agreement or promise (subsequent to the staking out and recording) where the claimant's connection with the property and acts regarding it are slight and attributable to causes other than the expectation of an interest, requires clear evidence to sustain it—even apart from the lack of tangible consideration and the lack of writing to satisfy the statute. *Re Young & Wettlaufer* (1908), M. C. C. 296.

Claim to an interest—*Corroboration.*]—A claim to an interest in a mining claim staked out in the name of another person cannot be established by the uncorroborated evidence of the claimant. *Re McDonald & Casey* (1908), M. C. C. 219.

Corroboration — *Verbal agreement.*]—A verbal agreement for an interest in a mining claim entered into before the staking out is valid and enforceable if there is corroboration as required by the Act. *Re McGuire & Shaw* (1908), M. C. C. 156.
See *Re Craig & Cleary* (1908), M. C. C. 207.
See, also, *Re Odbert & Farewell, Ribble & Bilsky* (1910), M. C. C. 467.

Defect in mining claim — *Innocent purchaser.*]—Held by the Commissioner, dismissing the dispute, that, though the fact that H. was an innocent purchaser for value without notice or suspicion of illegality or fraud did not give him immunity from attack, yet as the facts were not within his own knowledge and he was at the mercy of witnesses who had been offered inducements to side against him, the evidence should be clear to justify the setting aside of his claim. *Re Smith & Hill* (1909), 14 O. W. R. 881, M. C. C. 349, 19 O. L. R. 577.

Discovery.] — In determining the sufficiency of a discovery, inspection by a competent independent person is a safer reliance than evidence of interested parties, or of ordinary expert or opinion witnesses. *Re Boyle & Young* (1906), M. C. C. 1.

Discovery—Inspection — Weight of evidence.]—See *Re Spurr & Penny & Murphy* (1909), M. C. C. 390, 14 O. W. R. 1239, 1 O. W. N. 287.

Discovery — *Ordering inspection.*] — Where the *ex parte* evidence before the Commissioner in support of an appeal from cancellation of a claim for lack of discovery was not satisfactory, he ordered a reinspection and the report of this being against the discovery, dismissed the appeal. *Re Rodd* (1907), 10 O. W. R. 671, M. C. C. 61.

Discovery claimed at different point from that shown in application.] — Where an applicant for a mining claim shewed his discovery in his application and sketch as being near the north boundary of the claim where it turned out there was no sufficient discovery, but at the hearing claimed it was near the south-west corner where a discovery had been made by the other parties, and the weight of evidence as to the real location was otherwise against him, the claim was held invalid. *Re Legris* (1908), M. C. C. 285.

Discovery not at post.] — Disturbing finding of fact — Assays. See *Re Blye & Downey* (1908), M. C. C. 120, 11 O. W. R. 323, 12 O. W. R. 286.
See 14 O. W. R. 523, 19 O. L. R. 249.

Expert opinion—*Discovery.*]—See *Re McDonald & Beaver S. C. M. Co.* (1906), M. C. C. at p. 9.
Re Boyle & Young (1906), M. C. C. at p. 2.

Forfeiture.]—Proof of facts necessary to establish forfeiture of a claim must be satisfactory. *Re Young & Scott & MacGregor* (1908), M. C. C. 162.

Forfeiture.]—See *Re Cropsey & Bailey* (1909), M. C. C. 337.

Insufficient writing under sec. 71 (2) (1908).]—A writing not definitely identifying the properties or showing the consideration to be paid or the share to be received—the other evidence and the circumstances shewing that it was not the intention to part with the whole—is not a sufficient writing under s. 71 (2) (Act of 1908), upon which to enforce a contract (made after the staking out), for an interest in mining claims. *Re Booth & Hylands* (1909), M. C. C. 339.

Proving result of inspection.]—See *Re Blye & Downey* (1908), M. C. C. at p. 136.

Stories of alleged prior discovery.]—Stories of alleged prior discovery and planting of posts, no trace of which can afterwards be found, should be received with a good deal of caution. *Re MacKay & Boyer* (1907), M. C. C. 83.

Survey—*Insufficiency.*]—A claimant seeking to set aside another claim as subsequent to and overlapping his own cannot make out a case or establish title to the disputed territory by mere production of a survey including the disputed territory as part of his claim.—Where it was shewn that the surveyor for the first claimant made his survey without any investigation or examination of the records at the recording office and located his lines without any proper warranty for placing them where he did, the survey was rejected; and a survey made for an opposing claimant which was shewn to be in accordance with the latter's staking was confirmed. *Re Waldie & Matthewman* (1909), M. C. C 451.

Taking evidence outside Ontario.]—Application by a party to have his evidence taken in New York on the ground that he was busy organizing or promoting a company was refused. *Re Colonial Devel. Syndc. & Mitchell* (1909), M. C. C. 331.
See 16 O. W. R. 183.

Unsupported story of discovery.]—A claimant's unsupported story of discovery need not necessarily be accepted merely because there is no direct evidence to contradict it. *Re McDermott & Dreany* (1906), M. C. C. 4.

Working conditions — *Inspection.*]—Where the evidence was such that it would be impossible to find that the work recorded had not been performed and an inspection could not in the circumstances be hoped to give any information conclusive enough to warrant a declaration of forfeiture, inspection was refused and the case dismissed. *Re Leslie & Mahaffy* (1909), M. C. C. 448.

(*d*) *Mining Commissioner.*

Enforcing settlement of case.] — Where in a proceeding before the Commissioner the parties and their counsel had settled the matters in dispute, and had signed and filed minutes of the settlement, but one of the parties afterwards refused to carry it out, an order was made by the Commissioner enforcing the settlement, and providing for the making of a vesting order to transfer the interest in the mining claim agreed to be transferred. *Re Lehigh Cobalt Silver Mines & Heckler* (1908), M. C. C. 252, 12 O. W. R. 854, 18 O. L. R. 615.

Jurisdiction — *Damages.*] — The Commissioner has no jurisdiction to deal with a claim for damages for breach of contract. *Re Babayan & Warner* (1909), M. C. C. 346.

Jurisdiction—*Damages or personal demand.*]—A claim by a syndicate against its manager for damages for negligence or other personal demand cannot be dealt with by the Commissioner. *Re Bilsky & Roche* (1908), M. C. C. 305.

(*e*) *Mining Recorder.*

Acting ex parte.]—See *Re Smith & Miller* (1910), M. C. C. 458, 1 O. W. N. 545.

Cancellation of claim for forfeiture.]—Where a Recorder cancelled a claim as forfeited for default in the working conditions and duly notified the holder of the claim by registered letter, this is conclusive that forfeiture in fact took place unless appeal is taken as provided by the Act. *Re Kollmorgen & Montgomery* (1909), M. C. C. 397.

Cannot revoke decision.]—A Mining Recorder who has once given his decision upon a dispute and recorded it in his books has no power to rehear the case or alter his decision except, perhaps, to correct an accidental slip or omission. *Re Smith & Pinder* (1908), M. C. C. 241.

Correcting clerical errors.]—It seems a Recorder may correct a mere clerical error made in entering a matter in his books. *Re Downey & Munro* (1908), M. C. C. 173, 14 O. W. R. 523, 19 O. L. R. 249.

Duty as to filing claims.]—Where an application for mining claim is presented which the Recorder does not think proper to be recorded, he should nevertheless, if desired, receive and file it. *Re Smith & Cobalt Devel. Co.* (1907), M. C. C. 64.

Duties of in case of forfeiture.]—If work upon a claim has been done, but report of it has not been filed, forfeiture does not occur until the 10 days allowed for filing (in addition to the time allowed for doing the work) have expired.—Until the lapse of the 10 days it is not to be presumed that the work has not been done and a new staking (though the applicant may insist upon filing it), should not be recorded until the 10 days have expired, unless the Recorder, after investigation (of which notice should be given to the holder of the claim), finds that the work has not in fact been performed. —But where there has been failure to file the report of work as the Act requires the Recorder will have knowledge of that from his own records and should act upon that knowledge and cancel the old claim and record the new one (if otherwise regular) accordingly. *Re Leslie & Mahaffy* (1909), M. C. C. 448.

(*f*) *Trial.*

Application under Mineral Act, B.C. —*Forum—Extension of time.*]—An order to extend the time for filing the affidavit and plan required by s. 37 of the Mineral Act must be made by the Court, and cannot be made by a Judge in Chambers. *Noble* v. *Blanchard*, 7 B. C. R. 62, not followed as to this point. McColl, C.J., dissenting. *Murphy* v. *Star Exploring & Mining Co.*, 22 C. L. T. 104, 8 B. C. R. 421.

Delay in proceedings.] — Proceedings in mining cases should be promptly disposed of, and where the appellant had sufficient notice and could have been ready, adjournment was refused and the appeal dismissed. *Re Bamberger & Sinclair* (1907), M. C. C. 36.

Importance of speedy litigation.]—In mining matters even more than in other cases it is important that litigation should be quickly and definitely disposed of. *Re Smith & Pinder* (1908), M. C. C. 241.

See *Re Smith & Miller* (1910), M. C. C. 458, 1 O. W. N. 545.

Re MacCosham & Vanzant (1908), M. C. C. 277.

13. Priority of Claim.

Among mining claims.] — In contests between rival applications for mining claims, priority of recording is immaterial if all are filed within the time limited by the Act. *Re Henderson & Ricketts* (1908), M. C. C. 214.

Among mining claims.] — Priority among mining claims depends upon priority of discovery and staking, the date of filing being immaterial if all are within the limit allowed by the Act. *Re Boyle & Young* (1906), M. C. C. 1.

Among mining claims.]—W. made a valuable discovery 16th July and staked out a mining claim on it 17th July, 1906; the Recorder (erroneously) refused to record it by reason of a prior existing recorded claim of C., and W. restaked within every 15 days till he could get it recorded. G., on behalf of the Company for which S., a partner of W., was foreman, staked the same discovery as having been made by himself on 30th July and staked out a mining claim for the Company on it on 9th August and tendered application on 10th August, which was refused. W. on 15th September by procuring abandonment of C.'s prior claim, got his own claim recorded on his discovery of 16th July and stakings of 17th July and 3rd September. The Company subsequently by mandamus order of the High Court got G.'s staking recorded, and also three other stakings on another alleged discovery, the latter being clearly invalid.—*Held*, by the Commissioner, that W. was entitled to the property. *Re Wright & Coleman Devel. Co. & Sharpe* (1909), M. C. C. 373.

Application for certificate of improvements—*Adverse action — Location.*]—The plaintiff was the owner of the Colonial mineral claim located on the 7th October, 1900. The defendant located over the same ground the Wild Rose fraction on the 4th September, 1902, and having advertised for purposes of obtaining a certificate of improvements, this action to adverse such application was brought:—*Held*, on the evidence that the location of the Colonial was proved, and was not invalidated on any ground; that the Wild Rose was duly located, but was already occupied. *Dockstader* v. *Clark*, 24 C. L. T. 43.

Hydraulic regulations — *Application for mining location — Duties imposed on Minister of the Interior—Status of applicant —Vested rights—Contract binding on the Crown.*] — Under the hydraulic regulations for the disposal of mining locations in the Yukon Territory, enacted by the Governor-General in council on the 3rd December, 1898, as amended by subsequent regulations and by the order in council of the 2nd February, 1904, the Minister of the Interior is charged with the duty, not only of pronouncing on the question whether or not the locations applied for should be reserved for disposal under such hydraulic regulations, but also of determining the priority of rival claimants, the extent of the locations, and the conditions of any lease to be granted.—Until the Minister has given a decision favourable to an applicant, there can be no implied contract binding upon the Crown in respect to the location applied for; and the mere filing of an application for an hydraulic lease confers no status or prior rights on the applicant in respect to the ground therein described. *Smith* v. *Rex*, *Frooks* v. *Rex*, 40 S. C. R. 258.

14. Recording Claim.

Land improperly covered by survey.]—A survey of a mining claim which (without authority) enlarges the boundaries beyond the area originally staked out and applied for, gives the holder of the claim no right to the added land, and does not prevent the valid staking out and recording of such land by another licensee. *Re Green* (1908), M. C. C. 203.

Ontario Mines Act, 1906—Claims for mining locations—Duty of mining recorder to record — Applications for *mandamus* — Ministerial act — Result of failure to record —Rights of applicants — Previous adverse claims undisposed of—Bar to recording fresh claims — Affidavit — Form — Appeal to mining commissioner — Judicial functions of recorder — Concurrent jurisdiction of mining commissioner to grant *mandamus* —Powers of High Court — Merits — Discretion—Initiating proceedings in Court — Costs. *Munro* v. *Smith, Mackie* v. *Smith, Richardson* v. *Smith*, 8 O. W. R. 452, 10 O. W. R. 97.

Recording applications—*Claim already on record.*]—Where there is an application for a mining claim on record another application for the same property should not be recorded until the first has been disposed of. *Re McNeil and Plotke* (1907), M. C. C. 144. Under the Act as amended in 1907, only one staking and record for a mining claim is permitted on the same land at one time, and until it has ceased to exist as provided in the Act other licensees are not entitled to prospect, work upon or occupy any part of the claim.—Where an application for mining claim is presented which the Recorder does not think proper to be recorded, he should nevertheless, if desired, receive and file it. *Re Smith & Cobalt Dev. Co.* (1907), M. C. C. 64.

Recording documents—Effect of—Compared with Registry Act. See *Re Odbert & Farewell, Ribble & Bilsky* (1910), M. C. C. 467.

Recording new staking.] — See *Re Leslie & Mahaffy* (1909), M. C. C. 448.

Recording transfer — *Effect of.*] — A purchaser of a mining claim who has paid the purchase money and obtained and

recorded a transfer from the recorded holder without notice of a prior unrecorded right or interest is protected from any claim or attack in respect of such right or interest. *Re Babayan & Warner* (1909), M. C. C. 346.

Water claim—*Distinction between filing and recording.*]—An application for a mining claim should not be rejected because it includes land covered with water.—The Act makes a clear distinction between filing and recording; where the Recorder believes the application is not in accordance with the Act or that it covers or substantially overlaps lands of a subsisting claim, he should not record it, but should if desired put it on file. *Re Sinclair* (1908), M. C. C. 179, 12 O. W. R. 138.

15. SALE OF CLAIM.

Agreement for sale of mineral rights—*Rescission—Undue influence—Trespass.*]—Agreement to give defendant certain mineral rights on plaintiff's land cancelled, plaintiff, an old man, being a parishioner of defendant, and not understanding the nature of the agreement. *McKinnon* v. *MacPherson*, 7 E. L. R. 448.

Agreement to share profits — Consideration — Interest in property — Services rendered—Sale of interest in land—Statute of Frauds — Solicitor — Professional services — Solicitors Act — Remuneration—No contract in writing—Pleading—Amendment — Costs — Appeal — Ground not taken in notice — Bill of costs—Taxation. *Curry* v. *MacLaren*, 12 O. W. R. 1108.

Cancelling from record of claim.]—See *Re Smith & Millar* (1910), 1 O. W. N. 545, M. C. C. 458.

Condition — Non-fulfilment — Failure of action for price. *Myers* v. *Tytler*, 7 W. L. R. 416.

Contract—*Option to purchase claim—Acceptance—Formal contract not completed—Claim transferred to other parties—Action for breach of contract to convey—Fraud — Conspiracy—Price not determined—Further provisions required to complete contract — Statute of Frauds.*] — Plaintiff secured an option on a certain mining claim. Defendants Currie and Otisse transferred it to defendant mining company. Then plaintiff brought action against all defendants, claiming damages for fraud and conspiracy in transferring said claim, and against defendants Currie and Otisse for damages for breach of contract and agreement to convey, and asked to have it declared that plaintiff was entitled to the claim under said option and acceptance and for an order directing the defendant mining company to transfer the same to him.—At trial Latchford, J., *held*, that the action should be dismissed.—Divisional Court affirmed Latchford, J., on the ground that the option in question was incomplete; that the price was not determined; that the agreement did not satisfy the requirements of the Statute of Frauds, further provisions being required to complete the contract.—*Winn* v. *Bull* (1877), 7 Ch. D. 29; *Chinnock* v. *Marchioness of Ely* (1865), 4 DeG. J. & S. 638; *Rossiter* v. *Miller* (1878), 3 A. C. 1124, and *Douglas* v. *Baynes*, [1908] A. C. 477, followed.—*Stow* v. *Currie* (1910), 16 O. W. R. 341, 21 O. L. R. 486, 1 O. W. N. 1097.

Contract to purchase mines, mining rights and options—*Partnership as to profits—Assignment of contract—Account of profits.*]—Action by an English company registered in Ontario, to compel defendants to transfer to plaintiffs, certain mining locations in Nipissing Districts. Plaintiffs alleged that one of the defendants received $100,000 from a firm of London brokers, to be expended by him on their account, in acquiring mining rights and lands in the Cobalt district, and that he had paid large sums for such properties, taking conveyances in his own name and in the names of his co-defendants and others in trust for himself, and that these parties had refused to convey said properties to plaintiffs as assignees of said London brokers. The defendants who received the money pleaded an agreement between himself and said London brokers, whereby the brokers agreed to furnish him with large sums of money, with which he agreed to purchase mines, mining claims, and options on mining claims, which they would market and sell by the formation and flotation of companies, etc., paying him one-half of the net profits accruing from each of the properties or options so purchased and disposed of, and also one-half of the profits which they as brokers might make in buying or selling the stock of any company organised for owning, promoting or controlling any such mines, claims or options. He admitted the receipt of moneys under the agreement, and the acquisition of properties, and that the conveyances of which were taken in the names of himself and his co-defendants. Certain of these properties were, he pleaded, transferred to said brokers who organised companies to deal with them, and received large profits, which they refuse to share with him as agreed. He asserted that he was entitled to an account:—*Held*, that it would be inequitable to allow the plaintiffs to succeed. The action should be dismissed with costs. If plaintiffs desire there would be a declaration that the plaintiffs, as assignees of the London brokers, were entitled to a two-thirds interest in the properties in question held in the name of any of the defendants, and that the plaintiffs were entitled to a conveyance of such interest upon said brokers or plaintiffs paying to defendant any balance that may be due to him for moneys expended on their behalf, and one-third of the profits of the ventures in which that firm was concerned jointly with said defendant. *Colonial Development Syndicate* v. *Mitchell* (1910), 16 O. W. R. 183.

See M. C. C. 331.

Conveyance of land—*Effect of — Precious metals.*]—*Held*, that where the precious metals have been passed out of the Crown to a grantee, a conveyance of the land by the latter to a third person in the ordinary form will pass the precious metals although not especially mentioned. *Re Eugene Mining Co.*, 20 C. L. T. 362, 7 B. C. R. 288.

Effect of recording — *Notice before completion of purchase—Delay.*] — B. ob-

tained from R., the recorded holder, an agreement for sale of a three-quarter interest in the mining claims, and recorded it; and in pursuance of its terms entered upon the claims and did the assessment work and developed them, being up to that time in ignorance of O.'s rights. O. being in fact the owner of an unrecorded equitable half interest in the claims instead of F., who was a party to the agreement and who was presumed to own it. B. was to be entitled to a transfer on paying $2,000, but before he paid the money or obtained a transfer O. filed a certificate under sec. 77 of the Act, putting him on notice of O.'s rights. B. subsequently obtained from F. for $900 what purported to be a transfer of a half interest in the claims. In proceedings by O. it was *held* (1) that the transfer from and payment to F. were ineffective; (2) that the notice to B. before he paid the money and obtained a transfer protected O.'s rights; but (3) that in the circumstances, and by reason of delay, O.'s protection as against B. should only be in respect of the purchase money and should not deprive B. of his rights under the agreement. *Re Odbert & Farewell, Ribble & Bilsky* (1910), M. C. C. 467.

Failure to record transfer—*Right of locator.*]—In May, 1897, B. located and recorded the "May Day" claim, and, six days after location, conveyed a half interest to the defendant by a bill of sale, which was not recorded till April, 1898. B.'s free miner's certificate lapsed in July, 1897, and in October, 1897, the plaintiff, a free miner, re-located the "May Day" as the "Equalizer" claim:—*Held*, that the defendant's title should prevail against the plaintiff's. *Gretchfield* v. *Harbottle*, 20 C. L. T. 395, 7 B. C. R. 186, 344.

Insufficient writing—*Delay.*]—A writing not definitely identifying the properties or showing the consideration to be paid or the share to be received—the other evidence and the circumstances showing that it was not the intention to part with the whole—is not a sufficient writing under s. 71 (2) (Act of 1908) upon which to enforce a contract (made after the staking out) for an interest in mining claims. — Unreasonable delay in complying with the conditions and in bringing proceedings for enforcement of an agreement relating to mining property where the transaction is one of a very speculative nature, will preclude enforcement. *Re Booth & Hylands* (1909), M. C. C. 339.

Misunderstanding — *Improvidence — Statute of Frauds — Time of essence.*] — Where an agreement or option for sale of two mining claims differed from what the defendants understood and intended, and had interlined in it a vital alteration which was not in the supposed duplicate furnished by the plaintiffs and which would make the bargain a very unfair and improvident one, specific performance was refused. — *Held*, also, that as the real terms of the contract in other respects were not in writing the Statute of Frauds would apply, and even if part performance would take it out of the statute as regards a claim for specific performance it would not do so as regards a claim for damages.—In agreements for sale of mining property time is of the essence of the contract. *Hunter* v. *Bucknall* (1907), M. C. C. 37.

Option—*Mandamus commanding execution of transfer of land—Event upon which plaintiffs were to become entitled to reconveyance—Failure to mine—Balance of money paid under option agreement.*]—In the first action plaintiffs claimed a *mandamus* commanding defendants to execute a transfer to plaintiffs of 20 acres of land in Township of Drury, in pursuance of an agreement dated June 2nd, 1906. At trial Latchford, J., gave judgment in favour of the plaintiffs. Court of Appeal allowed defendants' appeal, holding that the event upon which plaintiffs were to become entitled to a reconveyance did not occur and their action should be dismissed with costs. Meredith, J.A., dissenting in part.—In second action the plaintiffs' action was for breach of agreement and failure to mine, and defendants counterclaimed for $14,134.31, being the balance of the sum of $15,000 paid by defendants to the plaintiffs under an option agreement. At trial Latchford, J., dismissed both plaintiffs' action and defendants' counterclaim, with costs. Court of Appeal dismissed both the appeal and cross-appeal, each with costs. *Canadian Nickel Co.* v. *Ontario Nickel Co.* (1910), 15 O. W. R. 697.

Option or contract—*Time of essence——Acceptance of offer—Conditional deposit—Counter offer—Conditional contract—Statute of Frauds—Holiday.*]—M. and R. agreed to sell three mining claims to C. on condition that $5,000 be deposited in the bank on or before 9th Nov., $45,000 on or before 9th Dec., and the balance of $200,000 in one year thereafter. Owing to 9th Nov. being a bank holiday, the $5,000 was not deposited until 10th Nov., and then only "on condition that payment due 9th Dec. be extended to 1st Feb." M. and R., having been notified of this condition, repudiated the sale and resold to other parties.—*Held*, that C. was not entitled to enforce the sale.—An option or offer must be accepted strictly within the time limited.—Attaching a condition to an acceptance is in effect a counter offer and a rejection of the offer of the other party.—Time is of the essence of the contract in all agreements for the sale of mining property, and in any agreement for the sale of land which is unilateral or lacking in mutuality; and where time is of the essence it seems notice of rescission is not necessary.—A verbal acceptance by the plaintiff of a written offer of the defendant is sufficient as against the defendant notwithstanding the Statute of Frauds, but to justify enforcement of the contract the acceptance must be unequivocal and unconditional.—It seems that where the last day for doing an act under a contract falls on a holiday and the act therefore cannot be done on that day, it must be done on the next day prior that is not a holiday. *Re Cahill & Ryan* (1909), M. C. C. 320

Payment — *Sufficiency.*] — Producing the amount of a payment to the trustee holding the transfers in escrow, with a demand that the title be fixed up, where there was failure to respond to a request for unconditional payment or to shew continued

readiness and willingness to pay, cannot be relied upon as a good tender of the purchase money. *Darby* v. *MacGregor* (1907), M. C. C. 47.

Promise to pay fixed sum provided it be taken out of claim — Issue as to whether working expenses to be deducted—Equitable lien for unpaid purchase money—Effect of resale of claim before time for payment. *McDonald* v. *Winaud* (Yuk.), 6 W. L. R. 151, 653.

Sale—*Price — Condition payment — Returning the goods—Proof by presumptions.*] —A stipulation in the sale of an undivided part of a mine that the balance of the price shall be paid out of the revenue of the mine is conditional, and on failure of such revenue the purchasers are no further bound. The signing after the sale of the undivided part of a mine of a mortgage that encumbers it for a sum equal to the balance of the purchase price, and the endorsement by the purchasers of the vendor's note in favour of the mortgagee, and the declaration of the vendor in a subsequent deed that the whole price has been paid to him; a sale of the whole mine by the purchasers and the vendor to a third party for a price in royalties divided between them without a lien by the vendor on the shares of the purchasers for the balance of the first selling price, and the lapse of two years without mentioning or demanding the payment of the balance, is a sufficient proof that a release of it has been made by the vendor to the purchasers. *Nadeau's* v. *Vachon*, 1909, 36 Que. S. C. 316.

Sale of mine—*Lien for unpaid purchase money—1,100,000 shares to be held as collateral security.*]—Where defendant sold a mine and was to receive 1,100,000 shares as collateral security for $110,000 unpaid purchase money, the mining company sought to transfer the shares "in trust only in escrow as collateral security," while defendant wanted them transferred absolutely:—*Held*, that the shares should be transferred "in pursuance and subject to the terms of an agreement . . . between Currie and Warren & Co.," and that the share certificate should issue in the same form. *Warren* v. *Bank of Montreal* (1909), 14 O. W. R. 622, 1 O. W. N. 28.

Sale of mining claims—*Action to compel discharge of encumbrances.*]—Action to compel discharge of encumbrances on mining claims bought by plaintiff from defendants and for damages:—*Held*, that it was impossible to say that mortgages were paid as litigation now pending as to them before Supreme Court of Canada. Defendants gave covenants as to title. — *Held*, further, that plaintiff is entitled to have mortgages discharged and removed from record, and damages must be the sum required to obtain such release. *Post* v. *Syndicat*, 9 W. L. R. 352.

Signed by some only of the vendors — *Misunderstanding of terms—Illiteracy—Misdescription.*] — Where 3 out of 4 owners of a mining claim signed an agreement for sale which it was intended should be signed by all, and the evidence and circumstance shewed that it was not contemplated that the agreement should bind the interests of the 3 apart from the interest of the other, the agreement was held not to be binding upon any of the parties; the question of the effect of such a signing must be determined by the circumstances of the particular case.—Misunderstanding by the vendors as to the nature of the consideration they were getting, and misdescription in the agreement of the stock which it provided might be given them as the equivalent of money, the misunderstanding having been induced by the vendee, the vendors being Swedes, inexperienced in stock transactions and not able to read English well, discntitle the vendee to enforce an agreement for sale of a mining claim. *Re Oslund & Bucknall* (1909), M. C. C. 368.

Time for completion not specified—*Tender of conveyance.*]—Failure to specify a time for completion is not fatal to a written agreement for sale of an interest in a mining claim, a reasonable time being in that case inferred.—Where there is absolute refusal to carry out a contract of sale tender of conveyance is excused. *Re Connell & Wells* (1906), M. C. C. 17.

Title doubtful — *Waiver.*] — The ordinary principles of law regarding the matter of title should be applied as far as possible to the sale and purchase of unpatented mining claims, but the purchaser must be taken to know that the title is not absolute until the issue of a patent and that there can be no assurance, especially before issue of Certificate of Record, that adverse claims may not be set up.—The mere fact that a claim has been put forward by a third party, or that notice of such a claim has been sent to the Recorder, is not a valid objection to the title, in the absence of anything to shew that what was threatened was more than idle litigation.—It requires clear proof to establish waiver by a purchaser of the right to object to the title.—Though the purchaser might by his conduct have been estopped from objecting to the title, negotiations with him by the vendor afterwards looking to the removal of objections will reopen the question. *Darby* v. *MacGregor* (1907), M. C. C. 47.

Transfer of mineral claim—*Time for recording—Mineral Act.*]—The claimant of an interest in a mineral claim, seized under an execution on the 18th May, 1903, relied on a bill of sale obtained by him on the 23rd February, 1903, while in Dawson, Y.T., over 2,000 miles from the mining recorder's office. The bill of sale was not recorded until the 22nd May, 1903:—*Held*, that, as the time for recording mineral claims fixed by s. 19 of the Mineral Act is dependent upon the distance of the claim (not of the locator) from the recorder's office, therefore by s. 49 of the Act the bill of sale was of no effect as against the intervening execution. *Dumas Gold Mines, Ltd.* v. *Boultbee*, 24 C. L. T. 283, 10 B. C. R. 511.

Transfer of mineral claim—*Writing —Use by miner of another's name in locating.*] — A transfer of any interest in a mineral claim is not enforceable unless in writing. Where one free miner locates and

records a mineral claim, if he locates another claim on the same vein in the name of another free miner, he thereby acquires no interest in such last claim by virtue of s. 29 of the Mineral Act of 1896. *Alexander* v. *Heath*, 8 B. C. R. 95.

Transfer of mining locations—Parol agreement—Action for specific performance—Statute of Frauds — Part performance—Parol evidence—Mines Act, 6 Edw. VII. c. 11, s. 132—Dismissal of action without prejudice to another — Appeal — Excision of clause in judgment of Court below. *Harrison* v. *Mobbs*, 12 O. W. R. 465.

Transfer to joint tenants.]—If one of two joint transferees of an undivided interest in a mineral claim rejects the transfer, no title passes to the other. *Cook* v. *Denholm*, 8 B. C. R. 39.

Vendor and purchaser—*Sale of mining locations — Consideration — Lump sum — Separate valuation — Misrepresentation — Fraud — Damages.*]—Upon representations made by the vendor the plaintiffs purchased several mining locations, the consideration therefor being stated in a lump sum. In an action for fraud and deceit brought by the purchaser, the trial Judge, in discussing the total consideration for the properties purchased, found that there was evidence to shew the values placed by the parties upon each of two of these properties as to which false and fraudulent representations had been made, and which had turned out worthless or nearly so:—*Held*, reversing the judgment appealed from, Taschereau, C.J.C., and Idington, J., dissenting, that the finding of the trial Judge as to the consideration ought not to be disturbed upon appeal, and that the proper measure of damages, in such a case, was the actual loss sustained by the purchaser by acting upon the misrepresentations of the vendor in respect of the two mining locations in question, without regard to the results or values yielded by the other locations purchased at the same time, and as to which no false representations had been made. *Peck* v. *Derry*, 37 Ch. D. 541, followed. *Syndicate Lyonnais du Klondyke* v. *Barrett*, 25 C. L. T. 127, 36 S. C. R. 279.

Written offer to purchase — Construction — Purchase of options or of lands — Evidence—Parties not *ad idem*—Action for breach of contract—Moneys expended—Dismissal of action. *Welch* v. *Esperanza Cobalt Mines Co.*, 11 O. W. R. 722, 12 O. W. R. 1263.

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16. STAKING OF CLAIMS.

Adverse claim—*Plan of survey—Invalidity—Quartz mining regulations (Y.T.), s. 46—Staking — Field notes — Topographical indications—Contesting location after issue of grant possession.*]—Action under s. 46 above to have a plan of survey of a mining claim invalid and non-effective:—*Held*, that the plaintiffs' staking was good and sufficient; that the defendant's was invalid and bad, her plan defective, and her survey unlawful and improper. Plaintiffs are entitled to their claim as surveyed. *Lloyd* v *Nicholas* (1909), 12 W. L. R. 38.

Adverse claim—*Staking—Quartz Regulations, s. 53—Certificate of work—Impeaching by junior locator—Plan of survey—Defects in.*]—No irregularity arising after staking can be taken advantage of by an adverse or junior staker. Any such irregularities are treated by s. 53 above. Defendant's plan held to be defective. Plaintiff confirmed in his possession of his mining claim. *Balton* v. *Evans* (1909), 12 W. L. R. 116.

Annulment of prior lease — *Volunteer plaintiff — Right of action — Status of adverse claimants.*]—In an action by free-miners, who had "staked" placer mining claims within the limits of a concession granted for purposes of hydraulic mining, to set aside the hydraulic mining lease on the ground that it had been illegally issued and was null and of no effect:—*Held*, that, where there was a hydraulic lease of mineral lands in existence, the mere fact of free-miners "staking" claims on the lands included within the leased limits did not give them any rights or interest in the lands, nor did they thereby require such status in respect thereto as could entitle them to obtain a judicial declaration in an action for the annulment of the lease. *Hartley* v. *Matson*, 23 C. L. T. 61, 32 S. C. R. 144.

Contest as to staking quartz claim—*Action to declare staking illegal—Judgment by default afterwards set aside—Certificate issued to plaintiff while judgment standing — Counterclaim to set aside grant — Discontinuance of action—Trial of counterclaim — Practice—Costs.*]—Defendant to get costs up to discontinuance, including costs of a motion for a decree and a counsel fee; plaintiff to get costs of setting down action for trial on counterclaim and to counsel fee. Costs to be set off. *Pinder* v. *Bothelko*, 11 W. L. R. 563.

Defective staking for working permit.]—A working permit application was held invalid by reason of failure to mark the applicant's name or license No. on the No. 2, No. 3 and No. 4 posts, failure to do any fresh blazing, failure to shew in the application or sketch the length of the boundaries and failure to make affidavit either in substance or in form as the Act required. *Re Spurr & Penny & Murphy* (1908), 14 O. W. R. 1239, M. C. C. 390, 1 O. W. N. 287.

Delay—*Limit of.*] — Staking out of a mining claim must be proceeded with promptly after discovery else the discoverer's rights will be lost to a subsequent discoverer who completes staking first. — Delay from the morning of one day till the afternoon of the next when the staking might readily have been completed the same afternoon or the next morning, is quite beyond the limit allowed. *Re MacKay & Boyer* (1907), M. C. C. 83.

Delay—*Limit of—Working an Abandonment.*]—T. made a discovery and planted a discovery post on 10th Sept., doing nothing further till the 24th, when he completed the staking out of his claim; F. meanwhile made a discovery and on the same day, 14th Sept., completed the staking of his claim (being as a fact ignorant of T.'s discovery), *Held*, that F. was entitled to the property,

T.'s delay working an abandonment and leaving the lands open to F.—It seems doubtful whether anything except inability to complete the actual staking out of a claim will excuse delay. *Re Trombley & Ferguson* (1908), M. C. C. 189.

Delay—*Rights lost or postponed.*] — A discoverer who fails to plant his discovery post and complete the staking of the claim as quickly as in the circumstances is reasonably possible loses his rights when another licensee makes a discovery of valuable mineral and completes staking before him.—M. made a discovery of valuable mineral in the forenoon of 11th June and did nothing further that day except to put up at the discovery a small post or picket inscribed with his name; E. the same afternoon made another discovery and completed the staking out of his claim; M. the next day, after being told of E.'s claim and seeing his No. 1 post, completed his staking.—*Held*, that E. was entitled to the property. *Re McLeod & Enright* (1908), M. C. C. 149.

Delay—*Rights lost or postponed.*]— Unless a discovery is appropriated by at once planting a discovery post upon it and proceeding as quickly as reasonably possible to complete the staking out of a mining claim, the discoverer's rights may be lost or postponed. *Re Reicken & Thompson* (1907), M. C. C. 88.

Delay—*When fatal.*]—Delay in staking is fatal only where some one else effectively intervenes, and M., being disqualified, could not do so, and could not in any way prevent another claim accruing to the property. *Re Munro & Downey* (1908), 14 O. W. R. 523, M. C. C. 193, 19 O. L. R. 249.

Discovery of valuable mineral necessary before staking.]—Discovery of valuable mineral must be made before a valid mining claim can be staked out, and where a claim was staked on an insufficient discovery, no real discovery having been made until after the staking had been completed, and no discovery post planted upon it until after the claim had been recorded, the claim was held invalid. *Re Smith & Kilpatrick* (1908), M. C. C. 314.

Discovery post not planted on mineral.] — *Re Blye & Downey* (1908), 11 O. W. R. 323, 12 O. W. R. 986, M. C. C. 120.

See 14 O. W. R. 523, 19 O. L. R. 249.

Distance of discovery.]—Where in the staking and application for a mining claim the distance of the discovery from the No. 1 post was given as 1,250 feet instead of 910, the difficulty of making an accurate measurement in the circumstances being very great, it was held that this did not invalidate the claim.—It would be a hardship to hold a claim invalid by reason of such inaccuracies, but by them prospectors invite trouble and run serious risk of loss. *Re Gray & Bradshaw* (1907), M. C. C. 139.

Error in boundaries—*Defective markings.*]—See *Re Burd & Paquette* (1909), M. C. C. 419.

Evidence — *Certificates — Copies of documents.*] — In adverse proceedings where it is not established with reasonable certainty: (1) that the ground was properly staked, (2) that, assuming the ground had been properly staked, it was identical with the ground mentioned in the record; and the defendant shews title and produces certificates of work for several years, judgment will be given in favour of defendant. Before a substituted certificate will be admitted in evidence, there must be proof of loss of the original. Conditions of the admissibility of a mining recorder's certificate as to issue of free miner's license and as to issue of certificates of work considered. Copies of certain recorded instruments held admissible without proof of originals. *Pavier* v. *Snow*, 7 B. C. R. 80.

Exclusive status of first staker — *Comparison of laws.*]—The first staker of a mining claim has an exclusive status and while his claim subsists no other valid staking can be made upon the property.—Ontario and United States laws compared. *Re Lamonthe* (1908), M. C. C. 167.

Initial post — *Occupied ground — Curative provisions of statute.*] — In staking out a claim under the Mineral Act of British Columbia, the fact that initial post No. 1 is placed on ground previously granted by the Crown under these Acts does not necessarily invalidate the claim, and s.-s. (*g*) of s. 4 of 61 V. c. 33, amending the Mineral Act, R. S. B. C. c. 135, may be relied on to cure the defect. *Madden* v. *Connell*, 30 S. C. R. 109, distinguished. Judgment appealed from, 11 B. C. R. 37, affirmed; Idington, J., dissenting. *Clark* v. *Dockstader*, 26 C. L. T. 72, 36 S. C. R. 622.

Insufficient prior staking.]—Insufficiency of staking works abandonment of a claim and leaves the lands open to be staked by another licensee. *Re Milne & Drynan* (1909), M. C. C. 435.

Land covered with water.]—An application for a mining claim should not be rejected because it includes land covered with water. *Re Sinclair* (1908), M. C. C. 179, 12 O. W. R. 138.

Legal posts — *Stone mounds in lieu of stakes—Statute.*]—*Held*, that the requirement of s. 16 of the Mineral Act (B.C.), that posts No. 1 and 2 shall be of wood, is imperative, and stone mounds are not to be substituted. *Callahan* v. *George*, 21 C. L. T. 000, 8 B. C. R. 146.

Location—*Approximate bearing — Misstatement—"Minerals in place."*]—Accuracy in giving the approximate bearings in staking out a mineral claim is as necessary in the case of a fractional claim as in any other. A prospector, in locating and recording his location line between No. 1 and No. 2, as running in an easterly direction, whereas it was nearly due north, does not comply with the statute requiring him to state the approximate compass bearing; and his location is void. *Coplen* v. *Callaghan*, 30 S. C. R. 555, followed. Before a prosecutor can locate a claim, he must actually find "min-

erals in place." His belief that the proposed claim contains minerals is not sufficient. Judgment in 8 B. C. R. 153, reversed. *Colson* v. *Manley*, 22 C. L. T. 28, 32 S. C. R. 371.

Location — *Approximate compass bearing — No. 1 post on occupied ground.*] — *Held*, that the location of a mineral claim is not invalid merely because the No. 1 post is placed on the ground of an existing valid claim, if the facts bring the locator within the benefit of s. 16 (g) of the Mineral Act as amended in 1898. The direction of the location line was stated in the affidavit of location as being south-easterly, when, as a fact, it was south 52° 50′ west:—*Held*, that the discrepancy was of a character calculated to mislead. Appeal from judgment of Irving, J., dismissed, Martin, J., dissenting. *Dockstteader* v. *Clark*, 25 C. L. T. 23, 11 B. C. R. 37.

Location—*Mineral Act—Imperative provisions.*]—The Blue Bird mineral claim was located 20th April, 1895, and recorded 3rd May, 1895, and on 21st April, 1896 (before it would have lapsed if duly located), the defendants located the Red Oak claim over the same ground, and after lapse the plaintiffs located over the same ground the Rock Pay claim and attacked the defendants' title:—*Held*, that, as the location line of the Blue Bird was not placed as near as possible on the line of the wedge or vein, its location was bad, and the location of the Red Oak was good. The provisions of the Mineral Act as to location are imperative. *Bleckir* v. *Chisholm*, 8 B. C. R. 148.

Location—*Planting of posts — Formalities required by R. S. B. C. 1897, c. 135, s. 16—61 V. c. 33, s. 4 (B.C.).*]—Judgment of Supreme Court of British Columbia, affirming judgment of Martin, J., 10 B. C. R. 123, affirmed. *Sandberg* v. *Ferguson*, 35 S. C. R. 476.

Location of mining claim — *Adverse claimants — Staking — Defects — Bona fides — Validity — Priority — Placer Mining Act s. 25 (5)—Right of Court to adjudicate—Reference by Gold Commissioner — Absence of adjudication by Mining Recorder.*]—The plaintiff and the two defendants each separately staked a mining claim, and each applied for a grant within the proper time and paid the proper fee. The ground had been staked before, but the claim expired some time before the 30th November, 1909. The defendant E. staked on the 30th November, 1909, at 9.30 a.m.; the defendant G., on the same day at 10.30 a.m.; and the plaintiff on the 19th December, 1909, at 2 p.m. The Mining Recorder made no adjudication of the rights of the parties. The Gold Commissioner directed that a protest should be tried in the Territorial Court, and this action was brought accordingly:—*Held*, upon the evidence, that the staking of E., who was first in time, was defective and was not *bona fide*; but the staking of G., who was second in time, was nearly in accordance with the regulations, having some slight defects only, and his staking was *bona fide*.—*Held*, that the regulations should not be so strictly enforced that a variation of a quarter of an inch in the width of a stake should invalidate an otherwise perfectly valid staking; and therefore the Court should recommend that the Crown grant the claim to G.—Review of authorities.—By the saving clause, s-s. 5 of s. 25 of the Placer Mining Act, it is provided that "if upon the facts it appears to the satisfaction of the Mining Recorder that there has been on the part of the locator a *bona fide* attempt," etc., his failure to comply with the provisions of the Act shall not be deemed to invalidate his location:—*Held*, that, apart from this clause, the Court has the right to consider the question of *bona fides*; and, *semble*, that the functions of the Mining Recorder under the clause are transferred to the Court, where the whole question is referred to the Court without adjudication by the Recorder. *Baptist* v. *Erickson* (1910), 15 W. L. R. 1.

Location of mining claims—*Adverse claim — Plan — Signature of surveyor — Amendment — Survey post — Evidence.*] — In an adverse action for a declaration that the plaintiffs' mining claims were valid as against the defendants, and for trespass, the defendants asked for a non-suit upon the grounds that the plan attached to the affidavit of adverse claim was not signed by a provincial land surveyor, and that one of the plaintiffs' claims was an invalid location because the No. 1 post had formerly been a survey post of a prior claim:—*Held*, that leave should be granted to amend the plan by attaching the surveyor's signature; and that, in the absence of evidence that others desiring to locate in the vicinity were misled by the use of the survey post, there should not be a nonsuit.—*Dockstteader* v. *Clark*, 11 B. C. R. 37, 41, followed. *Crossley* v. *Scanlan* (1910), 14 W. L. R. 573.

Mineral claim — Invalidity — Imperfections in staking — Mineral Act. — *Pine Creek* v. *Pearse* (B.C.), 3 W. L. R. 425.

Mineral claims — Staking—Illegal post —Grant to locator under age—Extension of boundaries — Placer Mining Act, 1906, s. 13—Grant by Gold Commissioner—Amendment — Note or memorandum by Assistant Gold Commissioner—Status of person attacking placer grant — Volunteer — Parties — Attorney-General — Jurisdiction of Territorial Court — Adverse right — Dominion Lands Act—Title—Purchase for value without notice—Relocation. *McDougall* v. *Johansen*, 8 W. L. R. 955, 9 W. L. R. 151.

Mineral claims—*Relocation — Permission — Fractional claim—Marking line.*]—Where a holder of a mineral claim which is the subject of an adverse action causes the ground to be relocated by some one else from whom he purchases it for a small consideration, the provisions of s. 32 of the Mineral Act, requiring permission to relocate, do not apply. The location line of a fractional mineral claim must be marked by the blazing of trees or the setting of posts in the same manner as that of a full sized claim. *Snyder* v. *Ransom*, *Ransom* v. *Snyder*, 24 C. L. T. 41, 10 B. C. R. 182.

Mineral claim—*Defects in location of —Mistake—Certificate of work.*] — The defendant's mineral claim Cube Lode was located in May, 1892, and duly recorded, and

certificates of work were issued in respect of it regularly since. The plaintiff, in 1896, located and recorded the Cody Fraction and the Joker Fraction claims on the same ground, and attacked the defendant's location on the ground that upon the initial post the "approximate compass bearing" of No. 2 post was not given as required by the Act. The compass bearing was east by north, and not south-easterly as stated on No. 1 post:—*Held*, that the irregularity in locating was not cured by a certificate of work. *Per* Drake, J., that s. 28 of the Mineral Act cures only irregularities arising after location and record and which do not go to the root of the title. *Callahan* v. *Coplen*, 7 B. C. R. 422.

Overlapping claim—*Renewal of application—Re-staking.*] — In August, 1899, M. staked and received a grant for a placer claim, which included part of an existing creek claim, staked previously by W. In 1900, M. applied for and obtained a renewal of his license, embracing the identical ground staked by him in the previous year, and, at the time such renewal was applied for, W.'s creek claim had lapsed. In March, 1901, S. staked a bench claim, embracing the lands in W.'s expired location, which had been overlapped by M.'s claim, as being unoccupied Crown land:—*Held*, that, although M.'s original staking of the ground in dispute was invalid, yet, as W.'s claim had lapsed at the time of the application for a renewal grant in 1900, M. having been continuously in possession of the whole location as staked by him, his stakes still standing and the limit of his area well known, his application for the renewal gave him a valid entry without the formalities of re-staking and applying anew for the original area located by him, and, following the rule laid down in *Osborne* v. *Morgan*, 13 App. Cas. 227, S. could not interfere with M.'s possession. *St. Laurent* v. *Mercier*, 23 C. L. T. 211, 33 S. C. R. 314.

Placer Mining Act—Validity of location — Continuous working—Building cabin on claim — Making drain—Re-location — Notice of abandonment — Change in staking — Boundary line—Common post between claims —Trespass—Damages — Injunction. *Wheelden* v. *Cranston* (B.C.), 2 W. L. R. 546.

Placer mining claim—Grant—Renewal —Representation work — Sufficiency—Cancellation — Relocation — Staking—Evidence —False affidavits in other cases—Inadmissibility. *Palmgreen* v. *Tabor*, *O'Fallon* v. *Patton* (Yuk.), 6 W. L. R. 791.

Placer mining claim—Representation work — Sufficiency — Placer Mining Act—Expiry of claim — Staking by relocator — Onus of proof — Requirements of statute—Affidavit and application—Improper admission of evidence — Non-performance of work by men employed on other claims—False affidavits — Status of relocator—Possession of original grantee—*Bona fide* attempt to comply with requirements of statute. *Hocking* v. *Wenzell* (Yuk.), 6 W. L. R. 658.

Prior claim—*Default in working conditions.*]—A mining claim was recorded 3rd October, 1906; 53 days' work was done and filed upon it 27th June, 1907, and 63 days on 24th October, 1907, and nothing more was done.—*Held*, that the time for doing the 3rd instalment or 2nd year's work expired 3rd January, 1909, and that the claim was thereafter open to restaking. — Whatever may have been the proper interpretation of s. 164 of the Mines Act, 1906, in regard to the exclusion from computation of what was known as the close season, the amendment made in 1907, limiting the exclusion to periods of time shorter than a year, applied to all periods of time commencing subsequently to its passing, though the claim had been recorded previously. *Re Kellmorgen & Montgomery* (1909), M. C. C. 397.

Prior claims must have lapsed or *been abandoned, cancelled or forfeited.*]—H. purchased a mining claim from M. S., alleging invalidity of the claim on the ground of fraudulent recording by M. and lack of discovery at the time of staking, restaked the claim in his own name, planning his discovery post upon mineral that H.'s men had opened up, and filed a dispute and an application claiming the property for himself. The evidence put in on behalf of S. was unsatisfactory, and the circumstances such as to cast the gravest doubt upon the testimony.—*Held* by the Court of Appeal, that S.'s own claim to the property failed as he had not discharged the onus that was upon him to shew that at the time of his staking the lands were open to prospecting, which he could only do by shewing that H.'s claim had lapsed, been abandoned, cancelled or forfeited. *Re Smith & Hill* (1909), 14 O. W. R. 881, M. C. C. 349, 19 O. L. R. 577.

Prior staking—*Abandonment — Insufficient discovery.*]—P., McC. and McN. had stakings and applications for mining claims upon the same property in the order named. P.'s claims being recorded; McN. and McC. filed disputes against P., each claiming to be himself entitled to the property; the Recorder dismissed the disputes and upheld P.'s claim. — On appeal to the Commissioner, *held* by the Commissioner: That an exception in the McN. affidavit to what the Act required to be sworn to as to the lands being open, and the fact that prior stakings and applications existed at the time McN. staked, invalidated the McN. application (following *Re Isa Mining Co. and Francey*, 26). —That the existence of prior stakings also invalidated McC.'s application.—On appeal to the Divisional Court, *held* by the Court, that a prior staking which is invalid for lack of a real discovery is deemed to be abandoned within the meaning of the Act, and so does not stand in the way of another staking or prevent the making of the necessary affidavit as to the lands being open.—That assuming that P. had no real discovery or real staking, his claim must also be deemed to be abandoned and not a bar to McN.—That adding the words "except applications . . . the validity of which I have disputed" to what the Act requires to be sworn to as to lands being open, does not invalidate an application. (Holding *Re Isa Mining Co. and Francey*, *ante*, not applicable).—The fact that stakes and markings belonging to previous stakings are found upon the property does not prevent a licensee,

who knows that the stakings have lapsed or been abandoned, cancelled or forfeited, from staking out and swearing affidavit for a mining claim upon the same property.—(As to the holding of the Divisional Court as to abandonment see s. 83 of the Act of 1908, as amended in 1909, by c. 28, s. 31 (1), and see notes hereto.) *Re McNeil & McCully & Plotke* (1908), M. C. C. 262, 13 O. W. R. 6, 17 O. L. R. 621.

Prior staking—*Insufficient discovery.*]—A claim invalid for lack of sufficient discovery is not an abandoned one within the meaning of ss. 166 and 131 (1907), and does not until disposed of leave the lands open to a subsequent staking. *Re McCrimmon & Miller* (1907), M. C. C. 79.

Prior staking.] — Under the Act as amended in 1907, only one staking and record for a mining claim is permitted on the same land at one time, and until it has ceased to exist as provided in the Act other licensees are not entitled to prospect, work upon or occupy any part of the claim. *Re Smith & Cobalt Dev. Co.* (1907), M. C. C. 64.

Prior staking.] — While an unexpired and unabandoned valid staking out of a mining claim exists upon a piece of land no right can be acquired thereon by another licensee staking out another claim. *Re Haight & Thompson & Harrison* (1906), M. C. C. 32.

Prior staking—*Working permit.*] — A working permit application based on staking done while stakings and applications for mining claims and another staking and application for a working permit existed upon the property — the applicant being by reason of these unable to shew by affidavit as required by the Act that he had no knowledge of any adverse claim, the affidavit in fact shewing that he had such knowledge though it stated that in his belief the adverse claimants had no *bona fide* discovery of valuable mineral—was *held* invalid, under s. 141 of The Mines Act, 1906. *Re Isa Mining Co. & Francey* (1907), 10 O. W. R. 31, M. C. C. 26.

Procuring staking by non-licensee.]—Where a licensee procured a non-licensee to stake out a mining claim, the licensee not being himself present at the staking, and the staking was not and could not legally be recorded, and was not in fact founded upon a discovery of valuable mineral, the licensee was *held* under s. 136 (1907), to be disqualified from restaking the property without a certificate from the Recorder as in that section provided, and a restaking done by him without having procured such a certificate was declared invalid. *Re Smith & McHale* (1907), M. C. C. 99.

Staking necessary.]—A discoverer who fails to stake out his claim within proper time, in at least substantial conformity with the Act, abandons or forfeits his rights where another discoverer intervenes with a valid discovery and completes staking before him. *Re McDermott & Dreany* (1906), M. C. C. 4.

Sufficiency—*Adopting former markings —Substantial compliance—Honest attempt—Tendency to overlook irregularities.*]—Where in staking out a mining claim new or newly marked posts are planted, existing marking of lines, which the staker assisted in making, may be adopted, thus making substantial compliance with the Act, but it is safer to mark all lines anew.—It seems that where there has been actual discovery and an honest attempt to comply with the law the tendency should be to overlook irregularities in staking so far as the Act will permit. *Re Reicken & Thompson* (1907), M. C. C. 88.

Sufficiency — *Assisted by former markings—Form of claim—Irregular lot.*]—Where a township lot was irregular and the actual location of its west boundary was in doubt, there being conflicting surveys, laying out a claim in convenient form following the general purpose of the Act to secure compact shape and avoid ill-shaped remnants, is sufficient.—It seems the sufficiency of a new staking may be assisted by former markings of the same staker, but the principle of allowing adoption of old markings is rather a dangerous one. *Re Henderson & Ricketts* (1908), M. C. C. 214.

Sufficiency—*Defective posts — Lack of blazing—Substantial compliance.*] — Staking out a mining claim with pegs or short pickets instead of posts 4 feet high and 4 inches square as required by the Act, the posts also lacking the requisite markings and the boundary lines not being properly cut out and blazed, is not substantial compliance with the Act and is invalid.—So also a staking (in surveyed territory), without marking the number or portion of the lot on any of the posts and without properly blazing, marking or cutting out boundary lines, the application being also defective in describing property different from that staked out.—Where a claim is being set up against a prior discoverer perhaps a rather strict compliance with the law should be exacted. *Re Wellington & Ricketts* (1907), M. C. C. 58.

Sufficiency—*Defective posts — Substantial compliance.*]—Failure to erect a No. 1 post and using instead a tree 10 feet from the corner, the tree not being properly squared and not cut off, nor so fashioned as to be readily taken for a mining claim post, is not a substantial or sufficient compliance with the Act; nor it seems is a staking with the discovery post and the No. 1 post only half the prescribed size and the discovery post only 16 inches high. *Re Smith & Pinder* (1908), M. C. C. 241.

Sufficiency—*Delay — Adopting staking—Merits—Technicality.*]—M., having no real discovery and not believing he had one, on 21st August staked out a mining claim, omitting a discovery line, his purpose being to hold the land till word came that a former claim had been cancelled, on the morning of the 22nd, no word having been received, he pulled up the posts and planted and marked them afresh for that date, again omitting to blaze a discovery line; word came later in the day that the old claim had been cancelled on the 20th, and M. allowed his staking to stand. S. on behalf of D.

made a valuable discovery on the same land at 4.30 p.m. on the 20th, D. seeing it the same evening; they protected it by prospecting pickets until the afternoon of the 21st, when S. planted a discovery post; on the 22nd D. completed his staking; there was evidence that the old claim had lapsed for lack of work on the 16th.—*Held*, by the Commissioner:—That M.'s staking was invalid, because: (1) he was disqualified under s. 136 (1907), having previously staked or partially staked without recording; (2) he had no discovery of valuable mineral when he staked, and (3) probably because he did not blaze a discovery line.—That D. was entitled to the property; for even if the lands were not open when his discovery was made on the 20th, which it appeared they were, his visit to and adoption of the discovery and discovery post on the 22nd and completing his staking on that date made his claim good as from that time.—That as D.'s claim was a very meritorious one it should not be set aside upon any unsubstantial technicality. —On appeal to the Divisional Court:—*Held, per* the Court, that the Commissioner's findings should not be disturbed; and that M. was disqualified and his claim invalid.—*Held, per* Riddell, J., that there was no reason to doubt that D.'s claim was good. *Re Munro & Downey* (1908), 14 O. W. R. 523, M. C. C. 193, 19 O. L. R. 249.

Sufficiency—*Lack of post and blazing.*]—Failure to plant a No. 4 post, to blaze a discovery line and boundary lines, and to make a proper discovery post and put the correct license number on the posts, invalidates a mining claim. *Re MacCosham & Vanzant* (1908), M. C. C. 277.

Sufficiency—*Lack of posts and blazing — Working abandonment.*]—A staking in which two of the corner posts were not numbered and none of the lines were freshly blazed and half of one boundary had never been blazed, was *held* in the circumstances to work an abandonment and to leave the land open to restaking, the staker being at all events disqualified by a prior staking which he failed to record. *Re Kollmorgen & Montgomery* (1909), M. C. C. 397.

Sufficiency — *Lack of posts and markings.*]—Failure to go around the claim, omitting the planting of 3 of the corner posts, and the blazing of the lines, and failure properly to mark the discovery post, renders the staking of a mining claim invalid. *Re Milne & Gamble* (1908), M. C. C. 249.

Sufficiency—*Mistake in license number.*]—Putting a wrong license number on the posts by mistake will not invalidate the staking out of a mining claim. *Re Haight & Thompson & Harrison* (1906), M. C. C. 32.

Sufficiency—*Slanting post — Substantial compliance—Every reasonable intendment in favour of discoverer.*]—E.'s mining claim was not invalid by reason of his discovery post, where planting was difficult, having been placed in a slanting position, its point being in the vein and its side resting against and supported by a projecting piece of rock, this being considered in the circumstances substantial compliance with the Act.—It having turned out that M. had never really filed an application and could have no right to the property, every reasonable intendment which the Act permitted should be made in favour of the other discoverer rather than throw the property open. *Re McLeod & Enright* (1908), M. C. C. 149.

Sufficiency—*Working abandonment.*]—L., on 26th February, 1907, staked out 17 acres of the prescribed 40-acre portion of the lot which he applied for, placing his discovery post in the unstaked part, marking it for another portion of the lot, and failing to connect it by a blazed line with his No. 1 post, and as a fact had no real discovery of valuable mineral at the post or on the claim. C., on 21st June, 1907, discovered valuable mineral on the unstaked part of the claim and staked out and applied for the 40 acres.—*Held*, by the Commissioner, that L.'s claim was invalid, and that as it was not staked out as provided by the Act nor in substantial compliance therewith, it must be deemed to be abandoned under s. 166, and that the lands were therefore, notwithstanding that it was upon record open within the meaning of s. 131, as amended in 1907, to be staked out by another licensee, and that C. was entitled to stake out the property as he did and that his claim was valid and should be recorded. *Re Cashman & Cobalt & James Mines* (1906), M. C. C. 70, 10 O. W. R. 658.

Townsite.]—Under the Mines Act, 1906, subdividing township lots into small lots of the character of town lots and registering the plan in the Land Titles office and advertising and selling a number of the lots as town lots, did not constitute the land a "townsite" so as to preclude the staking out of a mining claim upon it. (See now s. 36 of the Mining Act of Ontario (1908)). *Re Western & Northern Lands Corp. & Goodwin* (1908), 13 O. W. R. 177, M. C. C. 230, 18 O. L. R. 63.

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17. Surface Rights.

Application to fix compensation — *Compensation — Negotiation first—Land not defined.*]—Under ss. 119 and 142 of the Mines Act, 1906, which provided that "failing arrangement" between the miner and the surface owner as to compensation for injury to the surface rights, or in case they "are unable to agree" upon the amount or the manner of paying or securing it, application might be made to the Commissioner, it was held that a *bona fide* and reasonable approach of the other party for a settlement must be made before the matter can be dealt with by the Commissioner, though no very formal or exhaustive negotiations would be necessary. *Re Francey & McBean* (1906), M. C. C. 30.

Compensation — *Liability limited to licensee — Jurisdiction of Mining Commissioner — Inability of parties to agree — Jurisdiction of High Court.*] — The compensation payable, under s. 119 of the Mines Act of 1906, 6 Edw. VII. c. 11 (O.), as amended by s. 33 of the Mines Act of 1907, 7 Edw. VII. c. 13 (O.), for damages done to surface rights in lands in the working of a mining claim, is claimable only

against the licensee who staked out the claim, and not against his transferee.—Judgment of Teetzel, J., 12 O. W. R. 584, affirmed. *Bassett* v. *Clarke Standard Mining & Devel. Co.*, 18 O. L. R. 38, 13 O. W. R. 97.
See 10 O. W. R. 752.

Compensation — *Mining claims on town sites — Temiskaming & Northern Ontario Railway Commission.*] — Section 109 of the Mines Act, 1906, 6 Edw. VII. c. 11 (O.), which provides that no mining claim shall be staked out or recorded on any land included in or reserved or set apart as a town site, whether the same shall have been subdivided into town lots or not, except by order of the Minister, refers to town sites transferred by order in council to the Temiskaming and Northern Ontario Railway Commission under 4 Edw. VII. c. 7, s. 3 (O.), and not to lands merely included on plans registered by private individuals and subdivided by them into small lots with streets and avenues. *Western & Northern Lands Corp.* v. *Goodwin*, 18 O. L. R. 63, 13 O. W. R. 177.

Fixing compensation — *Should be reasonably liberal.* —Compensation for injury to surface rights under s. 119 of the Mines Act, 1906, should be reasonably liberal. *Re McBean & Salmon* (1906), M. C. C. 24.

Peremption by owner of surface.]—The Act 1 Edw. VII. (Que.), c. 13, s. 2, in replacing Art. 1441 R. S. Q. by the following: "1441. Mining rights belonging to Crown in lands of private individuals may also be acquired in the manner indicated in foregoing article," had the effect of depriving owner of surface of the right of pre-emption which he had by virtue of that article as contained in 55-56 Vict. (Que.), c. 20. Consequently the purchaser, prior to 1901, of the right of pre-emption of owner of surface is deprived of such right by said Act and is without remedy against his vendor, or those associated with him, who, having applied therefor, obtained from the government, first, an exploration and prospecting license on same land, and, subsequently, a concession to themselves by letters patent of the mining rights therein. *Tetreault* v. *Griffin Crucible Graphite Co.*, 19 Que. Q. B. 51.
(Leave to appeal to the P. C. granted.)

Rights of miner disputed—*Re Western & Northern Lands Corp. & Goodwin* (1909), M. C. C. 290, 13 O. W. R. 177, 18 O. L. R. 63.

Streets and lots — *Right to search for minerals.*] — Under 4 Edw. VII. s. 3, c. 7, where power is given to transfer "ungranted lands" to Temiskaming and Northern Ontario Railway Commission, the Cobalt town site is included under these words, although plaintiff had mining rights therein, the Crown merely having granted surface rights. Where maintenance of a road is not necessary to use of a mine, user of the road will not be allowed to the detriment of the general public. Plaintiffs were not entitled to mine on the streets unless on the conditions contained in ss. 23 and 24, c. 18, 7 Edw. VII. They are entitled to have the use and possession of the surface for purposes of mining and getting from and out of the lots in question over which the mining rights extend, the minerals contained thereunder, or therein, including all operations connected therewith or with the business of mining. *Coniagas Mines* v. *Cobalt, Coniagas Mines* v. *Jacobson*, 13 O. W. R. 393.

Value for building purposes—*Benefit of doubt—Must be fixed once for all.*]—In fixing compensation under the Act for injury to surface rights by reason of a mining claim upon the same lands, any enhanced or prospective value the property has because of its being likely to come into demand for building purposes, should be considered. The surface owner should be given the benefit of the doubt as to the extent to which mining operations will likely interfere with the surface. The compensation must be fixed once for all. *Re Dodge & Dark* (1907), M. C. C. 44.

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18. WORKING OF CLAIM.

Action—*Inspection—Underground workings — Plans — Privilege—Enforcement of order.*]—The right to inspect underground workings in a mine carries with it the right to inspect and make copies of the plans of such workings. *Per* Martin, J.:—(1) The practice respecting inspection under r. 514 is distinct from the practice in obtaining discovery, and a claim of privilege set up in an affidavit in answer to a motion to compel inspection is not conclusive.—(2) It is a proper and convenient practice to apply to the Court to enforce an order for inspection when the resistance is not contumacious. *Star Mining & Milling Co.* v. *White Co.*, 9 B. C. R. 422.

Application of s. 81 Ontario Mining Act—*Contribution for work required under Act—Section 74 defines "otherwise agreed" —Takes case out of Act—Subscription money expended—Liability to account.*]—Appeal by defendant from a judgment of the Mining Commissioner ordering the defendant to contribute to work required under section 81 Ontario Mining Act. Divisional Court allowed the appeal without costs. *Irish* v. *Smith* (1911), 19 O. W. R. 529, 2 O. W. N. 1302.

Assessment work—*Affidavit—Notice — Certificate.*]—The plaintiff, owner of the Rebecca mineral claim and having an interest in the Ida, an adjoining claim, performed the assessment work for both claims on the Ida, as believed, but in reality, as shewn by subsequent survey, a few feet outside the claim, but did not file the notice required by s. 24 of the Mineral Act with the Gold Commissioner, who told him the work on the Ida would be regarded as done on the Rebecca. The plaintiff received in August, 1899, a certificate of work in respect of the Rebecca, and in his affidavit stated that the work was done on the Rebecca:—*Held*, in ejectment, that the plaintiff, being misled by the Gold Commissioner, was protected by s. 53 of the Act. The omission to file the notice required by s. 24 of the Act, and incorrect filling up of the affidavit, were irregularities which were cured by the certificate of work. *Lawer* v. *Parker*, 7 B. C. R. 418.
Affirmed 8 B. C. R. 223.

British Columbia Mineral Act, 1891 —*Apex location — Exploitation of vein — Continuity — Extralateral workings — Encroachment — Trespass—Quaere.*]—To justify an encroachment in the exercise of the right, under the British Columbia Mineral Act, 1891, 54 V. c. 25, of following and exploiting a mineral vein extralaterally beyond the vertical plane of the side-line of the location within which it has its apex, the owner of the apex must prove the identity and continuity of the vein from such apex to his extralateral workings. In the present case, the appellants failed to discharge the onus thus resting upon them. Judgment in 13 B. C. R. 234, 7 W. L. R. 147, affirmed. *White Co.* v. *Star Mining & Milling Co.*, 41 S. C. R. 377.

Certificate of improvements—*Application for, by co-owner.*]—A part owner of a mineral claim may apply for a certificate of improvements under s. 36 of the Mineral Act. *Beatty* v. *Botsford*, 21 C. L. T. 492, 8 B. C. R. 128.

Certificate of work—*Impeachment of —Evidence—Mineral Act, s. 28—Amendment Act, 1898, s. 11—Parties—Attorney-General.*] —Appeal from judgment dismissing the plaintiff's adverse action. The defendant relied on certificates of work obtained by him in respect of the mineral claims covering the ground in dispute, and the plaintiffs sought to shew that the full amount of work required by the statute as a pre-requisite to such certificates of work being issued had not been performed. The trial Judge refused to admit the evidence, holding that evidence impeaching a certificate of work could not be received in any proceeding to which the Attorney-General was not a party. The full Court affirmed the decision, holding that if a certificate of work is to be set aside the Attorney-General must be a party, and until set aside all things are presumed in favour of its holder. The plaintiffs in making their case admitted that the defendant had obtained certificates of work:—*Held*, by the full Court, that this in itself was affirmative evidence of the defendant's title, within the meaning of s. 11 of the Mineral Act Amendment Act of 1898. *Cleary* v. *Boscowitz*, 22 C. L. T. 41, 8 B. C. R. 225.

Co-holders—*Contribution.*] — Where a co-holder of a mining claim failed to contribute his share to the performance of the working conditions an order was made that unless he made payment of the amount due and costs within a specified time his interest should be vested in the other co-holders. *Re Neil & Murphy* (1908), M. C. C. 279.

Diamond drill—*Excuse for non-performance.*]—*Held*, that—whether or not diamond drilling was work within the meaning of s. 160—as enough had not been done since staking, the claim had become forfeited, and after more than a year of inactivity, the only excuse being negotiations with officers of the Department, the forfeiture must be considered final. *Re Waterman & Madden* (1907), M. C. C. 86.

Distinction between failure to perform and failure to file work—*Duties of Recorder.*]—If work upon a claim has been done but report of it has not been filed, forfeiture does not occur until the 10 days allowed for filing (in addition to the time allowed for doing the work) have expired.—Until the lapse of the 10 days it is not to be presumed that the work has not been done and a new staking (though the applicant may insist upon filing it) should not be recorded until the 10 days have expired, unless the Recorder, after investigation (of which notice should be given to the holder of the claim) finds that the work has not in fact been performed.—But where there has been failure to file the report of work as the Act requires the Recorder will have knowledge of that from his own records and should act upon that knowledge and cancel the old claim and record the new one (if otherwise regular) accordingly. *Re Leslie & Mahaffy* (1909), M. C. C. 448.

Extension of time—*Illness of holder.*] —In case of illness of the holder of the claim and in the other circumstances specified in s. 80 (Act of 1908), the Recorder has power to extend the time for performing work upon a mining claim even after the time has expired; but this is a power which should be very sparingly exercised, and where another claim has intervened only in very extreme cases if at all. *Re Seymour & Caster* (1909), M. C. C. 425.

See *Re Milne & Drynan* (1909), M. C. C. 455.

Extraction of ore from mine—Right of contractor to percentage of fund representing ore extracted—Bargain with lessee of mine—Right against mortgagee of ore claiming under lessee—Notice—Lien on fund—Fraud.]—Action for fraud, *Forrest* v. *Smith*, 9 W. L. R. 471.

Extraction of ore from mine—*Right of contractor as against mortgagee of lessee to percentage of fund representing ore extracted—Bargain with lessee of mine—Right against mortgagee of ore claiming under lessee—Notice—Lien on fund—Fraud.*]—A mortgagee with notice of an agreement, between the owner and a miner who takes out ore for a fixed percentage of the smelter returns on the ore extracted, cannot claim priority to the miner. *Forrest* v. *Smith* (1908), 14 B. C. R. 183, 9 W. L. R. 471.

Extralateral rights — *Trial—Adjournment of—Mineral Act, 1891, s. 31.*]—Appeal from an order on application to postpone trial, fixing a date (peremptory) for trial of an action by the owners of a mineral claim for an injunction restraining the defendants, who were the owners of adjoining mineral claims, from running a tunnel from their claims on to the plaintiff's ground. The defendants claimed, under s. 31 of the Mineral Act of 1891, the right to follow on to the plaintiff's ground the vein of ore in question, because the apex of the said vein was on the surface of their claim. Before going to trial the defendants wished to do development work in order that they might determine definitely the continuity of the vein in question, and they shewed that it was impossible for them to do the work needed by the date fixed for the trial:—*Held*, allowing the appeal, that the defendants should not be forced on to trial without being given a fair opportunity of doing such development work as might be necessary to determine the position of the apex of

the vein in question. *Noble Five Mining Co.* v. *Last Chance Mining Co.*, 23 C. L. T. 252, 9 B. C. R. 514.

Failure to contribute.]—O., who was under agreement with B. to give the latter a one-third interest in claims he might acquire, staked a claim under agreement with E. to give E., who had made the only real discovery upon the property, a one-half interest. Upon O. explaining the circumstances to B. and asking him for money to record the claim as the agreement provided, B. refused to pay anything or to have anything to do with the claim unless he would be given the whole of it, and told O. he might take the claim to some one else. B. stood by while O. and E. were at much trouble and expense protecting the claim through litigation, and he contributed nothing to the performance of the working conditions, without which the claim would have lapsed.—*Held*, that a claim subsequently brought by B. to enforce an interest should be dismissed. *Re Beaudry & O'Keefe* (1908), M. C. C. 288.

Forest reserve—*Permission to work — Disturbing title.*]—Where on a claim in a forest reserve part of the work filed was done before permission to carry on mining operations had been received, but additional work was done afterwards, whether enough or not did not appear, declaration of forfeiture was refused, the holder of the claim having acted in pursuance of the practice in the district, the attack on his claim not being made till long after the occurrence and being one that would disturb a large number of existing titles if it succeeded. *Re Balfour & Hylands* (1909), M. C. C. 430.

Forest reserve—*Permission to work — Disturbing title—Finality of Commissioner's decision.*]—Where in a forest reserve the work filed had been done before permission had been received, though after application for it had been made to the Recorder, who allowed the work to proceed, and the Recorder had with knowledge of the facts granted a certificate under s. 78 (4) (Act of 1908), that the work had been performed to his satisfaction:—*Held*, by the Commissioner that, upon these facts, and as the substantial merits of the case were all with the holders of the claim, and as a different ruling would disturb a very large number of titles, a declaration of forfeiture should be refused.—On appeal to the Divisional Court, —*Held*, by the Court, quashing the appeal, that the decision of the Commissioner as to the due performance of the work was final and not subject to appeal. *Re Perkins & Dowling* (1909), 1 O. W. N. 290, M. C. C. 436.

Importance of working conditions—*Retrospectivity of statute.*]—A mining claim was recorded 3rd October, 1906; 53 days' work was done and filed upon it 27th June, 1907, and 63 days on 24th October, 1907, and nothing more was done.—*Held*, that the time for doing the 3rd instalment or 2nd year's work expired 3rd January, 1909, and that the claim was thereafter open to re-staking. — Whatever may have been the proper interpretation of s. 164 of the Mines Act, 1908, in regard to the exclusion from computation of what was known as the close season, the amendment made in 1907, limiting the exclusion to periods of time shorter than a year, applied to all periods of time commencing subsequently to its passing, though the claim had been recorded previously.—Maintenance in full effect of the law of working conditions is of vital importance and the Commissioner and Recorders should be careful not to exceed the powers of relieving from forfeiture given them by the Act. *Re Kollmorgen & Montgomery* (1909), M. C. C. 397.

For remarks on the importance of working conditions see also *Re Drummond & Lavery* (1908), M. C. C. at p. 284.

Re Kollmorgen & Webster (1909), M. C. C. at p. 336.

Lands open for permit.]—A working permit application based on staking done while stakings and applications for mining claims and another staking and application for a working permit existed upon the property—the applicant being by reason of these unable to shew by affidavit as required by the Act that he had no knowledge of any adverse claim, the affidavit in fact shewing that he had such knowledge though it stated that in his belief the adverse claimants had no *bona fide* discovery of valuable mineral — was held invalid, under s. 141 of The Mines Act, 1906. *Re Isa Mining Co. & Francey* (1907), 10 O. W. R. 31, M. C. C. 26.

Location — *Certificate of work — Evidence to impugn.*]—A certificate of work done on a mining claim in British Columbia is conclusive evidence that the holder has paid his rent, and can only be impugned by the Crown. *Copley* v. *Callaghan*, 30 S. C. R. 555, and *Callum* v. *Manley*, 23 C. L. T. 278, 32 S. C. R. 371, followed. C., believing that the statutory work had not been done on mining claims, and that they were therefore vacant, located and recorded them under new names as his own, and brought an action claiming an adverse right thereto: — *Held*, affirming the judgment in 8 B. C. R. 225, that evidence to impugn the certificate of work given to the prior locators was rightly rejected at the trial. *Cleary* v. *Boscowitz*, 22 C. L. T. 278, 32 S. C. R. 417.

Miners' lay agreement — Master and servant—Breach of contract — Dismissal of servant—Wages—Damages—Theft of mineral—Action to recover property — Trial — Findings of jury—Perverse verdict—Appeal —Costs. *Brindamour* v. *Robert, Robert* v. *Brindamour* (Yuk.), 6 W. L. R. 821.

Mine owner—*Negligence—Accident to miner—Statutory duty.*]—Section 25 of the Inspection of Metalliferous Mines Act was not intended to impose unreasonable burdens upon the mine owner, and therefore he is only required to use reasonable precautions against accidents to miners. *McDonald* v. *Can. Pac. Exploration Co.*, 7 B. C. R. 39.

Mining regulations — *Representation work — Rights of different Crown grantees to same ground.*]—In July, 1898, the plaintiff located and obtained a Crown grant for placer mining in respect of a claim, and on the 25th January, 1898, one Mensing located a claim, and recored it the next day, and on

the succeeding 27th October, a few minutes after midnight on the 26th, the defendant relocated it as ground abandoned and open to occupation on the ground of non-representation. The two claims overlapped. On the 10th November, 1898, the defendant obtained her Crown grant for placer mining, covering the ground in dispute, and being a re-location of Mensing's old land. The Gold Commissioner had made a rule that three months' continuous work in the year was sufficient, and by the regulations a claim was deemed abandoned after it had remained unworked on working days for the space of seventy-two hours:—*Held*, that the defendant's Crown grant must prevail over that of the plaintiff. *Victor* v. *Butler*, 21 C. L. T. 454, 8 B. C. R. 100.

Neglecting to contribute.] — See *Re Seymour & Logan* (1909), M. C. C. 421.

Operation under option — *Changes in method—Title to adjoining property—Estoppel.*]—A mining property was operated under the terms of an option to purchase, which contained a provision that, upon failure to perform certain conditions within a specified time, the property, machinery and plant should revert to the plaintiff company. In the course of operating the mine the parties holding the option removed a portion of the buildings and plant to an adjoining property, owned by a third party, and sunk a shaft there and made other changes which rendered the former method of operating the mine useless.—*Held*, that neither the parties holding the option nor their agent, who had full knowledge of the facts, could acquire title to the adjoining property and hold the same adversely to plaintiff. *Empire Coal, etc, Co.* v. *Patrick*, 43 N. S. R. 65, 6 E. L. R. 266.

Placer mining—Lay agreement—Lease—Forfeiture—Breach of conditions—Failure to carry on mining operations—Waiver—Acceptance of percentage of output. *Clazy* v. *Meyers* (Yuk.), 2 W. L. R. 289.

Placer mining—Re-location of claim—Alleged failure to perform representation work—Sufficiency of work done — Time for filing affidavits proving work — Additional affidavits—Declaration that claim vacant—Re-staking by new locators—Numbering — Notice — Construction of mining regulations — "Deemed to be abandoned"—Mining recorder — Gold commissioner—Jurisdiction. *Grant* v. *Treadgold* (Yuk.), 4 W. L. R. 173.

Registration of agreement.] — An agreement by which owner or lessee of a mine authorises another to work it on shares need not be registered under B. B. Bills of Sale Act, 1905. *Traves* v. *Forest* (1909), 14 B. C. R. 183.

Affirmed, 42 S. C. R. 514.

Report of work.]—Failure to file a report of work, even though the work has been performed will of itself cause a forfeiture. *Re Kollmorgen & Webster* (1909), M. C. C. 334.

Report of work—*Failure of Recorder to enter.*]—Failure of the Recorder to enter upon the record of a claim a report of work duly filed will not work a forfeiture of the claim. *Re Bennett & Hylands & Barr* (1910), M. C. C. 465.

Staking and application for permit.] —S. and P. disputed the mining claim and working permit applications of M. and M., and claimed the property under mining claim applications filed by themselves. The Commissioner on application of M. and M. issued an appointment for the disposition of all matters concerning the property, and upon the evidence adduced declared that none of the parties had any valid application or claim, holding that all the mining claim applications were invalid for lack of discovery, and that the working permit application was invalid by reason of failure to mark the applicant's name or license No. on the No. 2, No. 3 and No. 4 posts, failure to do any fresh blazing, failure to shew in the application or sketch the length of the boundaries and failure to make affidavit either in substance or in form as the Act required.—On appeal to the Divisional Court.—*Held*, dismissing the appeal, that the Commissioner was right in determining upon the validity of all the applications and that the preponderance of evidence was clearly in favour of his finding. *Re Spurr & Penny & Murphy* (1909), 14 O. W. R. 1239, M. C. C. 390, 1 O. W. N. 287.

Time for application for permit.]—S. 141 (13) of the Mines Act, 1906, requiring an applicant for a working permit to procure it within 70 days after the staking out, is imperative and not merely directory, and unless complied with strictly, so far at least as the things required to be done by the applicant are concerned, the application would be void. *Re McBean & Green* (1909), M. C. C. 14.

Use of permit.] — Where discovery of valuable mineral cannot readily be made the proper course is to procure a working permit upon the property. *Re Waterman & Madden* (1907), M. C. C. 86.

Working agreement or lease — *Use of timber on claim — Ore-bins and tramway, right to use of — Covenant — Damages.*]— The defendant, by an agreement under seal, purported to lease to the plaintiff a portion of a quartz mine, the plaintiff covenanting, *inter alia*, to open and maintain in good repair 100 feet of No. 6 level from the mouth inwards, to remove all broken ore, and to sort out and preserve for shipment such material as could be profitably sorted, to place all concentrating ore on the dump as directed by the defendant, to work the demised area in a good and miner-like manner to the satisfaction of the defendant, and to insure by means of timbering, etc., as required by defendant, the safety of the workings and their permanency. The defendant was to receive the returns from all ore shipped, first making certain deductions, to keep certain percentages from the amounts received, and pay the balance to the plaintiff:—*Held*, that these provisions constituted a contract merely to win the ore for a sliding percentage of the returns, and was not a lease.—The plaintiff claimed damages for being prevented by the defendant from using the timber on the claim in his operations un-

der the agreement, for tearing up and removing the ore-track and trestle which were alleged to be the only means for working the ore, and also for preventing the plaintiff from using certain ore-bins and a track in connection with the same at the mouth of the level.—*Held*, that, as the agreement was silent concerning the use of the timber, track, trestle, and ore-bins, it should have been left to the jury to find whether there was a distinct collateral agreement concerning these matters, and if so, what it was. *Halpin* v. *Fowler* (No. 2), 5 W. L. R. 226, 12 B. C. R. 447.

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19. MISCELLANEOUS CASES.

Coal Mines Regulation Act—Election of check weighman—Mode of making up list of voters—Acquiescence—*Quo warranto. Re McBain*, 2 E. L. R. 160.

Dominion Lands Act—*Mining regulations—Royalties—Placer miner—Renewal of grant.*]—Section 17 of the Mining Regulations passed under the Dominion Lands Act (R. S. C. c. 54) does not, on its true construction, extend to the holder of a grant for placer mining the same privileges as to a renewal of his grant which are accorded to the holder of a quartz mining grant. The placer miner, on renewal (to which he has no absolute, but only a preferential right), holds under an annual grant in substitution for, but not in continuation of, his original grant. And the renewed grant is subject to all such regulations as may be in force at the date when it comes into operation, whether or not it was made during the currency of an existing grant:—*Held*, that the Governor in council has power to make regulations requiring the placer miner to pay a percentage on the proceeds realised from the grant. Such an imposition, called a royalty, is not a tax, but is a reservation which the owner in fee is entitled to make out of his grant. Judgment in *Rex* v. *Chappelle*, 32 S. C. R. 586, affirmed. *Chappelle* v. *Rex*, *Cannack* v. *Rex*, *Tweed* v. *Rex*, [1904] A. C. 586.

Hydraulic lease—*Pleading — Dispute note — Special defence—Free-miner's certificate — Recorded interest — New defence on appeal — Jurisdiction of County Court.*]—Defence setting up failure to comply with the provisions of the Placer Mining Act must be specifically pleaded, *e.g.*, lack of a free miner's certificate and failure to record interest.—Unless exception is taken at the trial to the jurisdiction of the County Court, it will not be entertained on appeal. *Gielnas* v. *Clark*, 8 B. C. R. 42, 1 M. C. C. 428, followed. *Stephenson* v. *Stephenson*, 13 B. C. R. 115.

Lease of oil rights—*Condition—Time—Well to be "commenced"—Preparations for drilling.*]—An "oil lease," or agreement under which the lessee was to have the right to take oil from the land of the lessors, provided that "if within six months from date a well has not been commenced on said premises, this lease shall be null and void." The well contemplated involved drilling into the ground or through rock several hundred feet. When the six months had expired, it was found that the lessee had done no work on the ground, but had put upon the place where the well was to be drilled some plant suitable for the contemplated operation, at an expense of $200:—*Held*, that this did not amount to a commencement of the well; the terms of the lease imported that some work was contemplated upon and in the ground—"breaking the ground" in order to the commencement of a well. *Lang* v. *Provincial Natural Gas & Fuel Co., Utz* v. *Lang*, 12 O. W. R. 671 17 O. L. R. 262.

Lien for wages filed too late with regard to period of service—*Subsequent services as watchman—No right to lien for—Voluntary services enhancing value of mine — Service of originating summons.*]—Plaintiff, a mine foreman for defendant T., having received a letter from T. intimating his intention of closing down the mine, whereupon plaintiff arranged to look after the mine as a watchman at reduced wages:—*Held*, that plaintiff not having filed his lien for wages prior to the reduction within 30 days, as required by s. 9, has lost his lien therefor and had no lien under s. 3 above for prospecting done after the reduction, such prospecting being voluntary, he having been retained merely as a watchman. *Kerruish* v. *Senkler* (1909), 12 W. L. R. 324.

Location of placer claim over lode claim—*Essentials of a placer location — Application and declaration—Gold Commissioner—Appeal—Pleadings—Issue not raised in Court below.*]—*Held*, that a placer claim may be located on a lode claim.—2. A Gold Commissioner had no authority to change the entire location of a placer claim, and an order to that effect made by him is null and void.—3. Where it is sought to sustain an appeal on an issue outside the record, on the grouna that nevertheless it was an issue fought out in the course of the trial, it must, particularly in a charge of fraud, appear that the attention of the Court and the adversary was directed to the fact that such an issue was being raised, otherwise a waiver of the necessity for a formal pleading will not be assumed. *Per* Martin, J., at the trial, that upon a locator of a placer claim tendering to the proper officer the proper fee and documents, he is entitled to obtain a record for the claim, and the officer has no discretion in the issuance thereof, and where the record is not granted to him in due course, he shall, under the remedial provisions of s. 19 of the Placer Mining Act, 1901, be deemed to have had such record issued to him at the time of his application therefor.—2. The validity of the placer mining record primarily depends upon the mere belief of the locator, based upon indications he has observed on the claim in the existence of a deposit of placer gold thereon. *Tanghe* v. *Morgan*, 25 C. L. T. 49, 11 B. C. R. 76.

Miner's lien for wages — *Lien not filed in time—Preservation of lien—Occasional services.*]—Proceedings to enforce a lien for wages:—*Held*, that the occasional visits made by claimant will not entitle him to a lien. *Baxter* v. *Senkler* (1909), 12 W. L. R. 463.

Miners' Lien Ordinance (Yukon)—*Action to enforce lien for wages—Time of registering claim for lien — Lapse of time since completion of work—Period of credit —Acceptance of due bill—Time given after work done—Mortgage—Rights of.*]—Plaintiff quit work on 14th November, having worked 2 days, 3 hours in that month. On 6th December he received from defendant a due bill for $198.50 for November and prior work. His lien for latter amount was filed on 25th May following: — *Held*, that as credit was given after work completely finished, there is no lien except as to November work, amounting to $11.80, which is saved by s. 9 of above Ordinance. *Sairanen* v. *Fortin*, 11 W. L. R. 456.

Miners' Lien Ordinance (Yukon)—*Enforcement of liens for material and wages by son of recorded owner of placer mining claims—Evidence establishing partnership—Claims of other lienholders against partnership interest — Pleading — Estoppel—Mortgagee — Execution creditor.*] — Actions under Yukon Miners' Lien Ordinance. A., a son of defendant, claimed a lien for wages: —*Held*, that A. was a partner of defendant. Other plaintiffs had made no claim against A., and it was now too late to add him under the section of the above Ordinance providing that "the Judge shall make such order as he thinks just." It was held, notwithstanding, that no claim was made against A., that the other plaintiffs have established a lien against the mining claim in question. *Root* v. *Rodenkerch*, *Rodenkerch* v. *Rodenkerch*, *Record* v. *Rodenkerch*, 11 W. L. R. 447.

Miner's liens — *Assertion of one lien against two claims—Yukon Miners' Lien Ordinance—Placer Mining Act — Grouping of claims — Partnership agreement—Lay agreement—"In respect to."*]—Plaintiff had been given by defendant two separate time checks for work done on two mining claims:—*Held*, that the grouping of the claims will not make a lien attach to more than one claim. "In respect to" means "in reference to" or "pertaining to." *McLean* v. *McDonald*, 11 W. L. R. 262.

Held, further, that there can be no personal judgment against defendants under the above lien Ordinance. *Ibid.*, 11 W. L. R. 389.

Miner's liens — *Contract—Trespass.*]—*Held*, that as defendant did not own the claim plaintiffs' liens did not attach. For particulars see *Olsen* v. *Desjarlais*, *infra* 595. *Larcau* v. *Olsen* (1909), 12 W. L. R. 462.

Miner's liens—Wages — Claims under Miners' Lien Ordinance for work done for layman—Defence by owner of mining lands —Acceptance by miners of layman's cheques — Payment—Delay in presentment—Laches —Waiver—Practice—Enforcement of liens—Originating summons — Certificate of commencement of proceedings — Time — Signature of clerk of Court. *Duggan* v. *Corbett*, 7 W. L. R. 693.

Mining company—*Judgment against — Wages — Directors — Manager — Dismissal of action.*]—A manager of a company is not a labourer, servant or apprentice within the meaning of s. 8 of the Ontario Mining Companies Incorporation Act, R. S. O. c. 197. An action brought against two directors of a mining company by such manager, who had recovered a judgment against the company for wages due him and payments made on their behalf to labourers and servants, and had subsequently obtained assignments of the amounts paid, was dismissed on a motion under Rule 616, on the ground that the action in which judgment was recovered was not such an action as is contemplated by s. 8. *Herman* v. *Wilson*, 20 C. L. T. 382, 32 O. R. 60.

Mining lease—*Hydraulic grant—Legislation — Riparian rights — Watercourses—Deed — Dominion mining regulations.*]—An hydraulic mining lease, granted in 1909, for a location in the Hunker Creek Valley, in Yukon Territory, extended along both banks of the creek, and, subject to all subsisting rights, included a point at which, in 1904, the plaintiff acquired, under the Dominion mining regulations then in force, the right to divert a portion of the waters of the creek, subject to then subsisting rights, for working his placer mining claims:—*Held*, that, under a proper construction of clause 10 of the hydraulic mining regulations, waters flowing through or past the location were subject to be dealt with under the regulations of August, 1898; that the hydraulic grant conferred no prior privileges or paramount riparian rights upon the lessee, and that the grant to the plaintiff was of a substantial user of the waters, which was not subject to the common law rights of riparian owners, and entitled him, by all reasonable means necessary for the purpose of working his placer claims, to divert the portion of the flowing waters so acquired by him without interfering on the part of the lessee of the hydraulic privileges. *Klondike Government Concession* v. *McDonald*, 27 C. L. T. 157, 38 S. C. R. 79.

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

Petroleum Bounty Act (Dom.) 1904, s. 2—*Owner of land a producer within the meaning of Act.*]—Where petroleum oil is extracted from wells, under an agreement with the owner of the land to pay him one-eighth of the oil produced, the owner of the land is a producer of petroleum oil within the meaning of the Petroleum Bounty Act (Dom.), 1904, s. 2, and is entitled to one-eighth of the bounty received for producing

such oil.—Judgment of Divisional Court (1909) 14 O. W. R. 926, 1 O. W. N. 147, and of Clute, J., at trial, affirmed. *Smith* v. *Elginfield Oil & Gas Co.* (1910), 16 O. W. R. 470, 1 O. W. N. 944.

Petroleum Bounty Act (Dom.) 1904, s. 2—*Owner of land a producer within the meaning of Act.*]—Where petroleum oil is extracted from wells under an agreement with the owner of the land to pay him one-eighth of the oil produced, the owner of the land is a producer of petroleum oil within the meaning of the Petroleum Bounty Act (Dom.), 1904, s. 2, and is entitled to one-eighth of the bounty received for producing such oil. *Smith* v. *Elginfield Oil & Gas Devel. Co.* (1909), 14 O. W. R. 926, 1 O. W. N. 147. *Thompson* v. *Talbot Oil & Gas Co.* (1909), 14 O. W. R. 971, 1 O. W. N. 152.

Placer mining—Use of stream—Riparian proprietors — Deposit of *débris* and tailings — Injury to lower owners—Reasonable use of water—Industrial necessity—Injunction — Damages — Reduction on appeal to nominal damages—Costs. *McLaren* v. *Jensen, McLaren* v. *Elliott* (Yuk.), 3 W. L. R. 199, 4 W. L. R. 162.

Placer Mining Act and Regulations—Application for renewal grant — Duty of Mining Recorder — Payment of fee—Change in regulations—Additional fee—Waiver—Instructions of department — *Mandamus*—Discretion. *Re Morrison* (Yuk.), 6 W. L. R. 606.

Railway—*Right of way—Encroachment — Statutes — Trespass — Damages.*] — Action for damages for encroachment upon and taking away valuable mineral under the land occupied by plaintiff railway as "right of way." Appeal from 10 O. W. R. 1110 to Court of Appeal dismissed, following decision of the Judicial Committee of Privy Council in *La Rose Mining Co.* v. *Temiskaming & Northern Ont. Rw. Com.* C. R., [1909] A. C. 347; *Temiskaming & Northern Ontario Rw. Com.* v. *Alpha Mining Co.*, 13 O. W. R. 804.

Recorded owner of mining claims—Mortgage in possession—Trespass—Justification under lease prior to mortgage—Title of mortgagor—Unlicensed foreign company — Sale under power—Purchase by agent of mortgagee—Notice of sale—Registration of lease—Agency of lessee's husband. *Clazy* v. *Thornburn* (Yuk.), 2 W. L. R. 534.

Report of mining engineer—*Injunction to restrain publication of — Object of publication — Formation of syndicate — Common interests — Ratification of publication.*]—Plaintiff prepared a mining report to assist one Warden to form a syndicate to purchase certain mining claims. The original syndicate idea fell through, but later a company was formed, and a large number of copies of the report were published with the company's prospectus. Plaintiff asked for an injunction to restrain this publication.—Teetzel, J., *held* (16 O. W. R. 158, 1 O. W. N. 817), that the action should be dismissed on the grounds of common interest of plaintiff and Warden and the fact that the report was prepared to assist Warden in realising upon their joint interests.—Divisional Court dismissed plaintiff's appeal with costs. *Moffat* v. *Gladstone Mines Ltd.* (1910), 17 O. W. R. 17, 2 O. W. N. 73.

Reservation in Crown grant—"*Mineral oils*"—*Whether included in "mines and minerals"—Saskatchewan Land Titles Act.*]—In the original grant from the Crown, all "mines and minerals" were reserved.—In transfer by M. to F. all "mines, minerals, and mineral oils" were reserved:—*Held*, that "mineral oils" come within the reservation of "minerals" contained in the original grant from the Crown, and therefore M. has no right to reserve "mineral oils." *Re Mackenzie & Mann & Foley* (Sask.), 10 W. L. R. 668.

Royalties—*Dominion Lands Act—Publication of regulations—Renewal of license—Voluntary payment.*] — The Dominion Government, by regulations made under the Dominion Lands Act, may validly reserve a royalty on gold produced by a placer mining in the Yukon, through the miner, by his license, has the "exclusive right" to all the gold mines—that is, exclusive only against quartz or hydraulic licenses or owners of surface rights, and not against the Crown. The provision of s. 91 of the Dominion Lands Act as to publication of regulations, means that the regulations do not come into force on publication in the last of four successive weeks in the *Gazette*, but only on the expiration of one week therefrom. Where regulations provided that failure to pay royalties would forfeit the claim, and a notice to that effect was posted on the claim and served on the licensee, payment by the latter under protest was not a voluntary payment. One of the regulations of 1889 was, that "the entry of every holder of a grant for placer mining had to be renewed and his receipt relinquished and replaced every year:—*Held*, reversing the judgment in 7 Ex. C. R. 414, that the new entry and receipt did not entitle the holder to mine on the terms and conditions in his original grant only but he was subject to the terms of any regulations made since such grant was issued. The new entry cannot be made and new receipt given until the term of the grant has expired. Therefore, where a grant for one year was issued in December, 1896, and in August, 1897, the renewal license was given to the miner, such renewal only took effect in December, 1897, and was subject to regulations made in September of that year. Regulations in force when a license issued, were shortly afterwards cancelled by new regulations imposing a smaller royalty.—Held, that the new regulations were substituted for the others and applied to said license. *Rex* v. *Chappelle, Rex* v. *Carmack, Rex* v. *Tweed*, 23 C. L. T. 34, 32 S. C. R. 586.

Leave to appeal granted by the Judicial Committee, 23 C. L. T. 163.

Trespass—*Action for — Discovery—Inspection—Order for—Copies of plans—Undertaking for damages — Security.*]—This was an action of trespass to extralateral rights appurtenant to a mineral claim located and recorded in 1891, and the point in dispute was as to the terms of an inspection order enabling the plaintiffs to inspect the

defendants' workings:—*Held*, affirming the decision of McColl, C.J., that the order might allow the inspection party to make copies of plans, charts, &c., of the other party's workings.—2. That the order should contain an undertaking for damages, and the practice does not require security to be given. *Star Mining & Milling Co.* v. *White Co.*, 22 C. L. T. 104, 9 B. C. R. 9.

Trespass to mining claim—Right of action—Status of plaintiff — Purchaser in possession under agreement with vendor—Maintenance—Damages—Value of mineral in the ground—Severance—*Quantum* of damages—Milder rule. *Kincaid* v. *Lamb* (Yuk.), 4 W. L. R. 167.

Trespass to placer mining claim — Evidence — Award — Estimate of value of pay-dirt—Plans and surveys—Appointment of surveyor—Estoppel — Wilful trespass — Action — Parties — Assignment of chose in action—"Right"—"Claim" — Demand — Tort—Right of action—Addition of parties—Damages—Costs. *Hilditch* v. *Yott*, 9 W. L. R. 53.

Trespass workings — *Extralateral rights—Continuous or faulted veins—Evidence—Inspection — Conflicting theories.*]— In a contest to determine the question as to whether a particular vein, called the Star vein, was continuous, or whether it was faulted by another vein styled the Black or Barren Fissure, the Court, after inspection of the mine, in presence of an engineer chosen by each party, ordered certain work to be done with a view to ascertaining which theory was correct. The facts that in three different places identically the same material was found in the Star vein and in the Fissure; that ore was found in the first 283 feet of the Fissure of the same character as that in the Star vein, and distributed over its entire width; that experiments destroyed the theory of junction or cut off in all slopes and levels in the mine where it was alleged that such existed; that in all pits dug on the apex the same vein matter was visible; that assay ore was found in a pit on the apex corresponding to the middle of the barren vein; that the defendants had followed up their vein into and along the Black Fissure for over 1,000 feet without cross-cutting; were sufficient to warrant the conclusion that the two veins were continuous in fact, and that one vein did not fault the other; and outweighed the circumstances that the Fissure was barren for about 1,000 feet, and that it presented a shattered and contorted appearance in making a sharp curve around a dyke of porphyry. *Star Mining & Milling Co.* v. *White Co.*, 12 B. C. R. 162, 2 W. L. R. 411.

Trespass workings — Following veins —Evidence—Inspection—Conflicting theories —Determination of Court — Appeal — New evidence — Reversal of judgment at trial. *Star Mining Co.* v. *White & Co.* (B.C.), 7 W. L. R. 147.

Trespass workings—*Wrongful abstraction of ore — Conversion — Accumulation of water — Nuisance — Injunction — Trespass of predecessor.*] — A mining company who purchase the assets of an old company, whose debts and liabilities they agree to pay and satisfy, are not liable to a stranger to the contract for a tort committed by the old company. The defendants purchased a mineral claim having ore on the dump which had been wrongfully taken from the plaintiffs claim; they let the ore remain where it was at the plaintiffs' disposal:—*Held*, there had been no conversion of the ore by the defendants. The defendants' predecessors in title ran trespass workings from their mineral claim, the Nickel Plate, through the Ore-or-no-Go mineral claim in which they had a right to mine, but of which the plaintiffs were the owners in fee, into the plaintiffs' mineral claim, the Centre Star, which adjoined the Ore-or-no-Go claim; to stop the flow of water from the Nickel Plate through the trespass workings to the Centre Star claim, the defendants built bulkheads on the boundary between the Centre Star and Ore-or-no-Go claims, and at this point a large body of water accumulated.—*Held*, that the accumulation of water was a menace to the plaintiffs and amounted to a nuisance, and that the bulkheads should have been built at the Nickel Plate boundary so as to keep the water from flowing from the Nickel Plate into the trespass workings. *Centre Star Mining Co.* v. *Rossland-Kootenay Mining Co.*, 11 B. C. R. 231, 1 W. L. R. 315, 396.

Water Clauses Consolidation Act—*Leaseholders and placer miners—Respective rights to water — Forfeiture.*]—It was the intention of the legislature, by s. 29 of the Water Clauses Consolidation Act, as enacted by s. 2 of c. 56, 1903-4, to secure to free miners, occupants of placer ground, whether they hold as original locators or as leaseholders, that continuous flow of water which the section specifies.—A free miner, having obtained certain rights on one creek under s. 29, does not forfeit them because he obtains additional rights an another creek under another section.—The enactment contained in c. 56 of 1903-4, shows a clear intention to cut down the rights of holders of water records, and to increase the benefits accruing to the individual free miner under the Placer Mining Act.—*Per* Irving, J. (*dissentiente*).—A leasehold being held under a lease granted pursuant to the recommendation of the Gold Commissioner, on the representation by the applicant that the ground is abandoned as placer ground, the term "location" would not be properly applied to it. *Gnaca & Mourot* v. *McKee Consolidated Hydraulic Limited*, 11 B. C. R. 481.

Water Clauses Consolidation Act—*Power company — Water records—Amendment — Notices — Terms — Approval of alteration by Lieutenant-Governor in Council.*] — When a power company have submitted the documents specified in s. 85 of the Water Clauses Consolidation Act to the Lieutenant-Governor in Council, one of the purposes set forth in the documents being to alter the points of diversion mentioned in water records purchased by the company, and when a certificate has duly issued under s. 87, approving the proposed undertaking, the power company are entitled, under s. 89, to have the records amended, and are not bound to give fresh notices or submit to such terms as the Commissioner might impose in ordinary cases, under s. 27. *Re Water Clauses Consolidation Act*, 10 B. C. R. 356.

Water Clauses Consolidation Act—*Water record — Grant by commissioner — Amendment — Review.*]—A mining commissioner, under the Water Clauses Consolidation Act, before the amendment of 1905, having adjudicated upon an application for a record, and having made the appropriate entry, is *functus*, and has no power to amend such record.—Any such amendment, being a nullity, cannot be reviewed in any proceedings under s. 36. *Wallace* v. *Flewin*, 11 B. C. R. 354, 2 W. L. R. 418.

Water Clauses Consolidation Act—*Water record and rights—Who may attack —Mining jurisdiction of County Court — Construction of statutes.*]—Action respecting water rights appurtenant to a placer mine:—*Held*, that no one has a status to complain about the diversion or misuse of water by the holder of a water record unless he himself holds such a record under the Water Clauses Consolidation Act, which is an exclusive code on the subject of water rights; and the right to a flow of water is vested either in the Crown or in the holder of such a record. 2. The County Court in its mining jurisdiction has power to deal with actions respecting the disturbance of water rights appurtenant to mining property. 3. All the principles of construction of statutes cannot be applied to enactments such as the Mineral Act, which is constantly being amended without very careful consideration or supervision. *Spruce Creek Power Co.* v. *Muirhead*, 25 C. L. T. 23, 11 B. C. R. 68.

Water grants — Construction of ditch by plaintiffs — Hydraulicing placer mining claims — Location of ditch — Plans and surveys — Ditch crossing defendant's claim — Trespass — Destruction of flume — Waste of water — Representation work — Right of grantee to attack grant to another—Rights of defendant as prior locatee — Crown regulations — Evidence — Injunction — Damages. *Yukon Consolidated Gold Fields Co.* v. *Schmidt* (Y.T.), 6 W. L. R. 592, 8 W. L. R. 708.

Water grants—Renewal—Ditch—Compensation—Interference. *Graves* v. *McDonald* (Yuk.), 1 W. L. R. 325.

Water regulations—Hydraulic lease—Water grant—Diversion of water. *McDonald* v. *Klondike Government Concession Limited* (Yuk.), 2 W. L. R. 501.

Water regulations — Jurisdiction of Gold Commissioner — Res judicata—Estoppel — Water rights — Priorities. *Anglo-Klondike Mining Co.* v. *Cook* (Yuk.), 1 W. L. R. 322.

Water regulations — Water rights—Grant by mining recorder — Protest—Jurisdiction of Gold Commissioner—Judicial determination—Authority in ministerial capacity — Diversion of water. *Carpenter* v. *Calligan* (Yuk.), 2 W. L. R. 488.

Water rights — Diversion of water—Hydraulic concession—Obstruction of stream with débris — Injunction. *Klondike Government Concession Limited* v. *McDonald* (Y. T.), 2 W. L. R. 219.

Water rights—*Placer mining—Jurisdiction of County Court—Two actions — Stay of one — Layman — Status of, to attack water record — Joint application of individual miners — Gold Commissioner—Appeal.*]—The County Court has jurisdiction over water rights appurtenant to placer claims, concurrent with that of the Supreme Court, and such jurisdiction is not ousted by the mere fact that an action was first begun in the Supreme Court by the same parties respecting the same subject matter, and until objection is taken it will continue to exercise its jurisdiction, whereupon the proper course is to apply to stay one of the actions, and it depends upon the circumstances which one will be stayed. It is too late to object to the jurisdiction after judgment. A layman is a lease-holder, and may apply for a water record, which is appurtenant to the mine and not to the miner, and only one who is the holder of a water record, or its equivalent under the Act, has a status to attack a water record; a right to water under s. 29 confers such a status. Individual miners working on the same creek who have statutory rights in the same water may join in an application for a record, or to reduce or modify an existing record which is being misused to their disadvantage, and on such application the Gold Commissioner may make such adjudication as seems to him just; and, unless those interested who participated in or properly had notice of the proceedings appeal from his decision in the summary way provided by s. 36, they are bound by it. If the action taken by the Gold Commissioner was the proper one, it is not invalidated because he gave wrong reasons or relied on one section instead of another which authorized his action. *Brown* v. *Spruce Creek Power Co.*, 11 B. C. R. 243, 1 W. L. R. 143.

Withdrawal of district from location and exploration—*Orders in council —Property and civil rights — British North America Act, 1867—Provincial Act disposing of rights sub lite — Intra vires—Constitutional law — Crown as party to action — Notice to Attorney-General of constitutionality of Act being in question — Precious metals — 7 Edw. VII. c. 15 (O.) — Mines Act.*]—The plaintiffs claimed to be entitled to a certain mining location situated under part of Cobalt lake, on the ground that their assignor had fulfilled all the requirements of the Mines Act, and had transferred his rights to them. At the time their assignor made his alleged discovery and staked out his claim, neither he, nor any one assisting him, had obtained a miner's license, and Cobalt lake had been by order in council withdrawn from location and exploration, as he might have ascertained if he had made inquiry from the proper authority. Moreover, subsequently, a sale of the mining locations in question, in spite of the plaintiffs' protests, had been made by the Crown to the defendants in January, 1907, and pending this action, 7 Edw. VII. c. 15 (O.) had been passed, confirming the sale and vesting the fee simple absolute in the lands and in all mines and minerals being and lying in or under the lands, and all mining rights therein and thereto, in the purchasers, the defendants, as and from the date of the sale, free from all claims and demands of every nature whatever in respect of or arising from any discovery location or staking:—*Held*, that this provincial Act was a public Act and *intra*

vires as relating to both property and civil rights in the province, and, although enacted during the pendency of this action, was absolutely conclusive against the claim of the plaintiffs.—The fact that the Attorney-General or his representative may attend the hearing of a case, under notice served upon him, that the constitutional validity of an Act of the legislature is called in question, does not enlarge the jurisdiction of the Court in respect of any substantial relief sought in the action, and, if the Crown has not been made a party to such action, the interposition of the Court must be confined to such relief as may be awarded in the absence of the Crown as a party to the record.—*Semble*, that in a Crown grant of a mining location, which was expressed to be subject to the provisions of the Mines Act, 1906, 6 Edw. VII. c. 11 (O.), ss. 188 to 221, and which granted both the land and the mining rights, as well as the mines and minerals thereon and thereunder, metals and minerals of every description, including the precious or royal metals, passed.—Sections 3, 4 and 5 of the Mines Act, R. S. O. 1897 c. 36, and ss. 2 (16), 3 (1), and (5) of the Mines Act, 1906, seem to indicate an intention to withdraw from the Crown any right under its perogative title to the precious metals. — Judgment of Riddell, J., 12 O. W. R. 297, affirmed. *Florence Mining Co.* v. *Cobalt Lake Mining Co.*, 18 O. L. R. 275, 13 O. W. R. 837.

Withdrawal of lands from entry — *Powers of Yukon Commissioner — Surface rights — Priorities.*] — On the 11th June, 1898, the Commissioner of the Yukon Territory instructed the then Gold Commissioner to receive no entries for 8 miles of the Klondike river from rim to rim, excluding located placer mines at the mouth of Bonanza. Prior to July, 1898, B. applied for an hydraulic lease of part of the territory referred to. At this time there were no regulations affecting hydraulic leases of placer mines. On the 3rd December, 1898, hydraulic regulations were passed. A lease was issued to B. on the 5th November, 1900. B. assigned this lease to the defendants. The plaintiff located a quartz or mineral claim for part of the land covered by the lease to B. on the 2nd November, 1899, and a record was issued to him on the following day: —*Held*, that the Commissioner had no power in June, 1898, to withdraw from entry the lands which he attempted to withdraw; his powers were defined by the order in council of the 17th August, 1897, and that power was not included. These lands were, therefore, open for location up to the time that the plaintiff staked; and, as the plaintiff had his location and record or grant before the issue of the hydraulic lease, the Crown could not afterwards derogate from its grant, unless there had been a fixed agreement concluded between it and B. as to the extent and terms of his hydraulic lease.—*Held*, also, that the grant to the plaintiff was governed by s. 33 of the regulations in force at the time, and by that the Crown, where the surface rights have not been already disposed of, grants them to the locator of the mineral claim.—*Held*, also, that the Crown intended to withdraw the granting of the lease to B. until regulations were passed to cover that kind of transaction, and that the nature of the lease —the ground covered and the character of the ground—was not determined by the Crown until the regulations were passed, and that these regulations were intended to cover the grant to the plaintiff and similar ones; and, therefore, the defendants took no interest whatever in this piece of ground covered by the plaintiff's location as a mineral claim, and it was absolutely cut out of their lease. *Smith* v. *Canadian Klondike Mining Co.* (Yuk., 1911) 16 W. L. R. 196.

Yukon Miner's Lien Ordinance — Preservation of lien — Time — Service on owners of mining claim — Originating summons — Owners not named as parties—Substituted service — Amendment. *Lushbaugh* v. *Callaghan* (Y.T.), 6 W. L. R. 830.

Yukon Miner's Lien Ordinance — Registration of lien — Time — Miners' Lien Ordinance — Constitutionality—Retroactivity — Contract made before passing of Ordinance — Effect upon contractual rights —Appropriation of payments — Account. *Re Westerberg & Field* (Yuk.), 5 W. L. R. 443.

Yukon Miner's Lien Ordinance — Wood supplied for working mining claim — Mortgage — Priorities — Registration — Affidavit attached to lien — Sufficiency of description — Date of credit — Extension— Waiver of lien — Time — Retroactivity of Ordinance — Postponement of time for Ordinance coming into force. *Drabeson* v. *Thompson* (Yuk.), 6 W. L. R. 587.

Yukon Mining Act, s. 23—Grants for hill claims — Meaning of "hill" — Miner staking two claims, one on each side of a creek — District localities — Right to stake without abandonment. *Jones* v. *Joyal* (Yuk.), 6 W. L. R. 407.

Yukon mining regulations—Hydraulic lease — Application for — Refusal by Crown. *Frooks* v. *Rex*, 11 Ex. C. R. 256. Affirmed, 40 S. C. R. 258.

Yukon mining regulations—Hydraulic lease — Application for — Refusal by Crown. *Smith* v. *Rex*, 11 Ex. C. R. 261. Affirmed, 40 S. C. R. 258.

Yukon mining regulations—Hydraulic lease — Breach of conditions—Recovery of possession of demised lands by Crown. *Rex* v. *Palmer*, 11 Ex. C. R. 269.

Yukon Placer Mining Act—Application for grant by member of North-West Mounted Police — Refusal of — Orders in council — Regulations of Department of Interior — Public policy — *Mandamus*. *Re Maclennan* (Yuk.), 7 W. L. R. 200.

MINISTER OF

Interior. *See* MINES AND MINERALS—MUNICIPAL CORPORATION—PARTIES.

Justice. *See* CRIMINAL LAW.

Crown. *See* CONSTITUTIONAL LAW.

Trade and commerce. *See* ALIENS.

MISCONDUCT.

See ADVOCATE—DENTISTRY—HUSBAND AND WIFE—MASTER AND SERVANT—MEDICAL PRACTITIONER — MUNICIPAL CORPORATIONS—PARLIAMENTARY ELECTIONS.

MISDIRECTION.

See BILLS AND NOTES — CONVERSION — CRIMINAL LAW—GIFT—LIMITATION OF ACTIONS — MASTER AND SERVANT — NEGLIGENCE—NEW TRIAL—RAILWAY—STREET RAILWAYS—TRADE UNION — TRIAL.

MIS-EN-CAUSE.

See PARTIES.

MISE EN DEMEURE.

See COSTS.

MISFEASANCE.

See COMPANY — MUNICIPAL CORPORATIONS —WAY.

MISJOINDER OF CAUSES OF ACTION.

See PLEADING.

MISJOINDER OF PARTIES.

See PARTIES.

MISNOMER.

Exception to form—*Husband and wife—Separation.*] — A judgment authorizing a wife to bring an action for *séparation de corps* against her husband, described as "Alexander Felix Boyd," does not authorise a suit against "Alexander Felix Boyle;" and an exception to the form in an action for *séparation de biens*, based upon such incorrect description of the husband, will be sustained. *Selby* v. *Boyle*, 6 Que. P. R. 282.

See AMENDMENT—HUSBAND AND WIFE—JUDGMENT—MUNICIPAL ELECTIONS—WILL —WRIT OF SUMMONS.

MISREPRESENTATION.

See FRAUD AND MISREPRESENTATION.

MISTAKE.

Contract for purchase of land—Mistake of purchaser as to quantity, not known to vendor—Hardship amounting to injustice —Rescission — Election to affirm contract after discovery of mistake—Fraud—Payment of commission to agent. *Stouski* v. *Hopp* (Man.), 2 W. L. R. 363.

Moneys paid out by mistake on forged express orders — Order cashed by bank—Recovery of amount from bank—Order cashed by payee — Non-liability of person indorsing for identification. *Can. Ex. Co.* v. *O'Neill, Can. Ex. Co.* v. *Home Bank*, 14 O. W. R. 287.

Mortgage — *Prior agreement—Mining rights — Misrepresentations—Illiteracy.*]—The plaintiffs leased mining rights under lay agreement to the defendants, providing for division of profits and payment of an existing debt, and for advances to be made out of the clean-ups, a mortgage to be given on the dumps to secure the advances. Owing to some inaccuracy, a new lay agreement was executed at the same time as the mortgage. The mortgage provided for payments at earlier dates than the lay agreement, and was not read over to the defendants, who were unable to read and had requested that it should be read over to them. In an action on the mortgage, evidence was given that a document signed on that date was represented to be in terms similar to the lay agreement as first drawn, but it might, possibly, have been the new lay agreement that was thus spoken of, and it appeared that, although the defendants became aware of the difference in the terms of payment mentioned in the mortgage, and complained of this to the plaintiffs' agent, they continued to work on the lay, assuming that the altered terms of payment would not be insisted on:—*Held*, that there was not sufficient evidence of acquiescence in the altered terms of payment, and that, as the evidence shewed that the defendants were illiterate, and the mortgage had not been read over to them on request, and they had been misled as to its contents, they could not be bound by its altered provisions as to the payments. *Letourneau* v. *Carbonneau*, 35 S. C. R. 110.

Recovery of money paid under mistake of fact — *Mortgage — Account—Acknowledgment — Estoppel — Appeal—Cross-appeal — Leave — Parties — Costs.*]—The judgment of Robertson, J., 22 C. L. T. 59, was reversed on appeal:—*Held*, that there could be no recovery against the executors, because their testator was not the person who received the erroneous overpayments sought to be recovered back. He omitted to give credit in his books or on the plaintiff's mortgage for two sums paid to him, but the plaintiff made no mistake in paying them, for there was then so much and more due on the mortgage, and when the executors subsequently assigned the mortgage to the defendant G. W. L. H. in part satisfaction of the legacy bequeathed to him by their testator, there was still a considerable balance due thereon. The time when these payments should have been taken into consideration was when the mortgage was being paid off to G. W. L. H. There was nothing to create

an estoppel as between him and the plaintiff so as to have prevented the latter from then claiming credit for these payments. G. W. L. H., and not the testator, was the person who received too much, and it was the payment to him which was erroneous. The executors, upon their appeal from the judgment against them, were entitled to be relieved and to costs of the action. And the plaintiff, although he had omitted to appeal, by way of precaution against that result, for judgment in his favour against G. W. L. H., should be permitted to do so, *nunc pro tunc*, and judgment should be entered for the plaintiff against G. W. L. H. with costs down to the trial and settlement of the judgment as if G. W. L. H. had been the original and only defendant. No costs of the appeal to any of the parties. *McDermott* v. *Hickling*, 23 C. L. T. 40, 1 O. W. R. 19, 768.

Rescission of contract—*Election to affirm voidable contract.*]—1. The mistake of one party to an agreement for the purchase of land as to the amount of land purchased, when the mistake is not known to the other party, and there is nothing in the language or conduct of the other party which led or contributed to the mistake, does not give a right of rescission unless a hardship amounting to injustice would be inflicted upon the party by holding him to his bargain, and it would be unreasonable to do so. *Templin* v. *James*, 15 Ch. D. 215, and *Miller* v. *Dahl*, 9 Man. L. R. 444, followed.—2. If a purchaser of land enters into and retains possession of the land and pays two monthly instalments of the purchase money after he has found out his mistake, he should be held to have elected to affirm his contract, and cannot afterwards have it rescinded. *Slouski* v. *Hopp*, 15 Man. L. R. 548, 2 W. L. R. 363.

See Banks and Banking — Bills and Notes — Bills of Sale and Chattel Mortgages — Buildings — Contract — Costs — Crown — Deed — Evidence — Executors and Administrators — Land Titles Act—Municipal Corporations — Partition — Practice — Principal and Agent—Sale of Goods—Ship — Vendor and Purchaser.

MISTAKE OF TITLE.

See Crown.

MODEL SCHOOL.

See Schools.

MONEY.

Action for money lent—*Date fixed for repayment — Statute of Limitations — Contract — Interest.*]—In an action for money lent, it appeared that the defendant in August or September, 1902, borrowed £20 from the plaintiff. On the 3rd August, 1903, the defendant wrote to the plaintiff: "Would you lend me £20 for say two years at most? I will honestly repay you." On the 23rd October, 1903, the defendant wrote to the plaintiff: "I scarcely know how to thank you for your very kind letter and for the draft duly received"—*Held*, that the time for payment was in September, 1905, and the action was not (in 1910) barred by the Statute of Limitations.—*Held*, also, that the plaintiff was entitled to interest at 5 per cent. upon the amount lent, there being a written contract for payment of money on a certain day to be spelled out of the two letters, the request and the acknowledgment. *Adlard* v. *Greensill* (1910), 14 W. L. R. 536.

Action to recover—*Chattel mortgage — Notes — Accounts — Question of fact — Conflicting evidence of transactions—Credibility of witnesses — Finding in favour of plaintiff — Judgment with costs.*]—Plaintiff brought action to recover $3,944.79 for money alleged to have been loaned defendant at various times.—Riddell, J., held, that it was a question of fact and found $2,780.23 to be due plaintiff. Judgment entered accordingly with costs. Counterclaim dismissed with costs. *Moorehouse* v. *Perry* (1910), 17 O. W. R. 27, 2 O. W. N. 92.

Action for money lent — Weight of evidence. *Armour* v. *Anderson*, 2 O. W. R. 473, 3 O. W. R. 214.

Action for money paid—Advance to protect stocks—Express or implied contract to repay — Ratification. *Walker* v. *Bower*, 4 O. W. R. 426.

Attachment of debts—*Claimants — Priorities.*] — Moneys paid into a County Court by garnishees were distributed among claimants according to priorities, the claimants who observed the first charging order being first entitled. *Wilson* v. *Robertson*, 9 B. C. R. 39.

Decease of person entitled—Payment out without letters probate or of administration — Solicitors — Undertaking. *Coleman* v. *McConnell*, 11 O. W. R. 202.

Had and received.—*See* Contract.

Money had and received—Deposit — Repayment — Evidence — Corroboration — Costs. *Burton* v. *Campbell*, 5 O. W. R. 53.

Ownership of — Partnership—Judgment creditors — Stop orders — Creditors' Relief Act — Payment out to sheriff for distribution. *Campbell* v. *Croil*, 8 O. W. R. 67, 9 O. W. R. 772, 917.

Payment into Court—Moneys of plaintiffs in hands of defendant—Alleged mental incapacity of plaintiff — Con. Rule 419 — Inquiry as to mental condition—Jurisdiction — Residence abroad. *Curran* v. *Collard* (1910), 1 O. W. N. 835.

Payment out — *Accountant's office — Issue of cheque — Refusal to accept—Delay in second application — Costs — Interest.*]

—The High Court receives money primarily for the protection of infants and others not competent to deal with their own property, and those who cannot be found; the machinery of the Court not being intended as a convenience for those who are *sui juris* and know their rights, it is the duty of those entitled to receive money out of Court to apply for it at the earliest moment reasonably possible.—A person so entitled, who had refused to accept a Court cheque on the ground that the solicitor who obtained it had no authority to do so, and delayed 17 years in applying for payment of the money, was ordered to pay the costs of an application to the Court for the issue of a duplicate cheque, the former cheque not having been accounted for, and interest was allowed at the rate of 3 per cent. only while the money was in Court. *Re Sturgis, Sturgis* v. *Van Every*, 9 O. W. R. 963, 14 O. L. R. 77.

Payment out—Costs—Solicitor's lien—Judgments — Priorities — Stop orders — Contract — Construction. *Raymond* v. *Faulkner* (Yuk.), 2 W. L. R. 461.

Payment out—*Life tenant—Lunatic—Foreign guardian — Maintenance.*]—During the infancy of the defendant $2,000 was paid into Court, to one-half of which she was entitled on attaining majority, and to the other half after the death of her sister. The defendant having come of age, but being of unsound mind, and residing abroad with her mother, who had been appointed her guardian by a foreign Court, the mother applied for payment out of the whole fund, having given in the foreign Court specific security for the amount:—*Held*, as to the half of the fund in which the applicant had a life interest, that it might be paid out to proper trustees appointed to administer and safeguard it, or it might be paid out to the applicant upon substantial security being given. —*Held*, as to the other half, that being actually in the hands of the Court, it was subject to the jurisdiction of the Court, and should be applied for the support and maintenance of the person of unsound mind, in the discretion of the Court—whatever sum should be shewn to be necessary for maintenance being paid to the foreign guardian. *Re Thompson—Thompson* v. *Thompson*, 21 C. L. T. 34, 19 P. R. 304.

Proof of actual advance—Evidence —Promissory note given for accommodation —Banks. *Ward* v. *Bell*, 4 E. L. R. 210.

Security for costs of appeal — Rule 820 — Appeal dismissed — Disposition of surplus after payment of respondent's costs —Claim of respondent for costs in Court below — Claim of appellant's solicitor under assignment. *Re Kay & White Silver Co.*, 12 O. W. R. 281.

Stop order cannot issue before the recovery of judgment and the provisions of Judicature Ordinance for the attachment of debts are not applicable to stop a fund in Court.—*Dawson* v. *Moffatt*, 11 Ont. R. 484, commented on; *Steckles* v. *Byers*, 10 C. L. T. 41, not followed. *Can. Moline Plow Co.* v. *Clement* (1906), 6 Terr. L. R. 252, 5 W. L. R. 32.

See Appeal — Infant — Mortgage — Payment into Court—Payment out of Court—Railway — Stay of Proceedings.

MONEY LENDERS ACT.

See Criminal Law—Statutes.

MONEY ORDERS.

See Principal and Agent.

MONEY PAID.

Failure of consideration — Action to recover — Defence of repayment — Conflicting evidence — Credibility — Surrounding circumstances. *Davies Co.* v. *Weldon*, 10 O. W. R. 210.

MONOPOLY.

See Constitutional Law — Injunction —Liquor Licenses—Municipal Corporations.

MORTGAGE.

1. Assignment.

Acceleration—*Assignment pendente lite —Parties—Costs.*]—Judgment in 21 C. L. T. 555, 2 O. L. R. 500, affirmed without costs, the Court refusing to interfere with the decision of a provincial Court in a matter of procedure. *Gibson* v. *Nelson*, 35 S. C. R. 181.

Agreement — Executors of purchaser from mortgagor — Liability for mortgage moneys—Statute of Limitations—Indemnity —Cause of action—Payment on mortgage. *Carman* v. *Wightman*, 8 O. W. R. 572, 10 O. W. R. 135.

Amount due—Evidence—Action on covenant—Costs. *Weber* v. *Oberholtzer*, 6 O. W. R. 111.

Amount due—*Failure of consideration—Rights of assignee—Receipt for consideration money—Estoppel—Judgment in action for non-performance of contract entered into as consideration.*]—Application for an order *nisi* for foreclosure. D. entered into a written agreement with defendant W., to plough latter's land. He did part and, in a way, did the rest. W. recovered judgment against D. for damage done to the land, but it does not appear that any sum was ever paid on judgment. Defendant W. had given D. a mortgage as security for payment for the ploughing. D. assigned the mortgage to the plaintiff:—*Held*, that plaintiff took mortgage subject to stated account between defendant W. and D., and mortgage was only good for price of part property ploughed. Defendant W. is not estopped by having obtained judgment against D. *Swan* v. *Wheeler*, 11 W. L. R. 730.

Conveyance subject to mortgage—*Reservation of life estate.*]—A father, being the owner of land, mortgaged it, and then conveyed it to his son subject to the mortgage, and reserved a life estate to himself:—*Held*, that the son was not entitled, on payment of the mortgage money to the assignee of the mortgage, to an assignment of the mortgage to himself or his nominee under R. S. O. 1897 c. 121, s. 2, s.-ss. 1 and 2; the holder of the mortgage having notice of the equitable right of the father to have his life estate relieved of the burden by payment of the mortgage debt by the son:—*Semble*, that the grantee was entitled to have the mortgage assigned in such a way that it would remain an incumbrance on the remainder in fee vested in him. *Leitch* v. *Leitch*, 21 C. L. T. 496, 2 O. L. R. 233.

Covenant by assignor for payment—*Release of surety—Assignment of mortgage—Covenant—Discharge of part of land.*]—The defendant, when assigning a mortgage on lands to the plaintiffs, covenanted that the mortgagor would pay. The plaintiffs afterwards, without his consent, discharged half the lands from the mortgage on payment of half of the mortgage debt:—*Held*, that this was such an alteration of the contract guaranteed as to release the defendant from his liability, whether the amount paid was the full value of the part released or not. *Farmers' Loan & Saving Co.* v. *Patchett*, 23 C. L. T. 285, 6 O. L. R. 255, 2 O. W. R. 702, affirmed 25 C. L. T. 7, 8 O. L. R. 569, 4 O. W. R. 349.

Covenant for good and valid security.]—Middleton, J., *held*, that a covenant in an assignment of a mortgage that the said mortgage is a good and valid security, not construed to mean that this covenant is a sufficient security, but only that the mortgage is valid in law. *Agricultural* v. *Webb*, 15 O. L. R. 213, followed. *Clerk* v. *Joselin*, 16 O. R. 68, distinguished. *Toffey* v. *Stanton* (1911), 19 O. W. R. 405, 2 O. W. N. 1219.

Debtor's acknowledgment of the mortgagee's claim—*Third party in possession of property—C. C. 987, 1570, 1571, 1574, 2041, 2127.*]—The minor who has acquired a property by a sale duly registered, may validly accept a transfer of the vendor's claim made subsequent to the sale of the property by the minor to a third party in possession of the property who is not bound by such claim, in view of the fact that the vendor's claim upon the property still remains intact in the hands of said third party. The transfer made by the seller of the balance of the purchase price, as certified by a duly registered deed, may be validly accepted by the purchaser, even though the latter be still a minor, because the nullity of contracts entered into by minors is merely relative and established in their favour. Acceptance by the original debtor of the transfer of a mortgage, is sufficient to give him the right to an hypothecary action to receive the amount of such claim, as against any third party in possession of the property, and, in that event, such third party cannot plead to the hypothecary action that the transfer to the plaintiff is null and void as to him, the defendant, in asmuch as the transfer was notified to him *Dionne* v. *Houle* (1910), 17 R. de J. 281.

Execution — Delivery — Retention by husband of mortgagor—Agency for mortgagee—Evidence—Action for foreclosure — Defence. *Cooney* v. *Henry*, 9 O. W. R. 956.

Motion for possession on default — *—Right to reconveyance or assignment — R. S. O. 1897 c. 121, s. 2.*]—The defendant the mortgagor, had conveyed away the equity of redemption. Default under the mortgage was admitted. Defendant was willing to pay if an assignment of mortgage were made to his nominee. On a motion for judgment for possession on default in a mortgage it was held that defendant was entitled to leave to have case tried out. *Syms* v. *McGregor* (1909), 14 O. W. R. 748, 1 O. W. N. 94.

Pendente lite.]—Mortgage action claiming payment of principal and interest. Defendant T. is holder of equity of redemption, and covenanted with mortgagor to assume mortgage. When action commenced, plaintiff had not an assignment of this covenant, but subsequently obtained same. On motion of defendant T., paragraph in statement of claim alleging obtaining of said assignment struck out. *Ronald* v. *Whitehead*, 12 O. W. R. 1073.

Proof of claim—Affidavit of assignee—Onus—Discovery of new evidence. *Randall* v. *Berlin Shirt and Collar Co.*, 5 O. W. R. 256, 646.

Registration — Absence of actual notice or knowledge — Payment to original mortgagee—Rights of assignee against mortgagor and grantee of equity of redemption—Foreclosure—Parties. *Watson* v. *Grant*, 9 O. W. R. 53.

Sale of assignment — *Absolute in form —Only mortgage in effect—Notice — Parol evidence—Admissibility of, on question of mortgage or no mortgage.*]—Where a tenant is in possession of land, a purchaser is bound by all the equities which the tenant could enforce against the vendor. This equity of the tenant extends not only to interests con-

nected with his tenancy, but also to interests under collateral agreements. The principle is the same in both classes of cases, that the possession of the tenant is notice that he has some interest in the land, and a purchaser having notice of that fact is bound to enquire what that interest is. But, a purchaser is not bound to attend to vague rumours, or to statements by mere strangers. A notice to be binding must proceed from some person interested in the property. B., the owner of land in West Canada, under a contract of sale from the Chancellor and scholars of King's College, being indebted to T. & Co., induced P. to assume the debt, and to secure him from any loss in consequence of such assumption, by deed poll endorsed on his original contract of sale, absolutely assigned the land to P. Up to the time of this assignment, B. himself had never been in the actual possession of the land, his father having managed the same as his agent. P. afterwards, in satisfaction of certain debts due by him, assigned the land conveyed to him by B., with other property to G. This assignment was also endorsed on the original contract of sale. Prior to the execution of this assignment, G. made some inquiries about the ownership of the property, but it did not appear that he received any information that B. was the owner. In a suit by B. against P. and G. for redemption.—*Held*, upon appeal (affirming the decree of the Court of Error and Appeal in Canada),—First, that, under the circumstances, the transaction between B. and P., although in form an absolute assignment and sale, was in effect a mortgage only. Second, that as G. had acted with proper *bona fides*, taking the assignment from a party who had the original contract of sale in his possession, and who had taken an absolute assignment of that contract, he had no notice, actual or constructive, of B.'s title.—*Semble*, where the receipt of the consideration-money is acknowledged in the body of the deed, it is not the custom in Canada to have an additional acknowledgment endorsed on the deed. Judgment of the Court of Error and Appeal for Upper Canada (5 Grant 1), and of the Court of Chancery for Upper Canada (1 Grant 459), affirmed. *Greenshields* v. *Barnhart* (1853), C. R. 2 A. C. 91.

Transfer of land subject to mortgage—*Real Property Act, s. 89—Implied covenant of indemnity—Assignment—Right of action.*]—The defendant took a transfer of land, absolute in fact as well as in form, from one Williams, and agreed to assume a mortgage on the property held by the plaintiff:—*Held*, that the plaintiff, who had obtained an assignment from Williams of her right of indemnity against the defendant under the transfer, had a good cause of action to recover the amount of his mortgage from the defendant direct. *Short* v. *Graham*, 7 W. L. R. 787, distinguished. *Morice* v. *Kernighan*, 18 Man. L. R. 360, 9 W. L. R. 397.

Undertaking of mortgagee to keep up insurance—*Seal—Negligence—Setting off unliquidated damages against debt—Right of set-off as against assignee of debt—Notice of assignment—King's Bench Act s. 39.*]—If a mortgage company through their manager undertake with the mortgagor to keep alive an insurance on the mortgaged property, and take steps towards carrying out such undertaking, but fail to carry it out, they are guilty of such negligence as to render them liable in damages to the mortgagor, if ignorant of such failure, for the amount of such insurance in case the property is burned after the policy lapses. *Skelton* v. *London and North Western Ry. Co.*, L. R. 2 C. P., *per* Willes, J., at p. 636, followed.—2. It is not necessary in such a case that the company's undertaking should be under seal.—3. The mortgagor has a right, under s. 39 of the King's Bench Act, to set off such damages against the mortgage debt in the hands of an assignee in trust, in the absence of proof of notice of the assignment having been given to him before the fire. *Newfoundland* v. *Newfoundland*, 13 App. Cas. 213, followed. *Campbell* v. *Canadian Co-operative Investment Co.*, 5 W. L. R. 153, 16 Man. L. R. 464.

Want of notice—*Lack of registration as required by Registry Act—Con. Rule 622—Interest on overdue principal.*]—Plaintiff, Pringle, brought action to recover $3,808.32 under a covenant in a mortgage, which had been assigned to him by Smith. The writ and statement of claim were amended under order of the Master in Chambers, by adding Smith as a party plaintiff with apt words, the covenant having been given to him. Defendant pleaded want of notice of assignee, and lack of registration as required by Registry Act. Meredith, C.J.C.P., gave plaintiff judgment for $3,395.98 and costs. Appeal to Court of Appeal dismissed with costs. See 12 O. W. R. 1186, 13 O. W. R. 484, 617. *Pringle* v. *Hutson* (1909), 14 O. W. R. 1083, 1 O. W. N. 153.

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2. Bar by Statute of Limitations.

Assignment — *Subsequent sale — Extinction of prior charge in favour of assignee—Retention of lien on part unsold — Statute of Limitations — Partnership—Oral agreement — Registry laws.*] — Two partners A. and B. bought two properties C. and D., and subsequently verbally dissolved partnership, A. taking C., and B. taking D. A. gave a mortgage on C. to E. and subsequently gave to plaintiffs a lien on C. and D. E. took foreclosure proceedings when plaintiffs paid off its claim, continued the proceedings, obtained final order and sold C. to R.:—*Held*, that plaintiffs had not thereby lost their lien on D., B. having gone into possession of D. on the dissolution has acquired title by possession. *Abell* v. *Porter* (1909), 12 W. L. R. 470.

Barred by Statute of Limitations.]—Mortgagee brought an action of ejectment and recovered judgment which he recorded, but took no further steps for 20 years:—*Held*, that judgment and mortgage were both barred. *Re Lands of James Ling* (1908), 43 N. S. R. 69.

Claim of mortgagee to moneys paid into Court—Expropriation of mortgaged lands — Ejectment against mortgagor — Judgment — Effect of — Registration — Possession — Prescription. *Re Ling & Dominion Coal Co.* (N.S.), 6 E. L. R. 264.

Conveyance of equity of redemption to mortgagee — Merger — Intention — Evidence — Statute of Limitations—Vacant land — Legal estate — Acknowledgements in writing — Letters of owners of equity—Dictation to amanuensis — Costs. *Rogers v. Brann*, 7 O. W. R. 617.

Deficiency after sale — *Action against heir in possession of other property for balance of mortgage—Statute of Limitations—Possessory title in defendant.*] — Plaintiff brought an action on a mortgage, sold the land under the judgment, and there was a deficiency of $224.06. Ascertaining that mortgagor had had an interest in certain other lands plaintiff brought action for a declaration that his mortgage was a charge upon this land in the hands of the heirs and that the land be sold for the payment of plaintiff's debt. Defendant set up the Statute of Limitations:—*Held*, that defendant's mother knew of defendant's acts of ownership therefore defendant William Lamiman acquired a title by possession; that there was no suspicion of fraud in the matter and defendant's title ought not at this distance of time to be disturbed. Action dismissed with costs. *Beer v. Williams* (1910), 15 O. W. R. 868, 21 O. L. R. 49.

Limitation of actions — *Mortgagor barred — Subsequent service of notice of sale—Effect of.*]—After the Statute of Limitations has run against a mortgagor of lands, service of a notice of sale by the mortgagee on the mortgagor does not give the mortgagor a right to redeem, the mortgagee's statutory title being in no way affected thereby. *Shaw v. Coulter*, 11 O. L. R. 630, 5 O. W. R. 305, 6 O. W. R. 55.

Mortgage — *Covenants — Payment on account.*]—Action for foreclosure: — *Held*, that a payment of $800 operated under s. 22 above as a bar to the Statute of Limitations. Foreclosure decree to go. *Robinson v. Robinson* (1909), 14 O. W. R. 155.—Circumstances disclosed later having justified the reception of further evidence, the hearing was enlarged that such evidence might be taken by the trial Judge. *Ibid.*, 14 O. W. R. 1009, 1 O. W. N. 185.

Recovery of judgment in ejectment —*Bar by lapse of time.*]—The mortgagee of land, instead of proceeding to foreclosure and sale under the statute, brought an action of ejectment against the mortgagor, and recovered judgment for default of appearance and plea. The judgment was recorded but no further steps were taken upon it for a period of upwards of twenty years, either by revivor or issue of execution, or by taking possession of the land.—*Held*, affirming the judgment of the trial Judge, that the judgment could not be enforced after the expiration of twenty years from its date, and that the lapse of time was a bar to both the mortgage and the judgment. *Re Lang*, 43 N. S. R. 60, 6 E. L. R. 264.

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3. Construction and Operation.

Attornment clause — *Relationship of landlord and tenant—Summary proceeding to oust grantee of mortgagor—Distress for rent—Landlords and Tenants Act.*] —The purchaser of mortgaged premises is not a tenant of the mortgagee or his assignee, and cannot be dispossessed by the summary procedure provided for by the Landlords and Tenants Act, R. S. M. 1902, c. 93, although the mortgage contains clauses creating the relation of landlord and tenant between the parties and giving the mortgagee the right to distrain for arrears of interest as rent. —Neither can the mortgagee or his assignee, in such a case, distrain upon goods other than those of the mortgagor for such arrears of interest. *Chalmers v. Freedman*, 18 Man. L. R. 523, 10 W. L. R. 434.

Building on adjacent lot projecting on mortgaged land—Reformation—Construction — General words — Short Forms Act — Description — Plan — Title—Registry laws — Appeal — Costs. *Fraser v. Mutchmor*, 4 O. W. R. 299.

Collateral security to bank—*Payable on demand—Power of sale — Notice of intention to exercise — Making the demand —Motion under Vendors and Purchasers Act.*]—The Sovereign Bank took a mortgage as collateral security to an account. The mortgage was payable on demand. The bank served notice on mortgagor of intention to sell and later sold the mortgaged lands. On a motion under the Vendors and Purchasers Act it was *held*, that the proper construction of the mortgage was that the bank was entitled to exercise the power of sale at any time upon non-payment after demand, and the notice of intention to exercise the power of sale was a sufficient demand to authorise a valid exercise of the power of sale and the bank was entitled to sell after the expiration of one month from the service of notice, therefore the bank could give the purchaser a good title to the property. *Re Sovereign Bank & Keilty* (1910), 16 O. W. R. 73.

Costs of mortgagee—Unnecessary proceedings — Tender — Waiver. *Middleton v. Scott*, 4 O. L. R. 459, 1 O. W. R. 630, 632.

Deed absolute in form—*Parol evidence —Admissibility of, on question of mortgage or no mortgage.*]—A. contracted for the grant of certain lots of land from the Government in Upper Canada, and paid part of the purchase money, and being indebted to B., he assigned by deed his interest in those plots to B. in consideration of the sum of £100. B. took possession of the lots, and afterwards obtained a grant of them by Letters Patent from the Crown in fee with the privity of A. A. subsequently became bankrupt, and B. was appointed assignee to his estate. No mention was made of any claim on the part of A. for right to redeem, or interest in the lots, in his affidavit of debts and assets, nor was any claim then made by him or his creditors. B. remained in possession until his death, and the property having greatly increased in value, A. procured the appointment of a new assignee of his estate, who filed a bill against the devisee of B. for redemption of the lots in question, upon the ground that the original transaction was one of mortgage and not of absolute sale. The original deed of assignment was lost, and no evidence of its contents could be produced, except a memorandum of account between the parties, made by the solicitor who acted for A. and B., upon which the assignment in

the deed was based. Parol evidence was admitted to prove the nature and terms of the transaction, but the Court of Error and Appeal in Upper Canada dismissed the bill. Such decision affirmed on appeal by the Judicial Committee. *Mathews* v. *Holmes* (1855), C. R. 2 A. C. 230.

Equitable mortgage — *Mining leases—Priorities — Judgment creditor — Sheriff's sale — Purchaser — Notice.*]—A company incorporated under the laws of the State of New York executed in New York a mortgage of lands in New Brunswick, and of minerals therein, while the title to the latter was in the Crown, the law of New York, unlike that of this province, not reserving minerals to the State. Mining leases subsequently were issued by the Crown to the company. A judgment creditor of the company, with notice of the mortgage, purchased the leases at a sheriff's sale, under an execution upon his judgment, and paid to the Crown rent overdue upon the same, whereupon new leases were issued in his own name, the Crown having no knowledge of the mortgage:—*Held*, that the new leases were subject to the mortgage. —*Semble*, that the title of the judgment creditor would have been postponed to that of the mortgagee, though he had been a purchaser without notice of the mortgage. *Continental Trusts Co.* v. *Mineral Products Co.*, 25 C. L. T. 67, 3 N. B. Eq. R. 28.

Foundation and buildings — *Distinct ownership of each — Recourse of the mortgagee of buildings erected on the mortgaged foundations.*]—Erections and buildings may be property distinct from the foundations on which they stand, the rule of the ancient law *de dificium solo cedit*, being nothing more than a presumption, since the promulgation of the Civil Code. Hence, the owner of the buildings has recourse against the creditor of the owner of the soil for his mortgage which he has duly registered against the whole lot, both foundation and buildings. *Belavance* v. *Reed* (1909), 36 Que. S. C. 392.

Hypothec to municipal corporation on conditions. *St. Jerome* v. *Commercial Rubber Co.*, C. R., [1908] A. C. 444, digested under MUNICIPAL CORPORATIONS.

Interest post diem — Construction of reconption clause — Usurious rate of interest. *Sparling* v. *Cunningham* (Yuk.), 4 W. L. R. 330.

Loan association — *Collateral security —Advance of maturing shares — By-law changing mode of payment — Covenant.*]— Where a mortgage of real estate by a member of a loan association incorporated under R. S. O. 1887 c. 169, executed to secure collaterally an advance to him of the amount of the maturity value of certain of his shares in the association, contained a covenant by the mortgagor that the monthly payments would be made according to the by-laws of the association until the shares should have matured, and also that he would make the several payments provided by the by-laws for the time being with respect to shares and the payment thereof:—*Held*, that the association had power, by by-law passed subsequent to the execution of the mortgage, to change the mode of payment, which, according to the mortgage, was by fixed monthly instalments, to a provision by which when the shares matured the mortgage should be released. *Williams* v. *Dominion Permanent Loan Co.*, 1 O. L. R. 532.

Mill — *Machinery — "Plant."*] — The word "plant" in a mortgage of a mill, held not to include office furniture, or a horse and carriage used for occasional errand purposes in connection with the mill, or material kept on hand for repairs to machinery; but held to include scows used for lightering the output of the mill from its wharf to steamers, and in lightering coal for the use of the mill, and also to include such stores as axes, shovels and files and other articles complete in themselves, used in carrying on the mill business. *Eastern Trust Co.* v. *Cushing Sulphite Fibre Co.*, 3 N. B. Eq. 378, 2 E. L. R. 28.

Mortgage—*Removal of house from mortgaged premises—Action to compel return — Mandatory injunction — Claim to house by wife of mortgagor—Fixture—Attachment to freehold—Intention — Parties—Disclaimer—Mistake—Costs.*]—Under a mortgage made by A. B., over lands described as that part of the most southerly 18 chains in width of legal subdivisions 1 and 2 in section 30 in a certain township, lying east of a certain river, the plaintiffs brought this action against A. B. and 3 other defendants, for payment of the mortgage moneys, or possession of the mortgaged premises, and also for a return to the premises of a house alleged to have formed part thereof and to have been removed therefrom:—*Held*, as to the defendant V. B., the wife of the defendant A. B., who claimed the house in question as her individual property, and removed it from the mortgaged premises to her own land, that, though the house was not physically attached to the freehold, but rested on blocks laid flat in the ground, it was, nevertheless, a part of the freehold, having been erected in lieu of an old house, which was undoubtedly subject to the mortgage, and the defendant V. B. having had no other intention than that of contributing to the welfare of the family, and the new house, taking the place of the old one, being used as ancillary to the inheritance, and as such remaining part of the inheritance. One R., the father of the defendant V. B. and of the defendant J. V., her sister, was originally the owner of all legal subdivisions 1, 2, 7, and 8. More than 15 years before action, R., by mere word of mouth, gave to his daughter V. B. the 2 chains in width north of her husband's 18 chains, and to his daughter J. V. the 5½ chains in width immediately north of V. B.'s chains. From that time V. B., living with her husband on the mortgaged premises, considered that the 2 chains immediately to the north were hers, and cultivated potatoes there. J. V. put up fences on the north and south boundaries (where she supposed them to be) of her 5½ chains, and had lived there ever since. In December, 1905, by a mistake, a certificate of title was issued to J. V. for a parcel of 5½ chains which included V. B.'s two chains. Neither V. B. nor J. V. knew of the error until after this action had been begun. The plaintiffs supposed, when the house was removed to the parcel given to V. B., that it was on J. V.'s land, as it appeared in the land titles office, and made her a defendant, alleging that, with her connivance, the house had been removed to her land. By

her statement of defence J. V. denied all the allegations of the statement of claim, and pleaded specifically that the land to which the house was moved was not hers, and that the moving was without her knowledge or consent. After J. V. had been examined for discovery, the plaintiffs amended their statement of claim, disclaimed any title to the house or to the land. Subsequently other arrangements were made by R. with his daughters: the land conveyed to J. V. she was allowed to retain, and to V. B. was conveyed 2 chains further north, to which she removed the house. Upon this appearing, no relief was sought against J. V., and as to her only the question of costs remained:—*Held*, that the disclaimer of J. V. was sufficient, and no costs should be allowed to the plaintiff against her; but the plaintiffs should pay her costs subsequent to the disclaimer. The defendant J. H. B. was added as a defendant as being mortgagee from J. V. of the land erroneously included in J. V.'s certificate of title, to part of which land the house was first removed. In his defence he stated that he claimed no other buildings than those that were on the land at the date of his mortgage—the house in question not having been removed there till a year later.—*Held*, that he should have all his costs from the plaintiffs.—*Held*, also, that the plaintiffs were entitled against A. B. and V. B. to a mandatory injunction for the return of the house to the mortgaged premises. *Case Threshing Machine Co.* v. *Berard* (1911), 17 W. L. R. 91, Man. L. R. .

Municipal land—*Privilege — Realty — Description — Aqueduct.*] — An aqueduct constructed upon land constitutes a surface right annexed to the land, and can, therefore, be mortgaged. — 2. Constructions upon the municipal domain, by virtue of a privilege granted by the council, are of the nature of realty for the time that the privilege lasts.— 3. The designation of the mortgaged property is sufficient if the creditor has not been led into error by such designation. *Garant* v. *Gagnon*, 17 Que. S. C. 145.

Payment of instalment — Subsequent advance — Special agreement — Effect of— Costs. *Griffiths* v. *Mackenzie*, 3 O. W. R. 777.

Proposal for mortgage — *Liability for expenses — Agreement — Solicitor's costs— Expenses of appraisement — Commission to agent.*]—The defendant applied to the plaintiffs for a loan on mortgage, but the loan was not completed through no fault of the plaintiffs. They sued the defendant for solicitor's costs, costs of appraisement, and brokerage at 1 per cent. on the sum they were ready to advance, and they relied on the following clause in the written proposal made to them: "If the loan for any cause should not be completed, I agree to pay all expenses incurred:"—*Held*, as to the solicitor's costs and expenses of appraisement, the charges being reasonable, and being for services rendered to the defendant at his request, that the plaintiffs were entitled to recover, but as to the item of commission at 1 per cent. on the gross amount of the loan, that this could not be properly included under the word "expenses," because the money was not earned, and the plaintiffs would not be legally justified in paying it unless it were an expense properly incurred; the brokerage or commission, under the circumstances of the case, being only payable on completion of the loan to the plaintiff's agents. *British Columbia Provincial Loan Assn.* v. *Charnock*, 22 C. L. T. 155.

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4. COVENANTS.

Action on—Attempted exercise of power of sale—Incomplete sale—Inability to reconvey—Change in position of property. *Mendels* v. *Gibson*, 2 O. W. R. 857, 3 O. W. R. 551, 4 O. W. R. 336, 5 O. W. R. 235.

Action on — Defence—Agreement not to enforce — Failure to establish—Consideration — Agreement to stifle prosecution — Evidence to establish. *Munn* v. *Holton*, 3 O. W. R. 804.

Action on — Impossibility of restoring mortgaged land if payment made. *National Trust Co.* v. *Bousfield* (Man.), 4 W. L. R. 575.

Action on covenant—*Sheriff's sale — Redemption.*]—Defendant mortgaged certain real estate to A., and afterwards conveyed the equity of redemption to E. P. A., who conveyed it to L. A. assigned the mortgage to the plaintiff, R., who foreclosed without making defendant a party to the proceedings. At the sheriff's sale plaintiff purchased the property for an amount less than the amount due for principal and interest on the mortgage, and afterwards conveyed it to F. Plaintiff having sued on the covenant contained in the mortgage, to recover from defendant the full amount due, deducting the proceeds of the sheriff's sale:—*Held*, following *Kinnaird* v. *Trollope*, 39 Ch. D. 636, *Almon* v. *Busch*, Ritchie's Eq. Dec., and *Miller* v. *Thompson*, unreported, that the plaintiff could sue for the amount by which the proceeds of the sheriff's sale fell short of the amount due on the mortgage on giving defendant a further opportunity of redeeming, and that, as this could not be done, the property having been disposed of to a stranger, there should be judgment for defendant. *Kenny* v. *Chisholm*, 19 N. S. Reps. 497 (affirmed on appeal to the Supreme Court of Canada) distinguished. Meagher, J., dissented. *Ryan* v. *Caldwell*, 32 N. S. R. 458.

Action to enforce — *Dilatory exception—Recourse against vendor — Warranty—Contract — Absence of privity— Delay.*]—In an hypothecary action the defendant pleaded that his vendor guaranteed to him that he would obtain an extension of time for payment, and, by a dilatory exception, asked leave to bring in his vendor in warranty:—*Held*, that the plaintiff, not being a party to the alleged subsequent agreement, whereby the vendor was alleged to have undertaken to obtain delay for payment, was not to be embarrassed and delayed in his remedy by reason thereof, and the dilatory exception was dismissed. *Corse* v. *Myler*, 8 Que. P. R. 7.

Building society—*Action on covenants after foreclosure—Reopening — Consolidation—Lien—Purchaser for value — Adding parties.*] — On the 27th December, 1893, the defendant K. gave a mortgage to a loan

company to secure $400. On the 10th March, 1894, K. agreed to sell the mortgaged property to L., and L. paid the purchase price. On the 4th June, 1895, the defendant K. gave a mortgage to the same company on other property to secure $2,000. K. subscribed on each occasion for shares in the loan company, which he assigned to the company as security for the loans, the mortgages being treated as collateral. Each mortgage contained a proviso that the company should have a lien upon all stock then or thereafter held by the defendant as security for the loans. K. allowed the payments on both mortgages to fall into arrear. The company proceeded on the $2,000 mortgage, and on the 24th August, 1899, obtained an order vesting the title to the property covered by it in themselves and debarring K. from all right to redeem. The plaintiff company became the owner of the two mortgages by assignment, and on the 10th January, 1901, sued K. upon his covenant for payment in the $2,000 mortgage, offering to reopen the foreclosure, and claimed the right to consolidate the two mortgages:—*Held*, that L. was entitled to be added as a party defendant under s. 36 of the Judicature Ordinance, 1898, and that the plaintiffs had no right to consolidate as against him. 2. The proceedings upon the $2,000 mortgage were not identical with foreclosure proceedings, and the presumption from the company's taking a vesting order and from their delay in suing was that they intended to take the land in full satisfaction and to abandon the remedy on the covenant. *Colonial Investment and Loan Co.* v. *King*, 23 C. L. T. 126, 5 Terr. L. R. 371.

Conveyance of equity of redemption —*Expropriation—Mortgagor—Notice.*] — A mortgagor who has conveyed away his equity of redemption is not entitled to notice of expropriation proceedings taken by a railway company with regard to part of the mortgaged lands; and, therefore, the absence of such notice does not constitute any defence to an action brought against him by the mortgagee on a covenant to pay the mortgage money. *Farr* v. *Howell*, 20 C. L. T. 278, 31 O. R. 693.

Covenant against incumbrances — Breach — Damages — Costs — Payment into Court. *Hiron* v. *Wild*, 2 O. W. R. 165.

Defence of payment — Promissory notes. *Pegg* v. *Hamilton*, 1 O. W. R. 418, 633.

Execution procured by fraud of agent of mortgagee — *Responsibility of mortgagee—Failure of action on covenant.*] —In an action upon a mortgage of land, the question was as to the liability of one of the defendants, a married woman, upon the covenant for payment contained in the mortgage deed, which purported to be executed by her. The land had been conveyed to her by an agent of the plaintiffs, a mortgage company, the mortgagees, but she did not know of the conveyance to her, and, if the signature to the mortgage deed was hers, she was fraudulently induced by the agent to make it, believing the mortgage deed to be, as represented by the agent, another and entirely different document, relating to a transfer of shares; in the same way she executed an authority to the agent to receive the mortgage moneys; he did receive the moneys and did not pay them over to her; and he made payments to the plaintiffs upon the mortgage:—*Held*, that the knowledge of the agent was constructively the knowledge of the plaintiffs, and they must be taken to have known all about the transaction; although both the plaintiffs and the defendant were innocent of any wrong-doing, the plaintiffs enabled their own agent to occasion the loss, and they must suffer it; if a company are negligent in the appointment of agents and appoint a rascal, they must be responsible for his rascality in dealing with the company's affairs; their negligence is the proximate and effective cause of the fraud. *Hunter* v. *Walters*, L. R. 7 Ch. 75; *King* v. *Smith*, [1900] 2 Ch. 425, and *Houghton* v. *Webb*, [1907] 1 Ch. 537, [1908] 1 Ch. 1, distinguished. *Bagot* v. *Chapman*, [1907] 2 Ch. 222, followed.—*Held*, therefore, that the plaintiffs were not entitled to recover upon the covenant, but the defendant married woman must transfer to the plaintiffs her registered title to the mortgaged property. *Dom. Perm. Loan Co.* v. *Morgan* (1910), 16 W. L. R. 7, B. C. R.

Extension of time for payment of instalment — *Agreement—Evidence.*] — *Held*, that an agreement to extend the time for payment of an instalment of principal and interest under a mortgage can be enforced, but such an agreement when verbal must be supported by evidence both clear and convincing. *Gilroy* v. *Proc*, 8 W. L. R. 81, 1 Sask. L. R. 111. Affirmed or reversed, 8 W. L. R. 777.

Interest—Board in lieu of—Settlement—Administrator. *Rockett* v. *Rockett*, 1 O. W. R. 309.

Judgment—Amendment—Costs. *Woods* v. *Alford* (1910), 1 O. W. N. 434, 455.

Loan security — Deed of sale—"Contrelettre" — Conditional sale — Obligation to maintain insurance—Breach — Forfeiture—Compensation. *Houle* v. *St. Aubin*, 3 E. L. R. 446.

Purchase subject to mortgage—*Implied covenant of indemnity—Assignment of implied covenant — Survivorship of Joint Contractors—Administrators — Territories Real Property Act.*]—The obligation, declared by the Territories Real Property Act, s. 63, to be implied in every instrument transferring any estate or interest in land under the provisions of that Act, subject to mortgage or incumbrance, is assignable by the implied covenantee to the original mortgagor. The implied covenant takes effect notwithstanding that the mortgage or incumbrance is not noted upon the transfer. The plaintiff sold, subject to a mortgage, to L. & V.; L. & V. gave a mortgage back for the whole price, the understanding being that L. & V. should pay the first mortgage, the amount thereof being credited in reduction of the second; L. & V. sold to T. for a certain sum, and T. was to pay what was then owing on the two mortgages; T. sold to S. for a certain sum, and S. was to pay what was then owing on the two mortgages, S. thus became by *mesne* transfer

the registered owner subject to the two mortgages, the first made by the plaintiff, the second by L. & V.; S. died, and the contesting defendants, his administrators, became, by transmission, registered owners, subject to the two mortgages. L. died, and V. assigned to the plaintiff the rights of L. & V. on T.'s implied covenant to discharge two mortgages. T. also assigned to the plaintiff his rights on S.'s implied covenant to discharge the two mortgages:—*Held*, that the plaintiff was entitled to an order against the contesting defendants, the administrators of S., that they pay the balance owing upon the two mortgages with costs, and that *de bonis propriis* if the assets of the estate proved insufficient. Semble, the assignment from V., the survivor of L. & V., conveyed the rights also of the representatives of L. *Glenn* v. *Scott*, 2 Terr. L. R. 339.

Release — *Dealings between mortgagee and assignee of equity.*] — The relations which exist among mortgagee, mortgagor, and assignee of the land who has agreed to pay the mortgage, are not those which obtain among creditor, surety, and principal debtor. *Aldous* v. *Hicks*, 21 O. R. 95, approved. Nor should the doctrine of discharge applicable to the case of an ordinary surety be extended to the case of a mortgagor where no actual prejudice has arisen. So long as the covenant to pay endures, the mortgagor is liable to pay when sued by the mortgagee; his equitable right is, upon payment, to get the land back, or to have unimpaired remedies against his assignee if he has sold the land; and if those rights can be exercised by him at the time he is sued, it is immaterial that at some previous time there was such dealing between his assignee and the mortgagee as would then have interfered with such rights. *Mathers* v. *Hellewell*, 10 Gr. 173, explained. Dictum of Maclennan, J.A., in *Trust and Loan Co.* v. *McKenzie*, 23 A. R. 107, dissented from. *Barber* v. *McCuaig*, 24 A. R. 402, 29 S. C. R. 126, followed. *Forster* v. *Ivey*, 20 C. L. T. 402, 32 O. R. 175. (See, also, *Watson* v. *Bell*, 32 O. R. 181*n*).

Release — *Dealings between mortgagee and assignee of equity.*]—When land subject to mortgage is sold by the mortgagor, and the purchaser assumes and covenants to pay the mortgage, the mortgagor does not become to the mortgagee a surety in the technical sense, and the doctrines as to the discharge of sureties do not apply to him to their full extent. The mortgagor is liable, therefore, upon his covenant, notwithstanding a previous extension of time granted by the mortgagee to the purchaser, if, when the liability is enforced, the right of the mortgagor to redeem is not affected. Judgment in 32 O. R. 175, 20 C. L. T. 402, affirmed; Osler and Maclennan, JJ.A., dissenting. *Forster* v. *Ivey*, 21 C. L. T. 550, 2 O. L. R. 480.

Sale—*Deficiency—Personal order for — Notice of motion — Service by filing.*]—A mortgage made by the defendant to the plaintiffs to secure payment of $500, contained a covenant that the defendant would pay, or cause to be paid, the said mortgage money, to wit, $500, with interest. On sale under order for foreclosure and sale, the mortgaged property realized only $110, and the plaintiffs applied for an order for judgment against the defendant, with costs, for the balance due on the mortgage, after deducting the proceeds of the sale. The defendant did not appear to the action, and as he was a seafaring man, and it was impossible to effect personal service, the notice of motion was served by filing with the prothonotary, pursuant to O. 65, r. 4:—*Held*, that the plaintiffs were entitled to the order applied for. *Reliance Savings & Loan Co.* v. *Curry*, 34 N. S. R. 565.

Subsequent dealings with equity of redemption—Merger—Accord and satisfaction — Liability — Reference. *Home Life Assoc.* v. *Spence*, 2 O. W. R. 974, 3 O. W. R. 414.

Transfer of land subject to mortgage—Implied covenant by transferee with mortgagee to pay mortgage money—Land Titles Act, s. 52 — Certificate of title—Evidence to shew that transfer by way of security only—Admissibility — Transfer of bare legal estate—Transferee not liable unless upon a real purchase. *Short* v. *Graham*, 7 W. L. R. 787.

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5. DISCHARGE.

Building society—Terminating shares—Payment — Interest — Amount necessary to discharge mortgage — Accelerated payments. *Mitchell* v. *Colonial Investment & Loan Co.*, 9 O. W. R. 219, 681.

Discharge—Form and effect of—Intention to take assignment — Mistake in conveyancing — Subrogation — Charges of land joining in mortgage as surety for owner—Extension of time to owner—Reservation of rights — Release of surety — Declaration of priority — Action — Parties — Amendment — Will — Condition — Fulfilment. *Quackenbush* v. *Brown*, 7 O. W. R. 284.

Discharge—Intention to take assignment — Mistake — Subrogation — Charges of land joining in mortgage as surety for owner —Extension of time to owner—Release of surety — Declaration of priority—Redemption—Costs. *Quackenbush* v. *Brown*, 10 O. W. R. 850.

Mortgagee dealing with property — *Power to reconvey — Action on covenant—Right of way.*] — A mortgagee, being compellable under his mortgage to discharge at any time any portion of the land described in it, having not less than 20 feet frontage, upon payment of a certain sum per foot frontage, not only discharged a certain portion of the land upon payment of a certain sum, but also assented to a right of way across the whole of the property, which right of way had been granted by the owners of the equity of redemption to the purchaser of a portion of the mortgaged lands, and released the right of way from his mortgage:—*Held*, that the mortgagee having debarred herself from restoring the estate covered by the mortgage, unaltered in character and quantity, in a manner unauthorised by the terms of the mortgage, owing to the right of

way, an assignee of the mortgage could not claim under the covenant therein in an administration of the mortgagor's estate. It is proper, however, in such a case that the mortgagee claiming under the covenant should have an opportunity within a limited time to put himself in a position to restore the estate upon payment of the mortgage money, and so twenty days were allowed for that purpose. *Re Thuresson, McKenzie* v. *Thuresson*, 22 C. L. T. 51, 3 O. L. R. 271, 1 O. W. R. 4.

Mortgagor becoming shareholder — *Liability for losses.*]—*Held*, that, under mortgage in question, and the by-laws and rules of defendants and their predecessors in interest applicable thereto, plaintiff was entitled to a discharge of his mortgage, given in form as collateral security for payment of shares subscribed for by him, upon payment of the principal and interest therein provided; and that the defendants could not charge against the mortgage a share of losses incurred in the management of the company. Judgment of MacMahon, J., 3 O. L. R. 191, 22 Occ. N. 60, reversed. *Lee* v. *Canadian Mutual Loan Co.*, 23 C. L. T. 165, 5 O. L. R. 473, 2 O. W. R. 370.

Rectification — *Limitation of actions — Real Property Limitation Act—Interest.*]—In 1882 the defendant mortgaged land to the plaintiffs to secure a loan. The plaintiffs asserted that it was intended by both parties that the mortgage should include the outer two miles as well as the inner two miles of lots 18 and 19, and that the outer lots were omitted by mutual mistake:—*Held*, on the evidence, that the mortgage deed should be rectified. The defendant paid interest up to the 25th November, 1883. In 1885 the defendant wrote to the plaintiffs asking for a discharge of part of the outer two miles which had been taken for a railway, and the plaintiffs executed the discharge and received payment of compensation from the railway company. The defendant left the land in 1892, and his brother-in-law afterwards cut hay upon it. The defendant paid no taxes since 1887. The plaintiffs paid all taxes from that year:—*Held*, that the Real Property Limitation Act did not begin to run in the defendant's favour till 1885, and did not continue to run after he abandoned the land in 1892; he thus had no more than 8 years of adverse possession. The principal became due in May, 1884. The contract to pay interest then ceased, and interest thereafter was recoverable only as damages, at the statutory rate, and for only 6 years before action. The statutory rate would be 6 per cent. up to 7th July, 1900, and 5 per cent. since: 63 & 64 V. c. 29 (D.). Judgment for rectification and foreclosure in default of payment; no personal order for payment, as the statute had barred the remedy on the covenant. *British Canadian Loan Co.* v. *Farmer*, 24 C. L. T. 273.

Right to discharge—Payment—Mutual loan company — Terminating shares — By-laws of company — Collateral security — Land Titles Act. *Re Kelly & Colonial Investment & Loan Co.* (N.W.T.), 3 W. L. R. 62.

Second mortgage — *Purchase by mortgagor at sale under first mortgage—Liability under second mortgage*—(*Man.*) *Real Property Limitation Act—Husband and wife—Agency of husband — Acknowledgment.*]—Action on a covenant in a mortgage. Judgment for plaintiffs:—*Held*, that there had been a sufficient acknowledgment of the debt to revive it:—*Held*, further, that defendant P. was not a trustee for defendant M. *Mitchell* v. *Rutherford* (1909), 12 W. L. R. 55.

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6. Distress.

Arrears of principal as well as interest—*Distress for Rent Ordinance, s. 5—Application and meaning—"Assign"—Representation as to ownership of goods seized — Estoppel.*]—The father of the plaintiff mortgaged land to the defendant to secure $476 and interest, to be repaid one-half, with interest, on the 1st November, 1908, and the other half, with interest, on the 1st November, 1909. The first payment was not made and was still due and unpaid when the defendant on the 28th September, 1909, seized the 1909 crop. The memorandum of mortgage, under the Land Titles Act, contained a provision whereby the mortgagor became tenant from year to year to the defendant, at a rental equivalent to and applicable in satisfaction of and payable at the same time as the interest; the legal relation of landlord and tenant being thereby constituted in express terms between the mortgagee and the mortgagor; and also a provision that, if default should be made in the payment of any portion of the principal, it should be lawful for the mortgagee to enter, seize, and distrain upon any goods on the lands, and by distress to recover as much of the principal and interest as remained due; and also a provision that, should default be made in the payment of any part of the principal or interest, the whole mortgage money should at once become due. The plaintiff, after the execution of the mortgage, became sub-tenant to his father of the mortgaged lands for one year, and as tenant took off the 1909 crop, which was seized by the defendant. In the distress warrant it was said that the distress was to be made by virtue of power for that purpose contained in the mortgage; and the distress was for $572.25, the whole amount due for principal and interest by virtue of the acceleration clause. By s. 5 of the Ordinance respecting Distress for Rent, C. O. 1898, c. 34, "the right of a mortgagee of land or his assigns to distrain for interest in arrears or principal due upon a mortgage shall, notwithstanding anything stated to the contrary in the mortgage or in any agreement relating to the same, be limited to the goods and chattels of the mortgagor or his assigns . . ." —*Held, per* Johnstone, J., that, while the attornment clause in the mortgage limited the right of distress at most to arrears of interest, the defendant distrained for all principal secured by the mortgage, apparently under the license clause, and now sought to justify the seizure under the attornment clause. It was not open to him to do so; he must justify under the license clause or not at all. *Miller* v. *Imperial Investment Co.*, 11 Man. L. R. 251, followed. Prior to the introduction of s. 5 above set out, the mortgagee, under a

license clause, could not have distrained the goods of the sub-tenant nor of a stranger. In the case of a lease made before the mortgage, the mortgagee took subject to the lease as assignee of the reversion, and was bound to respect the tenant's rights, but might, on default, become entitled to the rent and assume the position of landlord without the tenant's consent. In the case of a lease made after the mortgage, the mortgagee, being assignee, not of the reversion, but of the whole estate of the mortgagor, might treat the tenant as a trespasser and eject him without notice. *Rogers* v. *Humphreys*, 4 A. & E. 299, and *Evans* v. *Elliott*, 9 A. & E. 342, followed. Although the effect of a mortgage under the Land Titles Act would not be to vest all interest in the mortgagee, the result would be the same, and the only recourse the mortgagee would have against the sub-tenant would be that of an action or proceeding for the recovery of possession. Section 5 above quoted had, therefore, no application. *Per* Wetmore, C. J., that the plaintiff was not an "assign" of his father, within the meaning of s. 5.—*Held*, also, *per curiam*, that a representation made by the plaintiff that his father was the owner of the crop did not estop the plaintiff from asserting that the grain seized was his, because it did not appear that the representation had anything to do with inducing the seizure. *Vousden* v. *Hopper* (1911), 16 W. L. R. 294, Sask. L. R.

Attornment clause—*Excessive rent — Distress.*]—An attornment clause in a mortgage is valid if it constitutes a real relation of landlord and tenant between the mortgagee and mortgagor, and a distress levied for the rent is good, though the rent reserved is sufficient during the term specified in the mortgage, viz., ten years, to repay the principal money and interest thereon at 7 per cent. *Massey-Harris Co.* v. *Young*, 37 N. B. R. 107.

Tenancy at will—*Quiet enjoyment—Assignment of equity—Tenant—Sale of distress—Appraisement—Damages.*]—A mortgage containing the usual statutory covenants and a special clause providing for a tenancy at will at an annual rent equal to the interest:—*Held*, not inconsistent or void for repugnancy. *Trust and Loan Co.* v. *Lawrason*, 10 S. C. R. 679, distinguished. The mortgagor, remaining in possession upon the execution of the mortgage, had the right under the provision for quiet possession until default, to enjoy the premises, but for no determinate period, and his tenancy thereunder was a tenancy at will, and such provision was, therefore, not inconsistent with an express tenancy at will at a half-yearly rent. There being a tenancy at will at a fixed rent, there was, as incident to it, the right to distrain, and the covenant for quiet enjoyment must be read as subject to such right. *Doe d. Dixie* v. *Davies*, 7 Ex. 89, followed. After the mortgagor had made default, his continuance in possession was still as tenant at will. After default, the mortgagor, at the instance of the mortgagees, assigned his equity of redemption to his wife, and she took possession and agreed to apply the proceeds of the land to the payment of the mortgage:—*Held*, that this operated as a new tenancy at will with the wife, who became liable for the payment of the rent as the assign of her husband with the assent of the mortgagees, and her goods were, therefore, distrainable for the rent. So the goods of the husband might also be distrained as it was a case of real tenancy.—*Held*, however, that the defendants were liable for selling the distress without appraisement or valuation; and the measure of damages was the real value of what was sold, minus the rent due. *Pegg* v. *Independent Order of Foresters*, 21 C. L. T. 158, 1 O. L. R. 97.

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7. FORECLOSURE.

Acceleration—*Assignment pendente lite —Parties.*]—When a mortgagee, upon default in payment of an instalment of interest, brings a foreclosure action and claims payment of the full amount secured by the mortgage, any party to the action by original writ, or added in the Master's office, or by subsequent order, is entitled to hold him to his election and to pay his claim. But this right must be taken advantage of in the foreclosure action, and does not enure to the benefit of a person not a party to that action who ignores the foreclosure proceedings and brings a redemption action after making an independent tender to the mortgagee. A person who, after the institution of the foreclosure action, acquires an interest in or claim against the mortgaged premises, may, on his application, be added as a party. *Gibson* v. *Nelson*, 21 C. L. T. 555, 2 O. L. R. 500.

Action for—Failure to make lessees of owners of equity with option of purchase parties—Final order of foreclosure—Motion by lessees to set aside after expiry of lease —Dismissal without costs. *Elmsley* v. *Dingman*, 10 O. W. R. 248.

Action for—*Judgment — Principal due by virtue of acceleration clause—Default in payment of interest — Stay of proceedings upon payment of interest—R. S. O. 1897, c. 126, sched. B., cl. 16—Practice of High Court—Rules 387, 388, 389.*]—Present owners of equity of redemption by mistake paid into the wrong account in Court amount due under mortgage. Plaintiff moved for final order for foreclosure, but applicants were allowed to pay off mortgage debt on payment of costs, there being a mistake on their part. An appeal dismissed. *Hazeltine* v. *Consolidated Mines, Limited*, 13 O. W. R. 271, 994.

Action on covenant and for foreclosure—*Default in payment of instalment — Acceleration clause — Judgment for whole mortgage money—Application to set aside —Relief upon payment of instalment with interest and costs—Rules 277, 278—Real Property Act, s. 117.*]—On appeal from an order of the Referee, in an action for foreclosure and a personal order for payment, staying proceedings after judgment under Rule 278 of the King's Bench Act, R. S. M. 1902 c. 40, upon payment of the overdue instalment of principal, interest, and costs:—*Held*, (1) that the action was one for foreclosure within the meaning of Rules

277 and 278 of the King's Bench Act, although judgment for the amount of the debt was also asked for.—(2) A provision in a mortgage that, upon default in payment of an instalment of principal or interest, the whole should become due, is not one against which equity will relieve as being in the nature of a penalty. *Sterne* v. *Beck*, 1 De G. J. & S. 595.—(3) Although Rule 278 says that proceedings may be stayed in the action after judgment "upon paying into Court the amount then due for principal, interest, and costs," the relief ordered could not be granted to the defendant under that Rule, because, by virtue of the acceleration clause in the mortgage, the amount *then due* was the full amount of the principal debt, and equity will not relieve against such a provision.—(4) The defendant was entitled to the relief ordered by virtue of s. 117 of the Real Property Act, which provides that a mortgagor in the circumstances appearing in this case, may "pay such arrears as may be in default under the mortgage, together with costs to be taxed by the district registrar, and he shall thereupon be relieved from the consequences of non-payment of so much of the mortgage money as may not then have become due and payable by reason of lapse of time."—(5) Section 117 of the Real Property Act, notwithstanding that it is preceded and followed by sections relating only to mortgages registered under the new system, is not so limited, but expressly applies to all mortgages, including those registered under the old system. *National Trust Co.* v. *Campbell*, 7 W. L. R. 754, 17 Man. L. R. 579.

Action for foreclosure—Costs—Mortgagee claiming more than due—Tender. *Daigneau* v. *Dagenais*, 2 O. W. R. 132, 5 O. L. R. 265.

Action for foreclosure—*Parties—Irregularity—Appeal from Report.*]—An action for foreclosure and possession was begun by a mortgagee against the mortgagor and a tenant of the latter in possession. The tenant entered an appearance disputing the amount, and pending the action the mortgagor dispossessed her by other means. Judgment by default was obtained by the plaintiff against the mortgagor, without taking any notice of the tenant:—*Held*, that this was irregular; the action should have been dismissed or discontinued as against her. Upon the reference directed by the judgment and in his report the Master continued the tenant as a defendant by original action and also added her as a party in his office by serving her with notice to incumbrancers, although she was not a subsequent incumbrancer: — *Held*, that her name should be struck out both as an original and added party, upon her appeal from the report, notwithstanding that she had not moved to discharge the notice served upon her. *Cowan* v. *Allen*, 26 S. C. R. 292, followed. *McLaughlin* v. *Stewart*, 21 C. L. T. 185, 1 O. L. R. 295.

Action to enforce—Defence—Collateral security—Acceptance of other security — Reservation — Intention. *Heney* v. *Ottawa Trust & Deposit Co.*, 2 O. W. R. 146.

Ascertainment of amount due — *Amount advanced less than face of mortgage—Share of profits — Other considerations—Ratification.*] — In an action for foreclosure of a mortgage for $12,000, defendant claimed that plaintiff had advanced only $5,000 in cash and that there was no other consideration:—*Held*, that as the mortgagee was given an interest in the property which was to be sub-divided into lots, and that as his share of the profits was to be $7,000, there was nothing improper or inequitable in fixing the amount and including it in the mortgage. There had also been ratification. Judgment for full amount claimed and defendant's appeal dismissed. *Burkle* v. *Peasley*, 14 O. W. R. 37.

Assignment of mortgage — *Advances, Subsequent to—Report—Varying, on motion for foreclosure—Interest.*]—H. assigned to the plaintiff a mortgage of certain property of which F. was owner, subject to the mortgage to H. The assignment, to which F. was a party, and which was made at his request, contained, among other things, an agreement on his part that any future advances which he might require, if made by the assignee, should also be a lien or charge upon the property. After the death of F. foreclosure proceedings were commenced by the plaintiff, who, in addition to the amount secured by the mortgage, made a claim for subsequent advances. The defendant H. was appointed to represent the heirs of F. in the proceedings, but, subsequently, C. F., who claimed to be one of the legal representatives of F., was permitted to appear, and entered an appearance by her attorney. Plaintiff's claim was sent to a referee to ascertain and report the amount due, and after a hearing, at which C. F. was represented, the referee reported as due the sum of $808.45, including $338.96 for subsequent advances. On application for order for foreclosure and sale, the Judge reduced the amount of the plaintiff's claim to $435.25, with interest to the date of the sale:—*Held*, that the Judge had authority to open up the question as to the correctness of the referee's report, but was wrong in his conclusion, the recital in the assignment being sufficient as between the parties to make the subsequent advances a charge upon the property, and there being sufficient evidence to support the finding that the advances claimed were actually made:—*Held*, also, that plaintiff was entitled to recover interest up to the date of payment by the sheriff, and not, as allowed, only to the date of sale. *Wallace* v. *Harrington*, 34 N. S. Reps. 1.

Change to sale before final order— — *Previous contested application — Res judicata—Practice—New account — Costs.*] —An order *nisi* for foreclosure changed into one for sale. The first order had been contested and not appealed from:—*Held*, the matter is not *res judicata*. *Case Co.* v. *Preston* (1909), 12 W. L. R. 12.

Equitable jurisdiction of Court — *Opening up foreclosure proceedings — Construction of statute—Real Property Act, R. S. M. (1902), c. 148—5 & 6 Edw. VII. c. 75, s. 3 (Man.)—Equity of redemption* —

Certificate of title.]—Under provisions of s. 126 of Man. Real Property Act, R. S. M. (1902), c. 148, as amended by s. 3 of c. 75 of 5 & 6 Edw. VII. (Man.), the Court has equitable jurisdiction to open up foreclosure proceedings in respect of mortgages foreclosed under ss. 113 & 114 of the Act, notwithstanding the issue of a certificate of title, in the same manner and upon the same grounds as in the case of ordinary mortgages, at all events where rights of a third party holding the status of a *bona fide* purchaser for value have not intervened. Judgment appealed from, 19 Man. L. R. 560, 13 W. L. R. 451, reversed. *Williams* v. *Box* (1910), 31 C. L. T. 251, 44 S. C. R. 1.

Foreclosure and sale — *Vendee—Trustee—Insurance by mortgagee—Account.*]—*Held*, on appeal, that on the evidence, defendant had purchased the property in question for plaintiff, held same as a trustee, and therefore had to account for insurance moneys received by him. The trial Judge held that defendant had agreed to sell the property to plaintiff. *Rudderham* v. *Moffatt*, 6 E. L. R. 245.

Foreclosure or sale—*Originating summons—Defendant not appearing—Discretion of Judge—Order for sale.*] — *Held*, that when a mortgagee takes proceedings on default by way of originating summons for an order for sale, or in the alternative foreclosure, the Judge hearing the application may exercise his discretion and order sale, notwithstanding the fact that the mortgagee asks for foreclosure, and that the application is not opposed. *Excelsior Life Ins. Co.* v. *Prestwick*, 8 W. L. R. 780, 1 Sask. L. R. 215.

Insolvent company mortgagors—Action by mortgagee for foreclosure—Rights and priorities between mortgagee and liquidators of company—Fixtures — Liquidators' costs of preservation of property, of abortive efforts at realization, and of liquidation —Co-operation with mortgagee in efforts to sell—Costs of action and reference. *Wood* v. *Curry*, 12 O. W. R. 345.

Judgment for foreclosure—*Ex parte* order for new account and new day for redemption—Receipt of money and payment out since judgment—Possession taken by mortgagees—Necessity for order—Rule 387. *Federal Life Ins. Co.* v. *Siddall*, 12 O. W. R. 529.

Mortgagee in possession — *Account of rents—New day—Final order—Rights of purchaser after decree—Parties—Power of sale.*]—Mortgagees had been in possession before action for foreclosure. In such action, after decree and report fixing a day for redemption, the defendants applied for a new day, when the plaintiffs stated on affidavit that sums paid by them for taxes and costs more than exhausted the rents received since the date of the report:—*Held*, that the statement of the plaintiffs was insufficient: see Rule 387.—*Held*, also, that a purchaser who has purchased during the pendency of foreclosure proceedings, and whose rights are expressly subject to the termination of the proceedings by a final order of the Court in favour of the mortgagee, stands in a different position from one who comes in for the first time after a final order has been made, and is more readily made subject to the discretion of the Court to open the foreclosure. *Campbell* v. *Holyland*, 7 Ch. D. 166, and *Johnston* v. *Johnston*, 9 P. R. 259, followed. *Gunn* v. *Doble*, 15 Gr. 655, distinguished. In this case the mortgagors were in no default; the slightest examination of the proceedings on the part of the purchaser would have shewn him that the mortgages had never been properly foreclosed, and that no day had ever been fixed for the payment of the balance due the mortgagees. But he did not even ask whether a final order had been obtained, which was the condition upon which his sale was to be carried out:—*Held*, therefore, that the mortgagors had clear rights to redeem; and, having come in promptly for relief and taken vigorous steps to assert their rights, they were entitled to have the final order of foreclosure set aside, a new account taken and a new day fixed, and to redeem both as against the plaintiffs and B., for which purpose the latter should be added as a party:—*Held*, lastly, that the sale to B. was not, under the circumstances, sustainable under the power of sale contained in the plaintiffs' mortgage. *Kelly* v. *Imperial Loan Co.*, 11 S. C. R. 516, distinguished. *Supreme Court of the Independent Order of Foresters* v. *Pegg*, 20 C. L. T. 400, 19 P. R. 254.

Opening foreclosure — *Real Property Act.*]—Section 71 of the Real Property Act, R. S. M. 1902 c. 148, must be read along with the other provisions of the Act, as s. 92 dealing with trusts, s. 76 declaring the cases in which an action will lie against a registered owner, and s. 52 giving the Court power over certificates of title in any proceeding respecting land; and foreclosure proceedings conducted by the district registrar, in the case of lands which have been brought under the Act, are no more binding between mortgagor and mortgagee than a decree and final order of foreclosure made by the Court; and, if the dealings between the parties, subsequent to the foreclosure, are shewn to be such as would be sufficient in equity to open the foreclosure and let the mortgagor in to redeem, they should in the case of lands under the Act have the same effect. *Campbell* v. *Bank of New South Wales*, Torrens Australasian Digest, p. 149, not followed. Under the circumstances set out in the case, it was held that the defendant was entitled to be let in to redeem the property in question. *Barnes* v. *Baird*, 25 C. L. T. 20, 15 Man. L. R. 162.

Opening up foreclosure — *Subsequent Incumbrancer.*] — Mortgagees obtained the usual judgment against the mortgagor and his wife for redemption or foreclosure on the 5th April, 1900. The Master added as defendants a subsequent mortgagee and creditors of the mortgagor having a *fi. fa.* lands in the hands of the sheriff, and his report, dated the 16th May, 1900, certified that the execution creditors had not proved any claim, and appointed the 17th November, 1900, for payment by the subsequent mortgagee. Payment not having been made, a final order of foreclosure as to the added

defendants was issued on the 21st November, 1900. The Master thereupon made a subsequent report appointing the 29th December, 1900, as the day for payment by the original defendants; and, payment not having been made by them, a final order of foreclosure was issued against them on the 29th January, 1901. On the 3rd April, 1901, the execution creditors served a notice of motion to open the foreclosure. On the same day the mortgagees had written to the mortgagor offering to give him, as of grace, a part of any surplus over their claim which they should realise by a sale of the mortgaged premises, upon the mortgagor agreeing not to move to open the foreclosure:—*Held*, that the execution creditors, having moved with reasonable promptness, and being in a position to give the mortgagees immediate payment, were, under the circumstances detailed in the evidence, entitled to have the foreclosure set aside, and to be let in to redeem upon the usual terms. *Thornhill* v. *Manning*, 1 Sim. N. S. 451, followed. *Scottish American Investment Co.* v. *Brewer*, 21 C. L. T. 522, 2 O. L. R. 369.

Order for, under Manitoba Real Property Act—*Right of Court to open foreclosure and allow mortgagor to redeem—Effect of s. 114 of Act.*]—Action for redemption. There is no power to open a Real Property Act foreclosure unless that power is preserved to the Court by s. 126 of above Act as amended in 1906, c. 175. The vague declaration in that section, that the jurisdiction of the Court over mortgages is not affected by the Act, was never intended to deprive an order of foreclosure of the effect given it by s. 114 above. The Court clearly has no power to allow redemption where a certificate of title has been issued to the mortgagee. Action dismissed. *Williams* v. *Box*, 11 W. L. R. 111.

Order nisi for—*Payment by mortgagee of taxes since order made—Motion to vary order—Practice — Order for new day and new account—Costs.*]—After order *nisi* made for foreclosure, the mortgagee paid certain taxes which had been levied. Under the mortgage these were payable by mortgagor:—*Held*, that accounts must be taken anew, and a new day fixed. Costs of application and taking account and order to be borne by mortgagee, as the taxes had not been paid for protection of the security. *Mathew* v. *McLean*, 11 W. L. R. 630.

Order nisi — *Proceedings under power of sale—Right to redeem before order absolute—Tender.*] — A mortgagee, having obtained a foreclosure order *nisi*, shortly afterwards, and before the period allowed for making absolute the order *nisi* had expired, entered into an agreement for the sale of the mortgaged premises to a purchaser who had knowledge of the foreclosure proceedings. The order absolute was never taken out. The agreement for sale was not deposited for registration for some three years after it was entered into, but, a few months before its deposit for registration, a tender was made on behalf of the plaintiffs of the amount due under the mortgage, which was refused on the ground that the property had been parted with, and that the plaintiffs had lost their right to redeem:—*Held*, affirming the decision of Hunter, C.J., 4 W. L. R. 91, that the mortgagee could not, after the order *nisi* for foreclosure and before it was made absolute, exercise his power of sale without the leave of the Court. *Stevens* v. *Theatres Limited*, [1903] 1 Ch. 857, and *Campbell* v. *Holyland*, 7 Ch. D. 166, followed. — *DeBeck* v. *Canada Permanent Loan & Savings Co.*, 12 B. C. R. 469.

Order under Real Property Act — *Right of Court to open foreclosure and allow mortgagor to redeem—Effect of ss. 114 and 126 of Act.*]—A mortgage of land under the Real Property Act, R. S. M. 1902, c. 148, was made under the provisions of that Act. Default having been made, the land was offered for sale under the provisions of the Act. The sale having proved abortive, an order of foreclosure was made by the District Registrar, and an absolute certificate of title was issued to the mortgagee. No irregularity or fraud was charged. In an action brought by the mortgagor for redemption, it was contended that the Court had power, under the statute, to exercise its equitable jurisdiction over mortgagees, and reopen the foreclosure.—Section 114 of the Act declares that an order of foreclosure under the hand of the District Registrar shall have the effect of vesting the land in the mortgagee, free from all right and equity of redemption of the owner, etc. And by s. 126 of the Act, as amended by 5 & 6 Edw. VII. c. 75, s. 3, "Nothing contained in this Act shall take away or affect the jurisdiction of a competent Court on the ground of fraud, or over contracts for the sale or other disposition of land or over equitable interests therein, or over mortgages, nor shall anything in this Act affect the right of the mortgagee to foreclose or sell through any competent Court, which it is hereby declared may be exercised in such Court:"—*Held*, Richards, J.A., dissenting, that the general declaration in s. 126 that nothing in the Act shall take away or affect the jurisdiction of the Court over mortgages, does not affect the particular enactment as to the statutory proceeding for foreclosure, and the latter still retains the absolute quality and effect given to it by the statute.—Once the statutory order is made, there remains outstanding no right or equity of the mortgagor in the land, and therefore no possible interest or right of the mortgagor therein or thereto in respect of which the Court has or can have jurisdiction.—*Campbell* v. *Bank of New South Wales*, 16 N. S. W. Eq. 285, 11 App. Cas. 192, applied and followed.—*Assets Co.* v. *Mere Roihi*, [1905] A. C. 263, specially referred to.—*Per* Richards, J.A., that the intention of the legislature was to preserve to the Court, not only as to foreclosure by the Court, but also as to foreclosure under the Real Property Act, the jurisdiction it always had with regard to mortgages. *Williams* v. *Box* (1910), 13 W. L. R. 451.

Parties—*Administrator.*] — Subsequently to the making of a mortgage the original mortgagor had assigned the equity of redemption in the mortgaged premises to F. in trust to pay the creditors of the mortgagor, who had become insolvent. In an action by the mortgagee for foreclosure the administrator of the estate of F. was made the defendant:—*Held*,

having regard to s. 19 of the Trustee Act, as amended in 1887, that the administrator was the proper party defendant. *Williams* v. *Brown*, 20 C. L. T. 419.

Parties—*Devisee of deceased mortgagor—Executors—Joint assignees of mortgage—Death of one—Action by survivor—Trustees—Objection—Laches—Action to open foreclosure.*]—Mary Ann Plenderleith and her husband had mortgaged certain lands. Husband died in 1890, leaving a will whereby he devised and bequeathed all his real and personal estate to his wife, and appointed her to be his sole executrix. This will was proved on 23rd July, 1890. She died on 22nd September, 1890, also leaving a will whereby she appointed defendants James M. Brown and Jesse Brown to be her executors, and whereby also she devised and bequeathed all her real and personal estate to her daughter, Eliza Plenderleith, the plaintiff in this action, then an infant. Probate of this will was granted to the executors named therein on 2nd October, 1890. John Downey, one of the assignees of the mortgage, died on 11th April, 1894, leaving a will and appointing executors. On 28th November, 1894, the surviving assignee of the mortgage, James Maclennan, brought an action for foreclosure against James M. Brown and Jesse Brown, executors, representing the estates of Mary Ann Plenderleith and her husband. In the statement of claim it was alleged that plaintiff and Downey held the mortgage as mortgagees in trust, and that plaintiff, after the death of Downey, was entitled as surviving mortgagee and trustee to the moneys secured by the mortgage. Defendants filed an answer admitting their character of executors under the wills of the mortgagors, setting out the devise of Eliza Plenderleith, and submitting that she was a necessary party to the action. The usual foreclosure judgment was obtained upon motion for judgment, and, after a reference and report, a final order of foreclosure was made. On 1st May, 1902, James Maclennan conveyed to George Hamilton. On 2nd May, 1902, George Hamilton conveyed to the defendant George B. Smith, who on the same day conveyed by way of mortgage to defendant M. Augustus Thomas. On 14th November, 1904, Eliza Plenderleith brought this action against Smith and Thomas to set aside the foreclosure and for redemption, alleging that the foreclosure proceedings were irregular because the personal representatives of Downey were not made parties, and because Eliza Plenderleith, the plaintiff in the present action, was not a party to those proceedings. Maclennan had entered into possession of the lot after the foreclosure as owner, and since then the possession had followed the conveyances:—*Held*, the law laid down in *Re Martin*, 26 O. R. 465, was there held by the Chancellor that the joint effect of 54 V. c. 18, s. 1, and 56 V. c. 29, s. 4, was to vest all estates in the devisees under the wills of persons dying at any time, whether before or after 4th May, 1891, unless the executors registered a caution within a year. That construction, however, was not approved by the legislature, and the declaratory s. 29 of 60 V. c. 14 expressly interpreted s. 1 of 54 V. c. 18 as applying only to the estates of persons dying after 4th May, 1891, and this interpretation is made retrospective, save where a conveyance had been made before the passing of the declaratory section. Both Mr. and Mrs. Plenderleith died before 4th May, 1891, and the result was, that the equity of redemption was vested in their executors at the time of the foreclosure action and judgment; they were properly made defendants as the owners of the equity, and the present plaintiff, Eliza Plenderleith, the devisee of her mother, was neither a necessary nor a proper party to the foreclosure action. The other objection was, that Downey's personal representatives were not necessary parties to the foreclosure proceedings.—*Held*, the case was within s. 13 of c. 121, R. S. O. 1897, which entitled a surviving mortgagee, in the case of a mortgage or obligation made or assigned to two persons "jointly and not in shares," to receive the mortgage money from the mortgagor and to give a valid discharge of the mortgage. This mortgage became the property of the two assignees, "jointly and not in shares," within the meaning of this section, and James Maclennan, the survivor, became entitled as against the mortgagors to receive the money and to enforce payment of it by action. It was true that the section applies only to securities made or assigned after 1st July 1886, but the renewal agreement was made after that date, and contains a direct covenant by the mortgagors with the assignees to pay the mortgage money and interest at a new day, and this constitutes a new "obligation" after 1st July, 1886, so as to bring the case within the section. The statement of claim in the foreclosure action alleged that Maclennan and Downey took and always held the mortgage and the moneys secured by it as trustees. They being trustees, the right to recover the money survived, at law and in equity, upon the death of Downey, to his co-trustee Maclennan. *Plenderleith* v. *Smith*, 5 O. W. R. 753, 6 O. W. R. 389, 10 O. L. R. 188

Parties—*Final order — Irregularity—Decease of infant defendant—Right of representatives to redeem — Order of revivor—Practice—Accounts — New day.*]—An action upon a mortgage for foreclosure was begun in 1898, and the usual judgment was pronounced on the 30th January, 1899. One of the mortgagors defendants died on the 20th June, 1899, an infant, unmarried, and intestate. On the 2nd May, 1900, a final order of foreclosure was granted, no notice being taken of the death of the infant, and he and not his personal representatives or those claiming under him being declared to stand absolutely debarred and foreclosed:—*Held*, that the final order was irregular and was not binding on the infant's mother, who was not a party to the action, and in whom an undivided interest in the estate of her deceased son vested at the expiration of a year from his death; and that she was entitled to redeem and to be added as a defendant, upon her own application. *Campbell* v. *Holyland*, 7 Ch. D. 166, followed.—An order was made adding her as a defendant, and directing that the action be carried on between the plaintiff and the continuing defendants and new defendant, and that it stand in the same plight and condition in which it was at the time of the infant's death.—The effect would be to require a new account to be taken and a new day fixed for redemption, of which all the defendants would be entitled to avail themselves. *Kennedy* v. *Foxwell*, 11 O. L. R. 389, 7 O. W. R. 26.

Practice in action — Notice to incumbrancers. *Acadia Loan Corporation* v. *Wood*, 1 E. L. R. 121.

Proviso for maintenance of third person—*Failure of mortgagor to maintain—Enforcement by mortgagee's administrators.*]—M., desiring to provide for the support of a daughter, E., conveyed land to his son S., and took from him a bond and mortgage conditions for her support. The mortgage contained a proviso that S. should well and truly and comfortably support and maintain E.—S. did not comfortably maintain E., and she left the home of S., and was harboured and supported by the plaintiffs who also took out letters of administration to M.'s estate:—*Held*, that the transaction could be treated as a mortgage; and foreclosure was accordingly granted.—*Semble*, that if necessary a trustee could have been appointed. *Kinney* v. *Mclauson*, 40 N. S. R. 278.

Rate of interest — *Loan company — Pledge of shares by mortgagor—Forfeiture —Separate action.*]—The defendant, having certain shares in the plaintiff company, obtained a loan of $600. The shares were allotted and the loan granted upon certain conditions, which included the payment of a membership fee, and certain monthly dues and the execution, as collateral security, of a mortgage, which was to continue until the maturity of the shares, or until payment of the loan was made. Under the by-laws of the company the rate of interest on loans was declared to be 6 per cent., but under the provisions of the mortgage executed by the defendant, the rate of interest payable where the stock payments, dues and interest were not promptly paid, was 15 per cent.:—*Held*, that, the defendant having made default in her payments, the company were entitled to payment of the amount due them, with interest at the latter rate. The contract of membership as a shareholder was distinct from the mortgage contract, and was not to be considered in the foreclosure suit. If her shares were wrongly forfeited, the defendant's rights as a shareholder were to be sought in a separate action, and afforded no defence to the foreclosure suit. *Canadian Mutual Loan Co.* v. *Burns*, 34 N. S. R. 303.

Real Property Act—*Certificate of title —Release of covenants for payment—Action for indemnity—Defence—Parties — Addition of.*]—By transfer under the Real Property Act, the plaintiff conveyed land to the defendant, subject to two mortgages. By virtue of the Act, the transfer implied a covenant by the defendant to indemnify the plaintiff against his covenants in the mortgages. The defendant did not observe this implied covenant, and the mortgagees recovered judgment against the plaintiff for the amount due on the mortgages, after which the plaintiff gave the mortgagees collateral security for his indebtedness. The mortgagees had begun foreclosure proceedings under their mortgages, and, after the judgment against the plaintiff, obtained, by virtue of the foreclosure proceedings, a certificate of title to the mortgaged lands. About a year afterwards the mortgagees realised a large sum from the collateral security. By this action the plaintiff claimed payment of the amount due on the mortgages, invoking the implied covenant for indemnity. The defendant, by an amendment made at the trial, set up that the mortgagees had, by their foreclosure proceedings and taking a certificate of title, released the plaintiff from his liability on the covenants:—*Held*, that the question so raised could not be litigated in the absence of the mortgagees, and the plaintiff should have leave to add them as defendants; and, if this was not done, the action should be dismissed. *Noble* v. *Campbell* (1910), 15 W. L. R. 696, 20 Man. L. R. 232.

Sale of property — Action for balance of mortgage claim—Costs. *McNeill* v. *O'Connor*, 2 E. L. R. 288.

Second mortgagee — *Defence—Amendment.*]—In a foreclosure action the only defence was by W., a second mortgagee, and it consisted solely of technical points of law, which were heard and disposed of by the Judge:—*Held*, that, after the decision on the hearing upon points of law, the defendant W. would not be permitted to amend the defence, inasmuch as, if W. had any ground of defence upon the merits, it should have been pleaded with the points of law.—O. 13, R. 12 (*f*), affords all the protection such a defendant can demand. *Ritchie* v. *Pyke*, 40 N. S. R. 476.

Second mortgage—*Pleading—Defence.*]—To an action brought by a first mortgagee for foreclosure, the defendants, purchasers of the equity of redemption, pleaded that after the making of the plaintiff's mortgage, the mortgagor made a second mortgage of the same lands, which was still outstanding and unpaid. The plaintiff applied to strike out the defence, under Order XXV., Rule 4. Ordered that the defence should be struck out. *Williams* v. *Morse*, 20 C. L. T. 418.

Second mortgagee—Rights of execution creditor—Practice — Originating summons — Affidavit—Intituling—Irregularity — Waiver. *Imperial Elevator Co.* v. *Jesse* (N.W.P.), 6 W. L. R. 381.

Subsequent encumbrancer made party in Master's office and foreclosed by consent—*Opening foreclosure—Terms.*]—Order made allowing applicant, a second mortgagee, made a defendant in the Master's office, and consenting to an order foreclosing her to redeem, foreclosure to be set aside on payment of costs. Appeal from order, 13 O. W. R. 1108, dismissed. *Gilles* v. *Smith*, 14 O. W. R. 205.

Subsequent incumbrancer — *Second suit—Costs.*]—Where a first mortgagee has commenced a foreclosure suit, and has obtained an order for foreclosure and sale, a second order for foreclosure and sale will not be granted to a second mortgagee in a second action in respect of the same lands. Such an order is unnecessary and oppressive. The second mortgagee's course is to protect his rights at the sale held under the first order. The second mortgagee is not entitled to add to his claim the costs of his foreclosure suit. *Wentworth* v. *Walsh*, 20 C. L. T. 340; *Grant* v. *Walsh*, *ib.* 341.

Tax title defence—*Conveyance of equity to purchaser at tax sale—Onus of proof of arrears — Improvements under mistake of title.*]— In an action for foreclosure, in

which a defendant set up a purchase at a tax sale prior to 1889, and a conveyance of the equity of redemption from the mortgagor, but did not prove the regularity of the sale, or that taxes were in arrear, and relied upon 58 V. c. 90, s. 13 (O.), and 63 V. c. 103, s. 11 (O.), and also claimed for improvements as made under a mistake of title:—*Held*, following *Stevenson* v. *Traynor*, 12 O. R. 804, that the onus of proof that there were taxes in arrear for which land might rightly be sold was upon the person claiming under the sale of taxes, and had not been satisfied.—*Held*, also, that the words "sales . . . for taxes" in s. 11 of 63 V. c. 103, mean sales for taxes for which the lands might rightly be sold.—*Held*, also, under the circumstances here, that the defendant had made no improvements as under a mistake of title—there was no mistake—he had simply improved his own land which he took subject to the mortgage. *Hislop* v. *Joss*, 22 C. L. T. 144, 3 O. L. R. 281.

Trustees — *Debenture mortgage — Company—Parties—Costs—Decree.*] — A suit to enforce a trust mortgage to secure debentures may be brought in the name of the debenture holders, the trustees being made defendants. In a suit by the holder of debentures to enforce a trust mortgage, the trustees made defendants in the suit were disallowed costs of a part of their answer setting up that the suit should have been brought in their name. Form of decree adopted in suit upon debenture mortgage. *Shaughnessy* v. *Imperial Trusts Co.*, 25 C. L. T. 67, 3 N. B. Eq. 5.

S. FRAUD.

Authority — *Alteration in deed.*]—*Held*, upon the evidence, that the solicitor for the mortgagors had authority to receive from the mortgagee the mortgage money on their behalf:—*Held*, also, that the proper conclusion from the evidence was, that the name of the plaintiff as mortgagee was written in the mortgage at the time of its execution. *Brockbank* v. *Holmes*, 20 C. L. T. 98.

Building loan—*Lien for materials supplied—Payment to contractor—Transactions in fraud of mortgagor's rights—Redemption—Costs.*]—A building and loan company advanced money to an illiterate woman for the purpose of aiding in the construction of a house to be erected upon lands mortgaged to the company to secure the loan. The mortgage contained no provision for advances to contractors, etc., as the work progressed, beyond the following:—"And it is hereby agreed between the parties hereto, that the mortgagees, their successors and assigns, may pay any taxes, rates, levies, assessments, charges, moneys for insurance, liens, costs of suit, or matters relating to liens, or incumbrances on the said lands, and solicitors' charges in connection with this mortgage, and valuator's fees, together with all costs and charges which may be incurred by taking proceedings of any nature in case of default by the mortgagor, her heirs, executors, administrators, or assigns, and shall be payable, with interest at the rate aforesaid until paid, and, in default, the power of sale hereby given shall be forthwith exercisable. And it is further agreed that monthly instalments in arrear shall bear interest at the rate aforesaid until paid." In a suit for redemption:—*Held*, first, that the clause in the mortgage did not justify the mortgagees in making advances to contractors and persons supplying material, without the express order of the mortgagor.—Secondly, that the mortgagees ought not to have recognized an order in favour of the contractor for the total amount of the loan, when they knew that the contractor had not completed his contract, and was, therefore, not entitled to the money when the order contained no name of a witness, and shewed that the mortgagor was unable to sign her name.—The payment having been made by the loan company to a lumber company supplying material to the contractors for the building, without the express authority of the mortgagor, and the lumber company having taken an assignment of the mortgage, and attempted to enforce it against the mortgagor, the transaction was declared fraudulent as against the mortgagor, and the payment to the lumber company disallowed.—*Held*, also, that the only costs the assignees of the mortgage were entitled to add to the mortgage debt were the costs of an ordinary redemption suit consented to by a mortgagee. Judgment appealed from varied, and appeal dismissed with costs. *Black* v. *Hilbert*, 28 S. C. R. 557.

Building society — Fraudulent misrepresentations—Rate of interest. *People's Building & Loan Assn.* v. *Stanley*, 1 O. W. R. 390, 469, 572, 592, 2 O. W. R. 122.

Consideration — Burden of proof — Fraud — Corroboration — Action by administrator of estate of deceased mortgagee —New trial—Discovery of fresh evidence—Admissions of widow of mortgagee—Corroborative evidence. *McLorg* v. *Cook* (N.W.T.), 6 W. L. R. 269.

Forgery — Facts establishing genuineness —Want of independent advice—Reduction of amount—Costs of action—Counterclaim —Promissory note. *Malcolmson* v. *Malcolmson*, 3 O. W. R. 324.

Fraudulent scheme — *Subsequent purchase for value—Exchange of lands—Constructive notice—Redemption—Costs.*] — A mortgagee of land made a colourable sale of the land, under the pretended exercise of the power of sale, to D., who conveyed to the mortgagee's wife, who conveyed to B., receiving in exchange a conveyance of another lot. The solicitor who acted for the mortgagee in the sale proceedings and drew the conveyances to D. and the mortgagee's wife, also acted for B. in drawing the deed of the lot conveyed by her in exchange, but there was nothing to shew that he had been instructed to examine the title of the mortgaged land on behalf of B.:—*Held*, that B. was not affected with notice of anything the solicitor knew, but that knowledge of the contents of the conveyances and of other facts from which a Court of equity would infer that there had not been an actual *bona fide* exercise of the power, should be imputed to B., whose husband acted as her

agent and was aware of the facts, and thus she had sufficient notice of the plaintiff's right as owner of the equity to prevent her from claiming the property free from it. *Rose* v. *Peterkin*, 13 S. C. R. 677, followed. 2. The conveyances to D. and the mortgagee's wife operated to vest the legal estate in the latter, and she could exercise the power of sale, which had not been exhausted. *Henderson* v. *Astwood*, [1894] A. C. 150, followed. 3. The conveyance to B. (being only a quit claim deed) could not be treated as an exercise of the power of sale because it did not purport to grant the whole estate in mortgage, but only the interest of the grantor, which was really only that of a mortgagee. 4. The power of sale cannot be properly exercised by the mortgagee accepting other property in exchange, unless there is no value in the equity. *Smith* v. *Spears*, 22 O. R. 286, explained and distinguished. 5. B. was entitled, on being redeemed, to add to her claim the costs of the sale proceedings up to but not including nor beyond the conveyance to D., and (following *Harvey* v. *Tebbutt*, 1 J. & W. 197) the costs of the action so far as it was for redemption only, but she should pay the plaintiff the costs occasioned to him by her resisting the claim to redeem, to be set off; and the mortgagee should pay the costs of the plaintiff and of B. *Winters* v. *McKinstery*, 22 C. L. T. 213, 23 C. L. T. 54, 14 Man. L. R. 294.

Payment — *Acceptance* — *Estoppel* — *Findings of jury.*]—In an action to foreclose a mortgage one of the chief grounds of defence was that the amount claimed had been placed by the defendant in the hands of M., a solicitor, to be paid over to the plaintiff, and that the plaintiff, after notice of such payment, induced the defendant to believe that he accepted such payment as a payment to himself, and that the plaintiff, after such notice, by failing to press for payment, prevented the defendant from recovering the amount from M., who had become insolvent and unable to pay. The jury found in answer to questions submitted: (2) that the plaintiff by his conduct, after the payment to M., led the defendant to reasonably believe that said payment was regarded and accepted as a payment to himself; but (5) that the position of the defendant, in consequence of such belief, was not changed for the worse. The trial Judge, notwithstanding the fifth finding, ordered judgment to be entered for defendant with costs: — *Held*, that a letter written by the plaintiff to the defendant did not support the fifth finding of the jury, and that the finding must be set aside. 2. That the fifth finding, even if supported by the evidence, was insufficient to complete an estoppel. 3. That to shew detriment to the defendant, it would be necessary to shew that the money was in the hands of M. at the time, and that the defendant, but for the letter written by the plaintiff, would have taken measures likely to secure payment. *Cameron* v. *McDonald*, 33 N. S. Reps. 469.

Payment of mortgage—*Fraudulent assignment—Liability.*] — The plaintiff, for the purpose of raising a portion of the purchase money on a contemplated purchase of land, mortgaged lands then owned by him to the defendant C., the money being received by a solicitor who acted for both parties. The purchase not having been carried out, the plaintiff asked to have the mortgage discharged, whereupon the solicitor, who had misappropriated the moneys, fraudulently procured from the mortgagee an assignment of the mortgage to himself, which he assigned to the defendant P., who advanced the money thereon in good faith and without any knowledge of the fraud:—*Held*, that the plaintiff was entitled to a reconveyance of the property released from the mortgage, and that the loss must be sustained by the defendant P., who took nothing under the assignment to him; for, the mortgage being paid off, the solicitor acquired no beneficial interest, being at most but a trustee of the legal estate, and he could pass no higher or better title to his assignee. *McCormick* v. *Cockburn*, 20 C. L. T. 178, 31 O. R. 436.

Pretended sale — *Fraud* — *Purchasers for value without notice* — *Knowledge of agent—Redemption* — *Acts of parties to fraud—Damage by.*]—On an appeal from the judgment of Meredith, C.J., 2 O. L. R. 134, 24 C. L. T. 438:—*Held*, that the defendant D. was not personally liable, as he committed no wrong in taking the assignment of the mortgage, and in exercising the power of sale wrought no change in the plaintiffs' rights, as the property in the hands of H., the purchaser, who became trustee for R., was redeemable unaffected by the sale. But the defendant H. was personally liable, as he was possessed of the legal title and had the legal power and control; it was his sale and his act that prejudiced the plaintiff. Judgment below varied. *Smith* v. *Hunt*, 22 C. L. T. 429, 4 O. L. R. 653, 1 O. W. R. 598, 798.

Sale on credit not carried out — *Removal of building from land—Inability to reconvey property in original condition* — *Liability of mortgagee to account for price, though not paid—Possession* — *Rents and profits.*]—Action on a covenant by defendant for the payment of $700 and interest, contained in a chattel mortgage from him to plaintiff. Defendant sets up in answer to plaintiff's claim that the chattel mortgage was given as collateral security to a mortgage on a cheese factory and the land on which it stood, which he had given to plaintiff, and on which there remained due the $700 secured by the chattel mortgage; that plaintiff took possession of the property covered by both mortgages and sold it on 7th August, 1902, under the power of sale, which the mortgages contained, to Alvin W. Mitchell, for $750; that Mitchell subsequently sold the property for $1,000; that the machinery contained in the factory was immediately removed by Mitchell or his grantee; that the factory was dismantled by Mitchell, and "removed piecemeal several miles from the original location;" and that plaintiff, by these dealings with the mortgaged property, "was estopped from proceeding with an action on the covenant." Mitchell never completed the purchase nor paid anything on account of either purchase money or interest, and the factory remained closed and unused until it was taken down:

—*Held*, in an alteration of the character or condition of the mortgaged estate, where the mortgagee was in a position to recover the whole of the land itself, that there was no good reason why he should not be entitled to recover the mortgage money after deducting from it what may be sufficient to compensate the mortgagor for the injury done to the mortgaged property by the wrongful act or default. Reference to *Munsen* v. *Hauss*, 22 Gr. 279.—*Held*, that plaintiff was bound to account for the whole of the purchase price which was to have been paid by Mitchell. Plaintiff was not entitled, according to the terms of the powers, to sell on credit, but a sale made by a mortgagee on credit, if a real sale, is, according to the decided cases, a valid exercise of the power, if the mortgagee stands ready to account to the mortgagor for the price as so much money received by him in cash: *Thurlaw* v. *Mackeson*, L. R. 4 Q. B. 97. Judgment should be entered for plaintiff for the mortgage money and interest (including the costs of exercising the power of sale, which could be taxed if defendant so desired), less the amount of Mitchell's purchase money ($7500), treating it as a sum received on 7th August, 1902. *Mendels* v. *Gibson* (1905), 5 O. W. R. 233, 9 O. L. R. 94.

Service of notice — *Fraudulent scheme — Exchange — Notice by solicitor's knowledge.*]—In April, 1900, plaintiff mortgaged land to defendant McK. to secure $140 and interest; the whole to become due in the following December. The mortgage provided for sale on one month's notice, after one month's default. Shortly after the mortgage was made, plaintiff paid McK. $2.50 for interest. In January, 1901, plaintiff left the province, and returned in August, 1901. Until two weeks before leaving, plaintiff lived on the mortgaged land. Shortly after plaintiff left, his brother paid McK. $32 on the mortgage. About 25th February, 1901, McK. took proceedings to sell under the power of sale; a notice of intention to sell was fastened to the door of the house on the property, but not served on plaintiff personally. The property was advertised for sale by auction on 9th April, 1901. Before the sale McK. arranged with D. to bid as if for himself, but in reality for McK. D. bid, and the property was knocked down to him. A deed purporting to be in pursuance of the power of sale, was executed by McK. to D., for the expressed consideration of $195, and a quit claim deed by D. to McK.'s wife, for the expressed consideration of $200. McK. paid for the drawing of both deeds; D. was paid $5, but otherwise no money was paid by or to him. Afterwards an exchange of properties was effected with one B., McK.'s wife executing a quit claim of the plaintiff's land in favour of B.:—*Held*, that the pretended sale to D. and the deed by D. to McK.'s wife were in pursuance of a fraudulent scheme by McK. to become the owner of plaintiff's land for much less than it was worth, and the sale was declared void. 2. That the service of the notice of sale was good. 3. It was contended that B. had notice of the fraud by having employed the same solicitor who had conducted the sale proceedings.—*Held*, that there was no presumption that the solicitor would communicate his knowledge to B., as it would be against his interest to tell. 4. The fact that on the day of the alleged mortgaged sale, B. found that the mortgagee or his wife claimed to absolutely own the land, was notice enough to put B. on inquiry. As she did not make such inquiry, she could not avail herself of her ignorance. The best position she could hold was that of an assignee of the mortgage. 5. A power of sale could not be exercised by an exchange of the land instead of by a sale for a price. *Smith* v. *Spears*, 22 O. R. 285, dissented from. *Winters* v. *McKinistry*, 22 C. L. T. 213.

Surplus proceeds — Distribution — Priorities—Receiver—Second mortgagee — Claim of receiver—Reference — Report — Order of Judge—*Res judicata* — Estoppel. *Milloy* v. *McClive*, 5 O. W. R. 799, 6 O. W. R. 800.

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9. Interest.

Action for principal on default of payment of interest—*Interest paid before action—Relief from payment of principal—R. S. O. (1897), c. 51, s. 57.*]—The treasurer and the collector of taxes of a municipality were in default in respect of moneys belonging to said municipality. They gave certain mortgages to municipality to cover such default. It was alleged that the conveyances were executed to stifle criminal prosecution, the wives joining to bar dower to prevent same:—*Held*, that the conveyances were valid and could be enforced.—The municipality sought to enforce payment of principal of mortgages on default of payment of interest:—*Held*, that mortgagees should be relieved from payment of principal, they having paid the interest due before the action was commenced. *Martin* v. *North Bay* (1910), 16 O. W. R. 778, 1 O. W. N. 1108.

Amount due — *Waiver or dispensation of tender — Rate of interest post diem — Costs.*]—Prior to the maturity of a mortgage, the mortgagor's solicitor wrote to the mortgagee's solicitor, that if he would call at the former's office he could have the principal and interest due, amounting to $396.48, and, on the mortgagee's solicitor failing to call, he wrote to the mortgagee that he was prepared to pay the said sum; this was answered by the mortgagee's solicitor sending a statement claiming, in addition, certain disputed costs: — *Held*, that what took place did not amount to a waiver of dispensation of a tender of the amount due under the mortgage. The payment of the principal money was to be made at the expiration of a named period, with interest at a specified rate, as well before as after maturity, until the said principal was fully paid and satisfied.—*Held*, that the interest at the rate specified was payable after as well as before the expiration of such period. *People's Loan and Deposit Co.* v. *Grant*, 18 S. C. R. 262, distinguished. In an action for redemption brought by the mortgagor, in which a tender was set up, the judgment was for a reference to a Master to ascertain the amount due, to make all

necessary inquiries for redemption of foreclosure, and to report; the provision for costs being that if the mortgagor had made default in payment of the amount, if any, found to be due, he should pay the costs; and, if no greater sum than $396.48 were found to be due, the defendant should pay the costs. Further directions were not reserved; nor were there any further directions as to costs.—*Held*, that the defendant was entitled to the costs of the action. Judgment in 22 C. L. T. 28, 3 O. L. R. 26, varied. *Middleton* v. *Scott*, 22 C. L. T. 369, 4 O. L. R. 459.

Building society — *Monthly payments —Maturity of shares—Depreciation — Discharge — Novation—Interest—Premium.*]— The plaintiff became a member of, and mortgaged his land to, a building society incorporated under R. S. O. 1887 c. 169, as collateral security for repayment of the value of his stock, which had been advanced to him, which stock he covenanted to assign forthwith to the company, and to repay its par value in 96 monthly payments, "as per rules, etc., of the company;" and he signed 96 promissory notes, which included interest at 6 per cent. and 40 cents per share per month, bonus or premium. Afterwards the company sold out to another company, and the plaintiff accepted shares in the latter in lieu of his shares in the former, contracting at the same time to observe the by-laws of the latter company, one of which provided that "the monthly dues under mortgages must continue to be paid until maturity of the pledged shares." Having paid the 96 notes, he claimed a discharge. Owing to a depreciation in the value of the assets of the vendor company, 78 per cent. was deducted from the amount credited on the plaintiff's shares, and a discharge was refused:—*Held*, that there had been a complete novation and change of membership by the plaintiff from one company to the other; and the plaintiff was not entitled to a discharge till he had paid his proportion of the deficiency arising from the depreciation. 2. That R. S. C. c. 127, s. 3, relating to interest on mortgages, and embodied in R. S. O. 1897 c. 205, s. 21, had no application to this mortgage; and moreover the rate of interest was only 6 per cent., the bonus (authorized by R. S. O. 1887 c. 169, s. 38), not being considered to be interest. *Lee* v. *Canadian Mutual L. and I. Co.*, 22 C. L. T. 60, 3 O. L. R. 191, 2 O. W. R. 370, 5 O. L. R. 471.

Building society—Payment by monthly instalments—Loan on shares—Mortgage as collateral security—Rate of interest—Fines —Rules of society — Insurance moneys received by mortgagees—Appropriation. *Home Building & Savings Assoc.* v. *Williams*, 5 O. W. R. 643.

Construction — *Interest.*]—The proviso for payment in a mortgage, given to secure an indebtedness, provided for the payment of "said overdrawn account and all promissory notes or bills of exchange (and interest upon the same) then due and payable:"—*Held*, that the overdrawn account was made chargeable with interest. *Bank of Montreal* v. *Dunlop*, 22 C. L. T. 327, 2 N. B. Eq. Reps. 388.

Default of payment of interest — Possession. *Coté* v. *Mcloche*, 1 O. W. R. 802.

Instalments, commuting — *Interest, simple or compound—Contract — Independent covenants.*]—By agreement between A. and the town of N., A. agrees to organize a company and erect a furniture factory in the town of N., and to maintain and operate the same for 20 years, and employ, in connection therewith, an average of 75 hands during the same period; and the town agreed to make certain concessions to the company and to lend it $20,000 repayable, without interest, by annual instalments of $1,000, to be secured by a mortgage on the company's property with the provision that the company might at any time repay the balance of the loan "at the then cash value figured at the rate of four per centum per annum." The company was organized, the factory built as agreed, and a mortgage given in pursuance of and referring to the above agreement, and the factory was insured for $20,000 payable to the town "as its interest may appear." After 3 years the company ceased to operate and went into liquidation, and shortly after that the factory was burned. Two instalments had been paid and one was overdue: — *Held*, the town of N. was entitled out of the insurance money to retain the amount of the overdue instalment with interest, and the liquidator was entitled to have the mortgage discharged on the further payment to the town out of the insurance money of an amount equal to the cash value of the future instalments of the date of payment on the basis 4 per cent. compounded annually. *Re Anderson Furniture Co.* (1908), 39 N. B. R. 139.

Interest—*Construction of clauses in a mortgage—Repugnancy—Earlier clause prevailing — Method of taking accounts in Master's office.*]—In taking accounts in this mortgage action it was held that where there are two covenants in a mortgage differing as to the calculation of interest, the earlier one prevails. As mortgaged property was sold in lots, interest calculated to day on which proceeds of each lot sold are received and proceeds then to be credited. *Saskatchewan* v. *Leadlay* (1909), 14 O. W. R. 89. In a redemption action agent of mortgagees allowed 10 per cent. on gross amount of new sales yearly, with an annual salary of $1,500. The agent carried on various businesses in addition to looking after sales of these lands. The rent of the office building was apportioned. Livery account averaged at $300 a year. Proper legal charges to be "moderated." Unsuccessful actions against certain purchasers of lots must be disallowed; so must legal fees paid by mortgagees to their solicitors. The mortgagees have no right to personal remuneration or compensation for inspecting lands. *Saskatchewan* v. *Leadlay* (1909), 14 O. W. R. 426:—*Held*, that the mortgage did not provide for interest on interest, nor for interest on compound interest after default. Mortgagees held liable for waste, cutting timber and fire wood, valued at $2,061; also for loss which could have been realized on some lots sold by mortgagees. *Saskatchewan* v. *Leadlay* (1909), 14 O. W. R. 475.

On an appeal from several rulings of the Master in Ordinary upon a reference directed to take mortgage accounts, it was *held*, that the covenant in the mortgage was for compound interest as well after as before maturity. *Imp. Trust Co.* v. *N. Y. Security and Trusts Co.* (1905), 10 O. L. R. 289, distinguished. The appeal was allowed on this point, also on two items of surcharge, one for $4,000, and the other for $3,279.22. On the questions of appropriation of payments, two items of surcharge, $800 and $4418.87; claim for compensation during 1900 and 1901 and the claim for annual allowances; the ruling of the Master was affirmed. As to costs it was agreed that they should be taxed by the taxing officer. Judgments of Hodgins, Master (1900), 14 O. W. R. 89, 426, 745, varied as per above. *Saskatchewan Land & Homestead Co.* v. *Leadlay* (1909), 14 O. W. R. 1096, 1 O. W. N. 228.

Interest on interest — *Accruing after maturity of principal—Construction of proviso.*]—A mortgage contained the following proviso: "Provided this mortgage to be void on payment of $5,000 with interest from the date hereof at the rate of 8 per cent. per annum as follows: That said principal sum at the expiration of one year from the date hereof, and the interest at the rate aforesaid on the principal money from time to time remaining unpaid until the whole of same is satisfied, and as well after as before maturity thereof, quarterly on each and every 12th day of November, February, May, and August hereafter, the first of such payments of interest to be due and made on the 12th day of November next; it being agreed and understood that in the event of said interest not being punctually paid, the amount of same shall bear interest at the said rate from the date of its maturity until paid in like manner as if it were part of the principal, but this proviso shall not entitle the said mortgagor to any extension of time for payment of the interest on the said principal sum beyond the date hereinbefore provided for payment of the same." —*Held*, that the proviso, taken as a whole, did not entitle plaintiffs to any interest upon interest which accrued after maturity of the principal money. It is clearly deducible from the authorities that, where a claim is made to convert interest into capital, the intention of the parties should be indicated by clear and unambiguous language, and, no such intention was indicated in this case, except as to interest accruing during one year. See *St. John* v. *Rykert*, 10 S. C. R. 278, at p. 288; Blythewood, 4th ed., vol. 3, p. 805, and precedents, p. 1131; Am. and Eng. Encyc. of Law, 2nd ed., vol. 16, p. 1073; Coote on Mortgages, 7th ed., p. 1181. Appeal allowed with costs, and the report amended by striking out all allowances for interest on interest which has accrued since maturity of principal. *Imperial Trusts Co.* v. *New York Security & Trust Co.*, 5 O. W. R. 213, 10 O. L. R. 289.

Limitation of actions — *Adverse possession—Foreclosure—Interest — Legal rate —Damages—Redemption — Arrears — Personal order.*]—In an action by mortgagees for foreclosure, it appeared that the defendant had left the land in 1892, seven years after the last payment on account of the mortgage, and had never paid or attempted to pay any taxes on it since those for 1887, after which the plaintiffs paid all the taxes. The mortgage contained the usual provisions for quiet possession to the mortgagees on default and for possession by the mortgagor until default.—*Held*, following *Buckham* v. *Stewart*, 11 Man. L. R. 625, and *Trustees, etc., Co.* v. *Short*, 13 App. Cas. 793, that the defendants had not been in actual adverse possession for a sufficient length of time to acquire title under the Real Property Limitation Act against the plaintiffs, and that occasional entries upon the land by a relative of the defendant for the purpose of cutting hay for several years after the defendant had left the land vacant had not the effect of continuing his actual possession beyond that time.—The principal of the mortgage fell due on the 25th May, 1884, and it was provided that interest at the rate of 8 per cent. per annum was to be paid half yearly . . . till the whole of the principal should be paid:—*Held*, following *Freehold Loan Co.* v. *McLean*, 8 Man. L. R. 116, and *Manitoba and North-Western Loan Co.* v. *Barker*, 8 Man. L. R. 296, that interest after the due date was only recoverable as damages and only at the statutory rate and only for the six years prior to the commencement of the action.—(2) That, although 63 & 64 V. c. 29 (D.), making 5 per cent. the legal rate, provides that "the change in the rate of interest in this Act shall not apply to liabilities existing at the time of the passing of this Act," the interest for that part of the six years since the passing of that Act should only be allowed at the rate of 5 per cent. per annum, for the word "liabilities" in that Act does not refer to the principal debt, but only to the obligation to pay interest as damages.—(3) It is only in an action for redemption, or one in which the question of the number of years' arrears of interest to be allowed is to be treated as if the action were one for redemption, that more than six years' arrears are allowed, on the principle that he who comes into equity must do equity.—*Dingle* v. *Coppen*, [1898] 1 Ch. 726, and *In re Lloyd*, [1903] 1 Ch. 385, distinguished.—*Held*, also, that s. 24 of the Real Property Limitation Act barred the right of the plaintiffs to a personal order against the defendant for payment of the mortgage debt after ten years from the last payment. *British Canadian Loan & Agency Co.* v. *Farmer*, 15 Man. L. R. 593, 24 C. L. T. 273.

Mortgagee in possession — *Referee's report—Exception—Accounting — Interest —Rents.*]—A taking of accounts of a mortgagee in possession. Commission on collecting rents not allowed. The mortgagee is not liable for rents he has not collected unless it has been due to his default in some way. *Earle* v. *Harrison*, 7 E. L. R. 309.

Payment—*Agent of mortgagee advancing money to make up interest unpaid — Dual character of agent—Question whether advance made on behalf of persons liable for interest.*]—Plaintiff, residing in Ireland, was first mortgagee of a property upon which defendant held a second mortgage. Mr. Frank Cayley acted as agent for plaintiff in investing her money in a first mortgage upon this

property. He also acted as agent for the owners of the equity of redemption in collecting the rentals of the property until July, 1904. Since that time he collected these rentals as agent for plaintiff, *qua* mortgagee in possession. The rentals received having proved insufficient, after satisfying such charges upon them as taxes, outlays for repairs, etc., to pay plaintiff's interest in full, Mr. Cayley from time to time advanced out of his own moneys, the sum required to make up the deficiency. Thus he remitted to plaintiff half-yearly the full amount of the interest accrued upon her mortgage during the previous six months. Plaintiff asserted that this amount was still due and owing as arrears of interest upon her mortgage; defendant insisted that Mr. Cayley's payments satisfied and extinguished plaintiff's claim for interest, and that only the principal moneys were outstanding:—*Held*, that the advances made by Mr. Cayley were never intended to be payments in satisfaction of plaintiff's claim for interest upon her mortgage, or to discharge the mortgaged premises therefrom. The facts do not bring the present case within *Williamson* v. *Goold*, 1 Bing. 171, and *Carroll* v. *Goold*, *ib.* 190, so much relied on by Mr. Denton. There the circumstances pointed clearly to payment in satisfaction being intended by the person who made it. *Simpson* v. *Eggington*, 10 Ex. 845, followed. Appeal allowed with costs here and below. *Glascott* v. *Cameron*, 6 O. W. R. 36, 10 O. L. R. 399.

Payment of interest — *Application of payment—Authority of agent—Question of fact.*]—Defendant held a first mortgage on C.'s lands, and interest being in arrears C. applied to plaintiff B. for a loan on second mortgage, which was made. B.'s solicitors gave C. a cheque in defendant's favour to take to defendant to pay this interest, marking the cheque *re* C. & M. Defendant applied this cheque on a claim a client of his had against C.:—*Held*, that C. was merely B.'s agent to deliver the cheque, and defendant must apply it to the interest in arrears. *Martin* v. *Hopkins*, 13 O. W. R. 100, 965.

Payment of taxes by mortgagees — *Interest — Default — Acceleration clause —Action for sale or foreclosure—Motion to dismiss as frivolous or vexatious — Relief under Supreme Court Act, s. 15.*]—A., B., and C. each held an undivided one-third interest in certain lands. C. had mortgaged his interest to A. and B. The mortgage contained the following covenants on the part of the mortgagor: (a) "that I will pay interest on the said sum or so much thereof as remains unpaid, at the rate of ten per cent. per annum, by monthly payments on the seventh day of each month in each and every year until the whole principal sum and interest be paid and satisfied, and that, after the maturity, interest shall accrue due at the rate aforesaid from day to day, and that interest in arrear, whether in principal or interest, and all sums of money paid by the mortgagee under any provision herein contained, or implied or otherwise, shall be added to the principal money and shall bear interest at the rate aforesaid, and shall be compounded half-yearly, a rest being made on the seventh day of each month, in each year, until all such arrears of principal and interest are paid, and that I will pay the same and every part thereof on demand;" (b) "that if default shall be made in any payment of interest or principal or any moneys hereby secured or any part thereof, then and in such case the whole money hereby secured shall become due and payable in like manner and to all intents and purposes as if the time herein mentioned for payment of such money had fully come and expired;" (c) "that the mortgagees may pay all taxes, rates, and assessments which shall fall due or be unpaid on the said lands . . . ." A. and B. paid the full amount of taxes due on the lands on the 27th November, 1907; and on the 23rd December, 1907, demanded payment of one-third the amount so paid from C., whether *qua* co-owner or *qua* mortgagor, does not appear. On the 31st December, 1907, they began an action for sale and foreclosure, asserting that the full amount of principal with taxes, etc., had fallen due under the acceleration clause, although apart from it the principal was not payable for over two years, and interest had been regularly paid by C. each month. On the 6th January, 1908, A. and B. rendered an account for the full amount of taxes paid by them, on account of A., B., and C., to the lessees of the lands, a partnership composed of B. and C., who, under the terms of the lease, were liable to pay all taxes, etc., on the lands. The full sum demanded was paid by the receiver (in a pending action between B. and C. to wind-up the partnership), and a receipt in full was given by A. and B. On motion to dismiss the action as frivolous and vexatious:—*Held*, that, under the terms of the mortgage, A. and B. were entitled to recover payment of one-third of the taxes, upon demand from C.—*Held*, that amounts so paid became principal moneys merely for the purpose of computing interest thereon; but *semble*, under the clause, "that if default shall be made in payment of interest or 'principal' . . . the whole money shall become due and payable," etc., etc., that the plaintiffs, by reason of non-payment of one-third of the taxes, after demand, were entitled to declare the whole mortgage moneys due, as for default in payment of "principal," and consequently, *held*, that the action to enforce the mortgage for the full amount of principal, etc., and for sale or foreclosure, etc., was not frivolous, vexatious, or an abuse of process.—Relief granted to the defendant under the Supreme Court Act, s. 15, on payment of costs of action. *McDougall & Secord* v. *York*, 1 Alta. L. R. 59.

Post diem—*Accounts rendered including interest at mortgage rate—No agreement to pay more than legal rate—Payments in lump sums — Application of by mortgagee—Interest Act, R. S. C. (1906), c. 120—Further directions—Costs.*]—A mortgage became due. There was no agreement afterwards made as to the stipulated rate of interest continuing. Mortgagee rendered accounts including interest at the stipulated rate. Mortgagor accepted these statements and made payments on account in lump sums to suit his convenience. Mortgagor paid mortgagee more than sufficient to pay the mortgage with legal

rate of interest after maturity.—Middleton, J., *held*, that the money was paid by reason of mistake in the law; that both parties were under the same error; that there was neither fraud nor fiduciary relationship and plaintiff could not recover any sum paid in excess of amount legally due; that the mortgage should be discharged, and the lands conveyed. No costs of action, reference or appeal. *Kerr* v. *Colquhoun* (1911), 18 O. W. R. 174, 2 O. W. N. 521.

Rate of — *Payment by instalments.*]—A mortgage given to secure payment of $20,000 with interest at nine per cent., payable half yearly, contained these provisoes: "Provided that on default of payment for two months of any portion of the money hereby secured the whole of the instalments hereby secured shall become payable. Provided that on default of payment of any of the instalments hereby secured, or insurance, or any part thereof, at the times provided, interest at the rate above mentioned shall be paid on all sums so in arrear, and also on the interest by this proviso secured at the end of every half year that the same shall be unpaid:"—*Held*, reversing the judgment in 26 A. R. 252, 19 C. L. T. 270, that the principal sum of $20,000, becoming due for non-payment under the first of the above provisoes, was not an instalment in arrear under the second, on which the mortgagees were entitled to interest at the rate of nine per cent. per annum. *Biggs* v. *Freehold and Savings Co.*, 21 C. L. T. 222, 31 S. C. R. 156.

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10. Redemption.

Abortive sale under power — *Costs —Charge for conveyance to nominee of mortgagee.*]—Mortgaged property sold under a power of sale, default having arisen, was bid in by an agent of the mortgagee, and subsequently conveyed by him to the mortgagee. In a suit for redemption:—*Held*, that the mortgagee was entitled to be paid the costs of the abortive sale, except an amount charged for the conveyance. *Patchell* v. *Colonial Investment and Loan Co.*, 2 E. L. R. 417, 3 N. B. Eq. 429.

Absolute conveyance to secure debt —*Redemption—Entry — Possession — Limitation of actions—Real Property Limitation Act, Manitoba — Acknowledgment.*]—Where the plaintiff in January, 1891, by a certificate of title under the Real Property Act, vested a parcel of land, vacant and which so continued to be until the commencement of the action, in the defendant, as security for a loan of $200 repayable in two months, and paid no taxes and nothing on the debt until October, 1902, when she asked the defendant for a statement of his claim, who then sent her a memorandum shewing, among other things, the amount due, it was held that such transfer had the effect of a mortgage, that the defendant should be presumed to have "obtained possession" at that time within the meaning of s. 20 of the Real Property Limitation Act, R. S. M. 1902 c. 100, and the plaintiff's right of redemption was barred by the lapse of 10 years; and that an acknowledgment of the right of redemption given after the lapse of the statutory period was of no avail to the mortgagor seeking redemption. *Rutherford* v. *Mitchell*, 15 Man. L. R. 390.

See *Burr* v. *Bullock*, 2 O. W. R. 428.

Account—Balance found due—Non-payment of balance—Dismissal of bill to redeem — Effect of dismissal — Foreclosure. *Patchell* v. *Colonial Investment and Loan Co.*, 4 E. L. R. 182.

Account—*Finding of Referee—Interest—Insurance, etc.—Agreement—Appeal dismissed with costs.*]—The action was brought for redemption of mortgaged premises, and the Referee found $9,784.15 as the amount required to redeem. — Latchford, J., dismissed an appeal from above finding.—Divisional Court *held*, that first, as to the allowance of interest on $3,047.02 from July 1st, 1895, this ground of appeal failed, as to the item of compound interest charged by Master, this ground of appeal failed, as to the insurance also this ground of appeal failed. That all the grounds of appeal failed, and the appeal should be dismissed with costs. *Patterson* v. *Dart* (1910), 17 O. W. R. 766, 2 O. W. N. 429.

Action to set aside judgment irregularly obtained — *Delay—Waiver by—Redemption—Equitable discretion of Court.*]—Final order of foreclosure was obtained in 1890. In 1910 plaintiff, mortgagor, brought action to set aside above order on ground of irregularities, and asked for redemption.—Teetzel, J., *held*, (16 O. W. R. 754, 1 O. W. N. 1096), that after a lapse of nearly 20 years, plaintiff must be treated as having waived the irregularities. Action dismissed with costs.—Divisional Court dismissed plaintiff's appeal without costs, as defendant did not ask for costs. *Hazel* v. *Wilkes & Fisken* (1910), 17 O. W. R. 104, 2 O. W. N. 131.

Bonus—*Collateral advantage.*]—The proviso for redemption in a mortgage dated the 30th August, 1902, to secure an advance of £3,500, was the payment on the 11th November of £6,000 and a transfer of £5,000 in shares in a company to be promoted by the mortgagor. The principal money advanced was applied in the purchase of mortgaged premises, which contained salt springs of speculative value, which the company were to develop and work. In a foreclosure suit: —*Held*, that the proviso for redemption was not unreasonable and should not be relieved against. *Buchanan* v. *Harvie* (No. 2), 25 C. L. T. 76, 3 N. B. Eq. 61.

Conveyance of equity of redemption to mortgagee — Merger—Intention—Evidence — Statute of Limitations — Vacant land—Legal estate — Acknowledgments in writing—Dictated letters—Costs. *Rogers* v. *Brann*, 6 O. W. R. 993.

Conveyance to secure advances — *Mortgage — Payments — Appropriation by mortgagee — Accounting — Redemption —Sale.*]—*Held*, on the evidence, that the conveyance herein, though absolute in form, was a mortgage. Accounts were then taken and plaintiff, an execution creditor, was given right to redeem, and if he fail to do so within three months land to be sold. *Nixon* v. *Currey*, 7 E. L. R. 269.

Counterclaim—*Action for redemption—Necessity to ask foreclosure.*]—Action to set aside certain deeds, and for a declaration that certain mortgages were paid off, or for redemption. The defence denied all the material allegations of the statement of claim, and the counterclaim was for foreclosure in respect of the mortgages mentioned. The counterclaim was objected to as unnecessary and embarrassing, and because the defendant, a mortgagee in possession, had not stated his willingness to account:—*Held*, that it was not absolutely necessary for the defendant to counterclaim for foreclosure in respect of the mortgages, which the plaintiff contended were paid off and should be released; for when the plaintiff fails in an action for the redemption of a mortgage the defendant is entitled to have a decree of foreclosure. But here the plaintiff's claim covered other matters and his claim for redemption was only in the alternative. If the plaintiff should partly succeed in his suit and abandon his alternative claim, it was possible that the defendant might have a good deal of difficulty in getting an order for foreclosure without another action, and he should not be compelled to take this risk. The counterclaim was not embarrassing to the plaintiff. It raised the same issues as were raised by the plaintiff. *Robert* v. *Miller* (No. 5), 20 C. L. T. 411. See also *Girardot* v. *Welton*, 20 C. L. T. 231, 257, 19 P. R. 162, 201.

Covenant—Sale of equity of redemption—Agreement to look to purchaser—Novation—Neglect to insure—Trusts—Evidence. *Cornell* v. *Hourigan*, 2 O. W. R. 4, 510.

Dealings between mortgagor and mortgagee—*Duress—Unfair bargain—Acknowledgment—Estoppel.*]—The plaintiff, in 1901, gave the defendant a quit-claim deed of the land in question as security for a debt. The defendant afterwards paid the money required to procure title to the land from the Canadian Northern Railway Company, but up to about May, 1903, he recognised the right of the plaintiff to redeem the land on payment of what was then against it, viz., about $900. Shortly afterwards, the defendant drove out to the plaintiff's farm and told him that if he wanted the farm he would now have to pay $2,000 for it. In the following November the plaintiff went to the defendant's office and received from him a letter written by the defendant, addressed to the plaintiff's wife, offering to sell the farm to her upon certain conditions, for $2,000, and the defendant at the same time induced the plaintiff to sign a letter agreeing to leave the place and all his improvements if the option to purchase was not exercised before the 1st November, 1904. When this last letter was signed, the plaintiff was told by the defendant that he must sign it or leave the place. The plaintiff was then, to the knowledge of the defendant, in distressed circumstances financially:—*Held*, that this transaction was, on its face, most unfair and extortionate; and, having been obtained by duress, the acknowledgment could not be allowed to stand in the way of the plaintiff's rights to redeem, which, up to that time, had clearly not been extinguished.—*Ford* v. *Alden*, L. R. 3 Eq. at p. 463, followed. *Winthrop* v. *Roberts*, 6 W. L. R. 476, 17 Man. L. R. 220.

Death of defendant after decree — *Right of redemption before confirmation of sale — Necessity for revivor.*]—While the lands were under advertisement of sale in pursuance of the decree of foreclosure and sale, which was in the usual form, the defendant died intestate. The plaintiff did not take any step to revive or continue the action, but proceeded with the sale as if the death had not taken place, and upon the sale purchased the property:—*Held*, that there is this distinction between the Nova Scotia decree and the English final order, that under the former the right of redemption exists absolutely pending the sale and final confirmation thereof, while under the latter no such absolute right exists:—*Held*, further, that the father of the deceased defendant could have exercised the only right that passed to him upon his son's death without being a party to the suit, unless the plaintiff refused to recognise his right, when he would need to ask the aid of the Court. The plaintiff would at his peril refuse him the right of redeem:—*Held*, further, that where a judgment of foreclosure and sale makes no provision as to a deficiency, the death of the mortgagor does not render necessary an application to revive. No claim for deficiency could be found on examination of the papers in this case. *Alward* v. *Lewis*, [1891] 2 Ch. 81, distinguished. *Stubbings* v. *Umlah*, 20 C. L. T. 357.

Default — Mortgagees taking possession—What constitutes possession—Seizure of crops—Severance—Claim under seed grain chattel mortgage—Validity. *Harrison* v. *Carberry Elevator Co.*, 7 W. L. R. 535.

Default on final day fixed—Refusal of defendant to accept redemption money — Application to Court to open up order—Exceptional indulgence—Relief from forfeiture—Terms—Costs. *Scott* v. *Buck*, 3 O. W. R. 629, 4 O. W. R. 201.

Dismissal of bill—*Effect of—Writ of possession.*]—A decree dismissing a bill on default of payment of the amount found due in a suit for redemption of a mortgage is equivalent to a decree of absolute or unconditional foreclosure, and the Court of Equity has jurisdiction under it to order a writ of possession to be issued under C. S. N. B. 1903, c. 112, s. 141. *Patchell* v. *Colonial Investment & Loan Co.*, 38 N. B. R. 339, 4 E. L. R. 182.

Expenditures by purchaser from mortgagee in possession — *Expenses of taking possession—Lien on mill machinery——Permanent improvements—Allowance for crops in ground—Insurance premiums — Interest—Costs.*]—After mortgagee had taken foreclosure proceedings, the mortgagor desired to redeem:—*Held*, that the mortgagee was entitled to charge in its accounts the following: $325 as compensation for crops put in prior to redemption proceedings, $350 paid to retire vendor's liens on certain fixed machinery, $78.75 insurance and interest on certain sums:—*Held*, also, that the mortgagee could not charge for the following: $25 for insurance paid without justification and $124 paid for care of mortgaged property. *Federal Life Assurance Co.* v. *Siddall* (1910), 16 O. W. R. 149, 1 O. W. N. 234, 796.

Extending time for — Terms—Costs. *Imperial Trusts Co.* v. *New York Securities Co.*, 9 O. W. R. 45, 98, 730.

Extension of time for redemption by second mortgagee. *Cameron* v. *Rutledge* (Y.T.), 2 W. L. R. 473.

Final order after abortive sale — New trial—Rule 393—Time for redemption. *Roberts* v. *Caughell*, 2 O. W. R. 799, 939, 971.

Foreclosure — Order *nisi*—Right to redeem if order absolute not issued—Practice. *DeBeck* v. *Canada Permanent Mortgage Corporation* (B.C.), 4 W. L. R. 91.

Hypothecary action—*Pleading — Declaration — Title—Possession—Incompatible allegations—Stay of proceedings — Dilatory plea — Redemption.*]—An allegation in an hypothecary action of the invalidity of the defendant's title to the hypothecated property, is incompatible with allegations and conclusions founded on the possession derived by the defendant solely from such a title.—Incompatible grounds in a declaration give the defendant the right to stay proceedings by a dilatory plea until the plaintiff make his option, but do not afford a defence on the merits.—An hypothecary action will lie against the purchaser by registered deed of hypothecated property subject to a right of redemption *remére*, although the seller continues in actual physical possession of the same. *Bruneau* v. *Crépeau*, 16 Que. K. B. 87.

Interest in mining claims — Representation work — Redemption — Tender before action—Refusal—Deed of reconveyance—Conditional tender—Readiness to implement tender — Pleading — Costs—Counterclaim—Amendment — Foreclosure—Appeal book—Preparation—Mistakes. *Hammond* v. *Strong* (Y.T.), 6 W. L. R. 694, 8 W. L. R. 362.

Mortgagee in possession — *Bar to equity of redemption.*]—The Court of Chancery, under s. 11 of the Chancery Act, 7 Wm. IV., c. 2, may under certain circumstances refuse redemption, notwithstanding twenty years have not elapsed since the mortgagor went out of possession. Judgment of Executive Council for Upper Canada, 1 E. & A. 172, 2 U. C. O. S. 1, affirmed. *Smyth* v. *Simpson* (1850), C. R. 1 A. C. 335.

Notice of sale—Tender—Money paid into Court—Reference — Exceptions—Interest — Condition attached to tender—Costs. *McKenzie* v. *McLeod*, 5 E. L. R. 172.

Payment—*Evidence—Onus.*] — Payment of a debt must be proved by the debtor beyond reasonable doubt; and where a mortgagor sought redemption, alleging that he had paid $400, which was in dispute, he was held not to have satisfied the onus of proving the payment. *True* v. *Burt*, 2 N. B. Eq. R. 497.

Power of sale—Pretended exercise — Redemption — Contribution — Co-owners — Costs—Tender—Declaration of interests — Commission. *Finkelstein* v. *Locke* (Man.), 6 W. L. R. 173.

Priorities — Execution creditors proving claims in Master's office—Payment of mortgagee's claim—Subsequent statutory assignment for creditors—Rights of assignee — Assignments and Preferences Act, s. 11. *Federal Life Assurance Co.* v. *Stinson*, 7 O. W. R. 777, 8 O. W. R. 929.

Priorities—*Execution — Creditors proving claims in Master's office — Payment of mortgagee's claim — Subsequent statutory assignment by mortgagor for benefit of creditors—Rights of assignee—Assignments and Preferences Act, s. 11.*]—After judgment for foreclosure of mortgage or redemption, judgment creditors of the mortgagor with executions in the sheriff's hands were added as parties in the Master's office, and proved their claims. The Master reported that they were the only incumbrancers, and fixed a date for payment by them of the amount due to the mortgagees. After confirmation of this report, S. obtained assignments of the judgments, and was added as a party. He then paid the amount due to the mortgagees, and the Master took a new account and appointed a day for payment by the mortgagor of the amount due S. on the judgment as well as the mortgage. This report was confirmed, and, the mortgagor having made an assignment for the benefit of creditors before the day fixed for redemption, an order was made by a Judge in Chambers adding the assignee as a party, extending the time for redemption, and referring the case back to the Master to take a new account and appoint a new day:—*Held*, affirming the judgment of the Court of Appeal in *Federal Life Assurance Co.* v. *Stinson*, 13 O. L. R. 127, 8 O. W. R. 929, that under the provisions of s. 11 of the Assignments and Preferences Act, the assignee of the mortgagor could only redeem on payment of the total sum due to S. under the mortgage and the judgment assigned to him. *Scott* v. *Swanson*, 27 C. L. T. 651, 39 S. C. R. 229.

Rate of interest — Redemption—British insurance company—Contract—Law of Canada—Tender—Agents—Bill of exchange. *Bradburn* v. *Edinburgh Life Assurance Co.*, 2 O. W. R. 253, 5 O. L. R. 657.

Rate of interest post diem—"*Liabilities*" — *Interest by way of damages — Statutory rate—63 & 64 V. c. 29 (D.).*]—The Act 63 & 64 V., c. 29 (D.), which provides for the statutory rate of interest being 5 instead of 6 per cent., amending the Interest Act, R. S. C. 1886 c. 129, contains a proviso that the former Act is not to apply to "liabilities" existing at the time of its passing:—*Held*, that the proper construction of the word "liabilities" is liabilities respecting the rate of interest, and that in a mortgage made in 1884, payable in 1900, bearing interest at 7 per cent., in which there was no provision for the payment of interest after maturity, the damages allowable as interest after maturity were not within the proviso. *Plenderleith* v. *Parsons*, 9 O. W. R. 265, 10 O. W. R. 680, 14 O. L. R. 619.

Rate of interest—*Tender — Condition attached to tender—Disclaimer—Costs.*]—In a mortgage of real estate, the proviso for payment was that the principal should be paid in five equal annual instalments, with

interest semi-annually at eight per cent.; and five promissory notes with interest at that rate were given:—*Held*, in a suit for redemption, that when there was no special agreement for interest on overdue payments, the mortgagor, adopting a certain rate higher than the statutory one and making payments under it, was bound by that rate so far as payments actually made were concerned, but was not bound as to unmade or future payments; and only the statutory rate could be enforced.—*Held*, that a demand for a discharge of the mortgage and release of the debt, accompanying a tender by the mortgagor, made the tender a conditional one.—*Held*, that when the mortgagee hampered and oppressed the mortgagor, and obstructed his suit in every possible way, the mortgagee, while entitled to the general costs of suit, would lose the costs of his own unnecessary pleadings, and would be compelled to pay the costs of any such pleadings by the mortgagor as were occasioned by his procedure.—If there had been a sufficient and unconditional tender by the mortgagee before suit, the mortgagee would have been liable for the costs of the suit.—*Held*, that a defendant who answered, and later on filed a disclaimer, would lose his costs, even if successful in having the bill dismissed as against him. *McKenzie* v. *McLeod*, 4 N. Ba. Eq. 72, 5 E. L. R. 172, 6 E. L. R. 553, 39 N. B. R. 239.

Sale by mortgagees under power of sale—*Redemption subject to sales — Addition of purchasers as parties.*]—When, after default in payment of a mortgage of lands, the mortgagee has sold the lands under the power of sale in the mortgage, the purchasers must be made parties to an action brought by the mortgagor for redemption, unless the plaintiff is satisfied with judgment for redemption subject to the several agreements of sale, as the sales could not be set aside or inquired into without having the purchasers before the Court.—It would not be sufficient to make the purchasers parties in the Master's office under Rule 40 of the King's Bench Act, as that Rule applies only to cases where no direct relief is sought against the parties to be added. *Rolph* v. *Upper Canada Building Society*, 11 Gr. 275, and *Hopper* v. *Harrison*, 28 Gr. 22, followed. *Campbell* v. *Imperial Loan Co.*, 15 Man. L. R. 614, 2 W. L. R. 327.

Sales by mortgagees under power of sale — Redemption subject to sales—Addition of purchasers as parties. *Campbell* v. *Imperial Loan Co.* (Man.), 2 W. L. R. 327.

Transfer of land subject to mortgage — Real Property Act, s. 89 — Implied covenant of indemnity—Assignment of —Re-transfer after notice—Liability. *Morice* v. *Kernighan*, 9 W. L. R. 397.

Transfers of land—Releases — Company—Impeachment for fraud and collusion —Redemption—Account—Terms—Time for redemption—Withdrawal of charges of fraud —Postponement of mortgage—Agent for care and sale of lands — Compensation — Costs. *Saskatchewan Land & Homestead Co.* v. *Leadlay*, 10 O. W. R. 591.

Sale by mortgagee under power — *Validity — Inadequacy of price — Valid contract of sale—Default of purchaser—Mortgagor asking to redeem before registration of transfer to purchaser—Absence of fraud — Regularity of sale proceedings.*]—Action for redemption. Mortgagee had regularly sold property by auction valued at $7,200 for $4,850:—*Held*, sale was not at such a gross undervalue as would justify the interference of the Court. The purchaser at the auction had made default in one of his payments.—*Held*, that this did not avail the mortgagor, the purchaser having a binding agreement which would be nullified if mortgagor now let in to redeem. Purchaser had not yet received his transfer.—*Held*, that the sale is complete under the agreement, and in the absence of some special circumstances the mortgagor will not now be allowed to redeem. *Saltman* v. *McColl* (1909), 12 W. L. R. 146.

Sale with right of redemption — *Lesion in contract between persons who have attained their majority—C. C. P., 655, 656, 722; C. C. 1012.*] — I. The proprietor of a property, which he holds under a right of redemption, has the absolute right to demand the dismissal of the seizure of such right of redemption issued in virtue of a judgment obtained against his vendor. Plaintiff cannot contest such opposition on the pretext that the price mentioned in the deed of sale is far less than the true value of the property; because if it were permitted, it would mean the setting aside of a contract between persons of the age of majority for lesion only. —2. The nullity of the seizure should be raised by an opposition to annul and not by an opposition to secure charges. *Beaucage* v. *Arpine & Paul*, 11 Que. P. R. 76.

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11. Reference and Accounts.

Account—*Payments by mortgagees—Release of claim — Improvements—Solicitor—Negotiation of sale — Commission.*]—Mortgagees of land, the mortgage being in default, made an agreement for sale to C., who paid nothing, but entered into possession and made improvements, and in order to do so borrowed money from N., and assigned to N. his agreement from the mortgagees; the agreement and the assignment were registered. The mortgagees found another purchaser, and paid N. a sum of money for a release of his claim:—*Held*, that upon an accounting by the mortgagees, at the suit of the mortgagors, on the basis of the second sale, the mortgagees were entitled to credit for the money paid to N.—*Held*, also, that they were entitled to credit for a small sum paid to their solicitor for negotiating the second sale —a service which comes within the scope of the professional duties and employment of a solicitor. *Laws* v. *Toronto General Trusts Corporation*, 24 C. L. T. 395, 8 O. L. R. 522, 3 O. W. R. 654, 4 O. W. R. 164.

Accounts of mortgagee in possession in action for redemption — *Construction of mortgage—Mortgagee's account—Interest post diem—Compound interest—Special allowances — Costs.*] — Court of Appeal affirmed judgment of Teetzel, J., 14 O. W. R. 1096, 1 O. W. N. 228. Meredith, J.A., dissenting. *Saskatchewan Land & Homestead Co.* v. *Leadlay* (1910), 16 O. W. R. 890, 2 O. W. N. 1.

Action—*Judgment — Subsequent settlement—Failure to carry out—Account—New day—Reference.*]—A motion by the plaintiff in a mortgage action for an order for a new day and a new account, and to change the relief sought from sale to foreclosure, was opposed on the ground of an agreement for a compromise after judgment under which money had been paid to the plaintiff, the mortgagee:—*Held*, that if the defendant mortgagor had made default in payments according to the agreement, the unmodified burden of the mortgage existed and was enforceable. Such an arrangement should be investigated in the Master's office, and not by independent litigation. The matter has passed into judgment, and the only matter between the contestants was one of account—how much was due and payable in respect of the mortgage, having regard to the arrangement manifested in the correspondence and dealings subsequent to the Master's report. It was foreign to the policy of the Judicature Act to contemplate new litigation in such a case as this: s. 57, s.-s. 12. *McCollum* v. *Caston*, 21 C. L. T. 189, 235, 1 O. L. R. 240.

Action on — Proof of execution — Default in payment — Defence — Mortgage given for price of horses — Breach of warranty as to age — Reference — Damages—Deduction from amount of mortgage—Costs. *Lockwood* v. *McPherson* (N.W.T.), 6 W. L. R. 277.

Action on — Statement of mortgagee's claim — Affidavit verifying. *Dominion Permanent Loan Co.* v. *Smeaton*, 40 N. S. R. 622.

Action to recover possession of mortgaged lands—*Company — Manager—Unauthorised dealing with company property — Reference.*] — Plaintiff brought action upon certain mortgages, and to recover possession of the mortgaged lands:—*Held*, that plaintiff was entitled to judgment for amount of mortgages and interest thereon. Plaintiff while acting as manager of the company converted to his own use large sums of the company's money, and procured and allowed improper payments and allotments of stock to himself and others:—*Held*, that as to these matters there should be a reference. Questions of costs and further directions reserved until after the Master reports. *Casler* v. *Grace Mining Co.* (1910), 15 O. W. R. 415, 1 O. W. N. 342.

Collateral security — Validity — Bank —Future advances—Bank Act — Consideration partly illegal—Right to recover for money lent — Amendment — Account — Appropriation of payments — Interest — Pass book — Monthly receipts — Settled account — Estoppel — Recital — Misrepresentations — Duress — Collateral agreement — Usurious rates of interest — Voluntary payment — Rates charged by bank without assent of customer — Reduction of rate—Interest on moneys deposited in current account — Oral contract — Deposit of gold dust — Assay value — Bank charges — Guaranty — Continuing instrument — Mistake — Negligence — Pleading — Credit for moneys transferred to bank. *Canadian Bank of Commerce* v. *McDonald* (Yuk.), 3 W. L. R. 90.

Costs—*Excessive demand—Tender.*]—Demanding much more than is afterwards found to have been due is not such misconduct on the part of a mortgagee as will deprive him of his costs. To relieve the mortgagor from liability to costs he must make an unconditional tender of the amount actually due. *Daigneau* v. *Daigneau*, 23 C. L. T. 90, 5 O. L. R. 265.

Default — *Power of sale—Motion to restrain exercise of power.*]—Mortgagee received $100 from a municipality as compensation for lands taken or injuriously affected.—Middleton, J., *held*, that he need not place this sum at the disposal of the mortgagor, there being no agreement so to do, therefore, the money stood as security for the mortgage debt and must be regarded as principal. *Royce* v. *Cross* (1910), 16 O. W. R. 988, 2 O. W. N. 58.

Enforcement — Defence of payment — Reference — Scope of — Specific performance of agreement — Parties — Evidence of statements made by deceased person—Inadmissibility — Reversing findings of Master—Burden of proof. *Lemon* v. *Lemon*, 3 O. W. R. 734, 5 O. W. R. 36.

Mortgage—*Paid off by life tenant — Right of tenant for life against remainderman — Waste — Voluntary and permissive — Reference.*] — This was an action for a declaration that plaintiff, the widow of John Currie, sr., deceased, was entitled to a lien or charge on certain land for moneys paid by her in satisfaction of a mortgage made by him thereon, and for sale of land in default of payment. Defendants are the surviving children and grandchildren of Currie, who are entitled in remainder on termination of plaintiff's life tenancy:—*Held*, that in respect of permissive waste, plaintiff is not impeachable. As to voluntary waste, plaintiff appears to have cut and sold a considerable quantity of timber and cordwood not in ordinary course of clearing, which was fixed at $250, and with which she should be charged. Plaintiff held entitled to judgment declaring her entitled to a lien on the land for $510, or so much less as may be found due to her upon the reference if defendant desire a reference and to sale in default of payment. Further directions and costs reserved. *Currie* v. *Currie* (1910), 15 O. W. R. 389, 20 O. L. R. 375.

Mortgagee in possession — *Exceptions to Referee's report — Accounting — Interest—Rents.*]—A mortgagee in possession is not, as a rule, entitled to commission for collecting rents. There must be evidence to support such a charge. Before a mortgagee in possession can be made liable for rents which he has failed to collect there must be evidence to shew that it has been due to his default in some way. *Earle* v. *Harrison* (1909), 4 N. B. Eq. 196.

Mortgagee in possession — Statute of Limitations — Payment by rents and profits —Account — Reference. *Chambers* v. *McCombs*, 1 O. W. R. 689.

Mortgagees' account — Expenses—Improvement in selling value of lands—Election expenses — Subscriptions to charities and

public purposes — Services and expenses—Wages of servants and rent of office—Charges for use of horses and vehicles — Remuneration for personal trouble — Agreements — Permanent improvements — Allowances — Appeal — Costs. *Saskatchewan Land & Homestead Co.* v. *Leadlay*, 12 O. W. R., 629, 1198.

Party added in Master's office — Notice to encumbrancers—Issue of fact—Order and notice set aside. *Colonial Loan & Investment Co.* v. *McKinley* (1910), 1 O. W. N. 658.

Payment—Evidence — Admissibility — Contract — Specific performance — Credit for sum paid — Burden of proof — Scope of reference. *Lemon* v. *Lemon*, 3 O. W. R. 734, 5 O. W. R. 36.

Payment of arrears — *Acceleration.*]— The effect of the acceleration clause, No. 16, schedule B., of the Act respecting Short Forms of Mortgages, R. S. O. 1897, c. 126, is to give a right in every case to the mortgagor, his heirs and assigns, to pay all arrears and lawful charges, and the mortgagee has then no right to take further proceedings, except when a judgment has been recovered. The plaintiff, as assignee of the mortgagor, was entitled to restrain proceedings under the power of sale in the mortgage, upon payment of arrears of interest and costs, the principal not being due except under the acceleration clause. *Robertson* v. *Hetherington*, 8 C. L. T. 141, distinguished. *Todd* v. *Linklater*, 21 C. L. T. 184, 1 O. L. R. 103.

Scope of inquiry—*Moneys received by mortgagees or which ought to have been received under trust agreement with mortgagor.*]—Report referred back in order to take an account of moneys received under a trust agreement as well as under mortgage. The reference had merely directed the taking of the mortgage account, the trust agreement not having been brought to the attention of the Court. *Cuckshutt* v. *Gray* (1909), 12 W. L. R. 435.

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12. REGISTRATION.

Priority—A hypothecary claim registered in Nov., 1908, will take precedence of the legal hypothec created in favour of mutual fire insurance co. by virtue of a deposit note date in Jan., 1909. *Commercial Mutual Fire Ins. Co.* v. *Tucker* (1910), 12 Que. P. R. 22.

Unregistered deed — *Subsequent registered mortgage for value without notice—Right of entry—Registry Act—Real Property Limitation Act.*]—The defendant was owner in fee simple in possession of a farm, and being about to marry the co-defendant, desired to convey to him an undivided one-half share thereof, so that they might become tenants in common. She consulted a local unlicensed conveyancer, who prepared a conveyance to himself and a re-conveyance to the two defendants, as tenants in common. The conveyances were left with him for registration. He registered the conveyance to himself, but fraudulently omitted to register the re-conveyance. The defendants continued in possession, but the conveyancer without their knowledge, mortgaged their farm to the plaintiff who brought action to enforce their mortgage:—*Held*, that under the Registry Act, R. S. O. 1897, c. 136, the re-conveyance was void against the plaintiffs, who had advanced their money without notice.—*Held*, also, that the right of entry did not accrue until the mortgage was registered, and the Statute of Limitations (R. S. O. 1897, c. 133), was not a defence to the plaintiffs' claim, the writ having been issued within the period of the limitation. Judgment of the Supreme Court of Canada, 36 S. C. R. 455, and the Court of Appeal for Ontario, 9 O. L. R. 105, 5 O. W. R. 123, discharged; judgment of Sir John A. Boyd, C., at trial, restored. *McVity* v. *Tranouth*, C. R., [1908] A. C. 1.

Unregistered transfer of part of land before mortgage — *Notice — Originating summons—Order for sale—Affidavit setting up fraud of mortgagee — Contract constituting fraud—Issue of disputed fact not triable under summons.*]—The defendant E. G., the registered owner of certain land, mortgaged it to the plaintiffs, and, the mortgage being in default, the plaintiffs obtained an originating summons for foreclosure. Upon the return of the summons an affidavit of E. G. was filed, in which he swore that before the mortgage to the plaintiff he had transferred an undivided one-half interest in the land to his brother, the defendant, T. A. G., and that, at the time of signing the mortgage, he informed the plaintiff that he was the owner of only a half interest, which was all he was mortgaging to the plaintiffs, and the mortgage was not to cover his brother's half interest. The transfer to T. A. G. was not registered until some time after the registration of the plaintiffs' mortgage.—By s. 173 of the Land Titles Act, no person taking a mortgage of any land for which a certificate of title has been granted shall, except in case of fraud by such person, be affected by notice, direct, implied, or constructive, of any unregistered interest in the land. By s.s. 2, knowledge of an unregistered instrument is not to be imputed as fraud: — *Held*, upon the case presented by the affidavit, that the conduct of the plaintiffs in obtaining and registering a mortgage upon the whole of the land, knowing that it was not intended to cover T. A. G.'s half interest, and with intent to obtain priority over his transfer, as evidenced by their attempt now to enforce the mortgage, amounted to "acts by which an undue and unconscientious advantage is being taken of another," and so amounted to fraud, according to the meaning of the word in s. 173; and the defendants were at liberty to set up as a defence to the plaintiffs' claim, fraud on the part of the plaintiffs: —*Held*, also, that the issue presented being one of disputed fact, the plaintiffs could not proceed further upon their originating summons, but must take such proceedings as would enable the Court to determine, not only the claim of the plaintiffs, but the defence of the defendants thereto.—Order for sale made by Newlands, J., on the return of the summons, set aside. *Independent Lumber Co.* v. *Gardiner*, 13 W. L. R. 548, 3 Sask. L. R. 140.

13. SALE.

Absolute sale—*Right to repurchase—Fraudulent against third parties—Valid between parties.*]—Where an instrument has been entered into between two parties for a purpose which may be considered fraudulent as against a third party, it may yet be binding as between themselves. A supposed fraudulent intention as to third parties cannot be interpolated in construing an instrument as to the rights of the contracting parties. Mere suspicion of a fraudulent intention to protect property against the just claims of third parties will not suffice to establish the fact that the transaction was wholly colourable as between the original parties to the instrument, as such a transaction is not as between themselves rendered void, because it may have the effect of defeating the claims of creditors. In circumstances, *held* upon the construction of certain instruments that, taken together, they did not operate as a mortgage, but as an absolute sale, to which was attached a conditional right of repurchase to be exercised on the happening of a given event. *Shaw* v. *Jeffery* (1890), C. R. 3 A. C. 483.

Action by second mortgagee to set aside sale—*Defects in notice of sale—Sufficiency of price obtained—Reasonable efforts to prevent sacrifice.*] — Plaintiff, a second mortgagee, brought action to set aside a sale made by the first mortgagee under the power of sale contained in his mortgage.—Sutherland, J., *held*, that a mortgagee is not a trustee of the power of sale for his mortgagor, and if he exercises the power of sale strictly and fairly, according to the conditions prescribed by the security without collusion and *bona fide* for the purpose of securing repayment of the mortgage money, the mortgagor has no right of action, even though the sale be very disadvantageous and a greater price might have been obtained by a postponement thereof.—That, in the present case, the evidence shewed that the mortgagee took reasonable means to prevent a sacrifice of the property, and the action should be dismissed with costs. *Kenney* v. *Barnard* (1910), 17 O. W. R. 889, 2 O. W. N. 470.

Action to enforce by sale—Parties — Mortgagees—Separate advances—Mortgagor —Administrator. *Fox* v. *Klein*, 1 O. W. R. 172.

Alleged at undervalue—*Mock biddings to swell price—Unable to rate 20% deposit—Property again put up for sale—Sold at $3,500 less than former bid—Duty of mortgagee—Power exercised in good faith—Action and appeal dismissed with costs.*]—Mortgagees offered mortgaged property for sale under power of sale. One, Fish, made mock bidding to swell price. Sale was adjourned for half an hour for Fish to raise 20% as deposit. Fish failed to return. Auctioneer proposed sale at next highest bid. Bidder withdrew his bid. Property again put up and sold to said next highest bidder but at $3,500 less than his former bid. Plaintiff brought action to set aside sale.—Clute, J., dismissed the action with costs.—Divisional Court *held*, that mortgagees' power had been exercised in good faith, and according to the evidence a good price had been obtained.—That the miscarriage was to be attributed rather to the eagerness of the parties interested in the equity of redemption than to any supposed collusive scheme. Appeal dismissed with costs. *Kaiserhof* v. *Zuber* (1911), 18 O. W. R. 883, 2 O. W. N. 941.

Allowance to mortgagees for expenditures in and about care and sale of lands.]—A Divisional Court dismissed an appeal from a Judge in Chambers who had varied the report of the Master in Ordinary. *Saskatchewan* v. *Leadlay*, 13 O. W. R. 397.

Amount in dispute — Taking accounts —Con. Rules 596 (4) 767—Amount found due by officer taking accounts, confirmed. *Colonial Invest. & Loan Co.* v. *Spooner* (1909), 14 O. W. R. 931, 1 O. W. N. 136.

Chattel mortgage—*Mortgage on lands as additional security — Appropriation of goods by mortgagee—Statute of Limitations —Power of sale — "Proceeding."*]—A mortgage on lands was given as additional security for the amount secured by a chattel mortgage. On default in payment, a warrant was issued under the chattel mortgage, and the goods were seized and taken out of the mortgagor's possession. Although a form of sale was gone through, no sale actually took place, but the goods were taken possession of by the mortgagee and appropriated to his own use. More than 10 years afterwards, the mortgagor's possession of the land not having been in any way interfered with, an assignee of the mortgagee attempted to exercise the power of sale in the mortgage of the lands:—*Held*, that the intended sale was a "proceeding" within the meaning of s. 23 of R. S. O. 1897 c. 133, which the assignee was precluded from taking, under that section, after 10 years. The mortgagee of the chattels, having appropriated them to his own use, and being unable to restore them in proper plight, could not enforce payment of the mortgage debt. *Meisonald* v. *Grundy*, 24 C. L. T. 356, 8 O. L. R. 113, 3 O. W. R. 751.

Execution creditors — *Sale — Surplus —Lien notes.*] — A part owner of a farm joined in promissory notes as surety for the purchaser of a machine, and also gave a lien on his share of the land as further security. Subsequently his interest passed to his co-owner, of whom the plaintiffs were execution creditors under judgments subsequent to the lien. The defendants, being mortgagees of the whole farm prior to the lien, afterwards sold under their power of sale, and out of the proceeds paid off the lien, and the notes were assigned in 1894 by them to an execution creditor subsequent to the plaintiffs, who held them till 1898, and then sued on the notes without result, as the maker had become insolvent. It was shewn that if the maker had been sued in 1895, by which time the notes had become payable, the amount of them would have been recoverable: — *Held*, that the notes were not paid by the application of the proceeds of the sale in discharge of the lien, at a time when they had not matured, the payment not having been made by the party primarily liable, the lien being given as a security only, and that the defendants should have secured the notes for the creditors generally, and were bound to account to the execution creditors for the amount paid in respect of them to the ven-

dors of the machine, though under the circumstances without interest. *Glover* v. *Southern Loan Co.*, 20 C. L. T. 66, 31 O. R. 552.

Judgment for sale of land—Sale under direction of clerk of Court—Invalidity—Refusal of motion to confirm—Necessity for approbation of Judge—Conditions of sale—Advertisements — Consent of prior incumbrancer—Reserved bid—Conduct of sale — Leave to bid—Description of land—Title Costs. *Cummings* v. *Semerad* (Alta.), 8 W. L. R. 644.

Land Titles Act, s. 103—*Distribution of surplus—Payment into Court—Claims of execution creditors—Creditors' Relief Ordinance, s. 3—Priority—Partnership land—Execution against one partner—Execution registered after notice of sale, but before sale—Executions registered after sale.*]—Where land was sold by a mortgagee under s. 103 of the Land Titles Act, and the surplus, after payment of expenses and the amount due to the mortgagee, was paid into Court, and claimed by several execution creditors as subsequent incumbrancers:—*Held*, that the provision of s.-s. 4 of s. 103, that the subsequent incumbrancers should be paid in the order of their priority, was controlled by the provisions of s. 3 of the Creditors' Relief Ordinance, declaring that there should be no priority among creditors by execution; and that, therefore, the moneys should be distributed among the execution creditors in equal shares.—*Dawson* v. *Moffatt*, 11 O. R. 484, followed.—The owners of the land, subject to the incumbrances, were two men who were partners, and all the executions were against the two men, except that of L., which was against one only of the partners. The land was partnership property:—*Held*, that the execution of L. was not postponed to those of the partnership creditors, but was effective against the interest of the one partner in the land. — The execution of one creditor was registered after the registration of the notice of exercising the power of sale, but before the date of sale:—*Held*, that this execution attached. — Two executions were lodged after the sale took place:—*Held*, that these executions did not attach.—*Breithaupt* v. *Marr*, 20 A. R. 683, followed. *Thompson* v. *Reyland* (1910), 16 W. L. R. 154, Sask. L. R.

Maintenance of widow—*Lease of mortgaged lands—Widow a party thereto—Insufficient income to maintain widow—Action for sale of property.*]—Plaintiff, widow of mortgagee, brought action to have it declared that said mortgage was a charge on the lands named, in favour of plaintiff, an order for sale of the lands, and the proceeds disposed of for the past and future maintenance of plaintiff.—Britton, J., *held*, (1910), 15 O. W. R. 815, 1 O. W. N. 679, that by reason of a lease, to which plaintiff was a party and because plaintiff of her own choice was not maintained previously as provided by the mortgage, there could not be said to be such default in complying with the proviso in the mortgage as to entitle plaintiff to maintain the action. Action dismissed with costs. Divisional Court affirmed above judgment. *Dymont* v. *Howell* (1910), 16 O. W. R. 938, 2 O. W. N. 28.

Mining property — *Judgment creditor of mortgagee — Sheriff's sale — Purchaser under—Priorities—General Mining Act, s. 39 — Registration—Expenditure on account of mortgaged property — Lien.*]—Mining leases of lands in New Brunswick and of the minerals therein, issued by the Crown to the appellant company, subsequent to a mortgage executed by them in the State of N. to the respondent company, incorporated under the laws of the State of N., which laws, unlike those of New Brunswick, do not reserve the minerals to the State, are subject to the mortgage.—A judgment creditor of the mortgagee having purchased the leases at sheriff's sale under an execution upon his judgment, whereupon new leases were issued to him in his own name, the Crown having no knowledge of the mortgage, took the new leases subject to the mortgage.—The mortgage, though not registered under s. 129 of the General Mining Act, C. S. N. B. 1903 c. 30, is not void as against a judgment creditor who had notice of the mortgage, and whose judgment was not registered under the section at the commencement of the suit.—The judgment creditor is not entitled to a lien prior to the mortgagee for the amount of the rent paid to the government on the licenses declared to be held in trust for the mortgagee. *Mineral Products Co.* v. *Continental Trust Co.*, 37 N. B. R. 140.

Affirmed by the Supreme Court of Canada; Maclennan, J.A., dissenting, 37 S. C. R. 517.

Notice — *Sufficiency — Service—Persons entitled — Agent—Registration—Statutes.*]—A notice of sale under the power in a mortgage was addressed to the mortgagor, then resident abroad, G. A. M. (as his agent), E. M. and W. M., J. M. and J. A., and said: "I, C. W., hereby give you notice," etc. It was dated, and signed by the solicitor for the mortgagee:—*Held*, that on its face it was a sufficient notice.—*Held*, that service of it was effective where made upon and accepted by G. A. M., who acted generally as agent of the mortgagor, who was abroad, and who received the notice from G. A. M. and never made any objection to it. E. M. and J. A. were subsequent mortgagees who had assigned their mortgages to G. A. M., who accepted service of it for them, saying in his acceptance that he was the assignee of their mortgages. The assignment to him was not registered.—*Held*, that J. M. and J. A. were not entitled to notice. The notice was not served upon E. M. and W. M., but the evidence showed that their mortgage was paid and satisfied.—*Held*, that they were not entitled to notice.—*Held*, also, that the notice was a good notice to G. A. M. in respect to all claims that he might have or profess to have in the matter.—*Held*, lastly, that, owing to the provisions of s. 8 of 63 V. c. 19, the provisions of s.-s. 5 of s. 6 of 62 V. (2) c. 16, providing for registration of notice of sale, did not apply to this case; here the sale was "effected" prior to the 1st January, 1900, and the conveyance when drawn would be "in pursuance" of that sale. *Fenwick* v. *Whitwam*, 21 C. L. T. 122, 1 O. L. R. 24.

Order for sale instead of foreclosure—*Absence of request — Imperial Chancery Act, 15 & 16 V. 86, s. 48.*]—The request for a sale from some of those named in the above section is a condition precedent for making an order for sale instead of fore-

closure. As no such request here order made for foreclosure although mortgagees claim $1,000 and land worth $1,850. *Canada Life* v. *Vance* (1909), 12 W. L. R. 231.

Payment — Credit—Set-off—Agreement —Death of mortgagee — Sale by administrators under power — Proof against administrators — Corroboration — Statute of Limitations — Account. *Mooney* v. *Provincial Trust Co.*, 3 O. W. R. 337.

Payment into Court of surplus — *Competing claimants of fund — Costs.*]—A mortgage sale under power yielded a surplus of $320.29, out of which the mortgagee applied to pay into Court $246.89, being the amount of a judgment against the mortgagor, which the judgment creditor sought by suit to have paid out of the surplus as against the owner of the equity of redemption in the mortgage:—*Held*, that, on the mortgagee paying into Court the whole surplus, less the costs of his appearance and application, his name should be struck out of the suit. *Boyne* v. *Robinson*, 25 C. L. T. 75, 3 N. B. Eq. 57.

Petition for—*Owners unknown—Contestation—Status of nu-propriétaire and appelé à une substitution — Extinction by prescription of hypothecary debt.*]—The *nu-propriétaire*, during usufruct, and the *appelé à la substitution*, after its opening, have a *locus standi* to appear and contest the petition of the hypothecary creditor under art. 1025, C. P. C., in order to obtain a sale of an immovable whose owners are unknown or uncertain. The party appearing may invoke and establish the extinctive prescription resulting from the lapse of time during the possession of the *usufruitier* or of the *grevé*. It is not even necessary for the Court to decide the point whether his status is that of *nu-propriétaire* or of *appelé à une substitution* by virtue of the title which he invokes. The extinction of the debt established involves the dismissal of the petition and of the subsequent demand (art. 1035) for a declaration of hypothec. *Kelso* v. *Layfield*, 20 Que. S. C. 204.

Power of sale—Construction—Notice—Validity of sale without notice to second mortgagee. *Dominion Trust Co.* v. *Bower* (B.C.), 3 W. L. R. 157.

Power of sale—Notice of exercising — Omission to serve on mortgagor and wife — Vendor and purchaser—Objection to title. *Re Muffitt & Mulcahill*, 8 O. W. R. 347.

Purchase money — Default—Deficiency —Money in Court—Payment out—Creditors of partnership. *Campbell* v. *Croil*, 6 O. L. R. 933, 7 O. W. R. 379, 475.

Rights of wife as dowress—*As surety —Lost by valid contract of sale under power —Power of Court—Costs.*]—Riddell, J., *held*, that there is no power in the Court to interfere with legal rights arising independently of any Court proceedings.—When a valid contract of sale is made by a mortgagee under a power of sale before any notice of intention to redeem is received from the wife of the mortgagor, the purchasers are entitled to possession, and the wife loses any right she previously had to redeem either as surety for the mortgagor or as dowress.—*Quære*, if the land had been foreclosed instead of sold? *Standard Realty Co.* v. *Nicholson* (1911), 19 O. W. R. 373, 2 O. W. N. 1189.

Sale at undervalue—*Duty of mortgagee — Interest of mortgagor — Notice to purchasers—Setting aside sale—Leave to redeem —Assignment of mortgage — Parties — Attorney-General—Equities between mortgagors and assignee.*]—The plaintiffs mortgaged to M., for $3,500, land containing a stone quarry. The mortgage deed contained a clause that, on 2 months' default, the power of sale might be exercised without notice. After default, M. assigned the mortgage to the British Columbia Government, and arrangements were made between the Government and the plaintiffs by which a contractor for the erection of the legislative buildings should be permitted to take possession of the quarry and take stone therefrom, paying to the Government a royalty for the benefit of the plaintiffs. Under this arrangement, stone was taken from the quarry, and the royalty credited upon the mortgage, the effect of which was to reduce the amount to $1,150. On the 11th March, 1908, the Government assigned this mortgage to the defendant company, and the company purporting to act in pursuance of the power of sale, sold the quarry to the other defendants for $3,500:—*Held*, that, while the mortgagee or his assignee is not a trustee for the mortgagor the power of sale ought to be exercised with due regard to the mortgagor's interests, and the sale ought to be made in the manner that it would be made by a reasonably prudent man selling his own property.—*Kennedy* v. *De Trafford*, [1897] A. C. 180, followed.—The evidence shewed that the quarry was worth at least $20,000; that the sale was made without notice to the plaintiffs, or to the public of any one except the purchasers, the other defendants; and that these defendants had sufficient notice or knowledge of the sale being at an undervalue to put them on their guard:—*Held*, in these circumstances, that the sale should be set aside and the defendants be allowed to redeem.—It was contended by the plaintiffs that the assignment of the 11th March, 1908, did not vest the mortgage in the defendant company, because there was no order in council authorising the assignment; and objection was taken by the defendants that, to enable the plaintiffs to succeed on such a ground, they should have made the Attorney-General a party:—*Held*, *per* Gallihet, J.A., that the Attorney-General was not a necessary party.—*Held*, also, *per* Gallihet, J.A., that there were no equities existing between the Government and the plaintiffs which attached to the assignment from the Government to the defendant company. *Hwson* v. *Haddington Island Quarry Co.* (1911), 16 W. L. R. 226, 16 B. C. R. 98.

Sale by Court — *Order as to distributing the price—Posting up notice—Interest in the suit—Parties to the action to set aside.*]—The ranking of a mortgage creditor in the order for distributing the amount of the sale of real estate by order of the Court does not entitle a preferred creditor to a right of action to have the plaintiff ranked in his place. The action cannot be begun before posting up the order, which being the only step with legal effect, and subject to modification, cannot

prejudice him. It is no longer so after posting because the statute provides for contesting the order, a method that should be followed except in exceptional and extraordinary circumstances. A plaintiff has no interest in setting aside a sale by the Court of real estate, the mortgagees then have only a right to their share in the amount to be distributed, and an action to set aside is not necessary to secure them this benefit. Further, such an action cannot be maintained when one of the interested parties, a guarantor of the mortgage, has not been served. *Howard* v. *Reed* (1909), 36 Que. S. C. 465.

Sale by mortgagees under power — Action by mortgagor to redeem—Possession — Legal estate — Notice of sale — Limitation of Actions—Real Property Limitation Act, *Campbell* v. *Imperial Loan Co.* (Man.), 8 W. L. R. 502.

Sale by mortgagees under power — Notice to mortgagor—Conditional notice—Sufficiency—Proof of receipt by mortgagor—Sale on credit—Accounting to mortgagor for whole amount of purchase money—Sale not purporting to be under power—Validity of, as exercise of power—Release of part of mortgaged premises — Sale not disclosed to mortgagor—Delay in accounting—Absence of demand — Costs — Third parties — Redemption. *Lockhart* v. *Yorkshire Guarantee & Securities Corp.*, 9 W. L. R. 182.

Sale by mortgagees under power — *Redemption—Real Property Limitation Act, R. S. M. 1902 c. 100, s. 20—Constructive possession by mortgagee of vacant lands — Acknowledgment to prevent statutory bar — Acquiescence and laches — Construction of contract—Condition in power of sale protecting purchaser—Exercise of power of sale by giving agreement.*]—Action for redemption of a mortgage in fee, covering several parcels of land, given by the plaintiff's predecessor in title. The mortgage became in default on the 1st January, 1892. The land was vacant, and, by the terms of the mortgage, the mortgagor's right to possession ceased upon default, but the mortgagees had not taken actual possession. Under the power of sale in the mortgage, the company had, between 1899 and 1903, made sales of the different parcels to three several persons, who were made co-defendants in the action. The purchasers had only entered into agreements to purchase, but had paid portions of their purchase money, entered into possession, and made improvements on the lands. The sales had been made without notice to the plaintiff, relying on the provision in the mortgage that "in default of payment for one month and ten days the said mortgagees may without any notice enter upon the said land and proceed under and exercise the power of sale or lease *hereinafter* conferred." There was no such power referred to *after* that provision, but the statutory power of sale under the Short Forms Act was contained in an *earlier* portion of the mortgage. The plaintiff allowed over ten years to elapse without making any payment on the mortgage or for taxes on the land. She knew of the making of two of the sales two years at least before commencing this action; but made no objection to any of them, although the mortgagees had sought her co-operation in endeavouring to realise on the lands. By the time the action was commenced, the land had so increased in value that it became worth while to redeem them, if possible:—*Held*, reversing the decision of Mathers, J., that the "possession" referred to in s. 20 of the Real Property Limitation Act, R. S. M. 1902 c. 100, means actual adverse possession, and not a mere constructive possession of vacant lands by reason of the mortgagor being in default; and the plaintiff was, therefore, not barred by the statute. *Smith* v. *Lloyd*, 9 Ex. 562, *Agency Co.* v. *Short*, 13 App. Cas. 799, and *Bucknam* v. *Stewart*, 11 Man. L. R. 625, followed.—(2) That the plaintiff had, by her laches and acquiescence in the sales made by the mortgagees, lost her right to redeem. *Archbold* v. *Scully*, 9 H. L. Cas. 388, and *Nutt* v. *Easton*, [1899] 1 Ch. 873, followed. —(3) That the word "hereinafter" in the power of sale quoted should be construed to mean "herein" or "hereinbefore," and, so construed, the power of sale was sufficient and had been validly exercised. The Court will correct such an obvious mistake. *Wilson* v. *Wilson*, 5 H. L. Cas. 66, and *Burgough* v. *Edridge*, 1 Sim. 269, followed.—(4) The defendant purchasers were in any case protected by the following clause in the mortgage: "No purchaser under said power shall be bound to inquire into the legality or regularity of any sale under the said power or to see to the application of the purchase money." *Dickie* v. *Angerstein*, 3 Ch. D. 600, followed.—If an irregular or improper sale is made by the mortgagee, the mortgagor has his remedy by way of an action for damages: *Hoole* v. *Smith*, 17 Ch. D. 434.—(5) The agreements of sale entered into between the mortgagees and the purchasers were valid exercises of the power of sale, and conveyances were not necessary. *Thurlow* v. *Mackeson*, L. R. 4 Q. B. 97, followed.—(6) The posting up on the lands, after the making of the sales, of a notice of sale prepared by the mortgagees' solicitors, did not give the plaintiff a right to redeem. It was not the act of the purchasers, and their rights could not be prejudiced by it. *Campbell* v. *Imperial Loan Co.*, 18 Man. L. R. 144, 8 W. L. R. 502.

Sale by mortgagees under power — *Sufficiency of notice of exercising — Notice unsigned — Condition — Waiver — Selling on credit—Sale carried out by mortgagees in form as absolute owners not as mortgagees under a power of sale—Non-disclosure of sale—Redemption.*]—In an action by the purchaser of the equity of redemption in mortgaged premises to redeem the same, upon the ground, *inter alia*, that no proper or sufficient notice of exercising power of sale had been served upon him:—*Held*, *per* Irving, and Clement, JJ. (Martin, J., dissenting), that it was no objection to the validity of such notice that it was expressed to be a notice by the agent of the mortgagee; or that it was unsigned, it having been mailed to the plaintiff accompanied by a letter signed by the agent in his own name; nor was such notice conditional by reason of a statement in such letter that if the plaintiff refused to sign a certain document "the only course open to me is to serve you with the enclosed notice of my intention to sell:" nor was it a valid objection to the sufficiency of such notice that the unsigned document stated that such sale would be after the expiration of one calendar month,

while the signed letter accompanying it informed the plaintiff, "I purpose to sell as soon as possible;" nor was such notice waived or abandoned by the mortgagee having served a fresh notice of exercising power of sale some two years subsequently.—The above notice was served on the plaintiff in October, 1897, and by articles of agreement dated the 8th December, 1899, and expressed to be made between the defendant corporation as vendors and the defendant Lemon as purchaser, the defendant corporation agreed to sell the mortgaged premises for $1,200:—*Held*, not a valid objection to such sale that it did not purport to be in pursuance of the power contained in the mortgage; nor that the mortgagee agreed to sell as absolute owner; nor that such sale was on credit:—*Held*, also, that neither the non-disclosure by the mortgagee of said sale of the 8th December, 1899, nor the service in January, 1902, of a fresh notice of exercising power of sale, entitled the plaintiff to redeem, but that the plaintiff was entitled to an account of such sale. Judgment of Hunter, C.J., decreeing an account, but refusing redemption, affirmed. *Lockhart* v. *Yorkshire Guarantee & Securities Corp.*, 14 B. C. R. 28, 9 W. L. R. 182.

Sale of land under order of Court—*Purchase by solicitor of party having contract of sale—Application to confirm—Absence of notice to other parties.*]—Application to confirm sale of land under an order of the Court in foreclosure proceedings refused, as plaintiffs' solicitors had neglected to inform defendant's solicitors of the day of the sale, as they promised they would do. Property to be re-advertised and re-sold. *Great West* v. *Lieb*, 11 W. L. R. 632.

Sale of mortgaged lands — *Summary proceeding—Sale at nominal price to agent of mortgagee—Refusal to confirm—Order for foreclosure.*]—Plaintiffs were proceeding with foreclosure proceedings when a subsequent encumbrancer produced an order *nisi* for a sale. At the sale the plaintiff's agent bought the property for 25 cents. On application for confirmation the mortgagor appeared to object, saying that plaintiffs had, before the sale, sold to another party. Confirmation of sale refused, and order made for foreclosure, and a vesting order. *Canada Permanent* v. *Jesse*, 11 W. L. R. 295.

Sale under direction of Court—*Application of plaintiff-mortgagee to cancel—Upset price fixed too low—Negligence of mortgagee.*]—Plaintiff, a mortgagee, applied to set aside a sale made on his application under direction of the Court:—*Held*, that purchase price was fair; that purchaser not at fault but plaintiffs were in having the reserve price fixed too low. Application refused. *Fox* v. *Hunter* (1909), 12 W. L. R. 87.

Sale under judgment — Abortive auction sale — Subsequent sale by tender—Sufficiency of price — Validity of sale — Special grounds for impugning—Irregularities. *Union Trust Co.* v. *O'Reilly*, 10 O. W. R. 618.

Sale under judgment — *Confirmation—Registered executions — Homestead exemption — Originating summons — Jurisdiction — Status of execution creditor.*]—*Held*, following *Rocz* v. *Spiller*, 6 Terr. L. R. 225, 2 W. L. R. 280, that the Court has jurisdiction in proceedings by way of originating summons to determine whether or not executions are binding on land against which they are registered.—2. That an execution creditor has no *locus standi* in an application for confirmation of a mortgage sale of a homestead declared exempt, and cannot take exception to the regularity of the sale proceedings. *Union Bank* v. *Jordan*, 8 W. L. R. 77, 1 Sask. L. R. 105.

Sale under judgment — *Death of defendant — Parties — Owner of equity — Right of redemption — Foreclosure—Practice.*]—While certain lands were under advertisement of sale, in pursuance of a decree of foreclosure and sale, the defendant died intestate:—*Held*, that, as the defendant's father, who was the person entitled to the equity of redemption, could have exercised the right to redeem without being a party to the suit, the plaintiff was justified in proceeding with the sale, as if death had not occurred. *Alward* v. *Lewis*, [1891] 2 Ch. 81, distinguished.—Under a decree in this province, the absolute right of redemption exists pending the sale and the final confirmation thereof, while under the English practice no such absolute right exists. — Distinction between English and Nova Scotia practice in foreclosure proceedings. *Stubbings* v. *Umlah*, 40 N. S. R. 289.

Sale under judgment—Purchase by a defendant—Vesting orders—Rescission —Reference as to title and accounts—Agreement — Ascertainment of amount due — Costs. *Campbell* v. *Croil*, 3 O. W. R. 862.

Short Forms Act—*Sale without notice.*]—The insertion of the word "calendar" before the word "month" in the words given in column one, number 13, of the second schedule to the Short Forms Act, R. S. M. 1902, c. 157, does not prevent the mortgagee getting the benefit of the wording of the corresponding long form, and, where the words of the short form above referred to were followed by the words "Should default be made for two months a sale or lease may be made hereunder without notice:"—*Held*, that these words were effectual to enable the mortgagee to make a valid sale and conveyance of the whole estate mortgaged, without giving any notice whatever of his intention to do so. *Re Cotter*, 23 C. L. T. 289, 14 Man. L. R. 485.

Subsequent sale of part charged with mortgage of whole — *Sale under power—Rights of subsequent mortgagee of part sold — Redemption or assignment — Dower — Election under will.*] — In 1899 the plaintiff's husband mortgaged 100 acres to a loan company, the plaintiff barring her dower, the mortgage containing a provision that the company and their assignees could release portions without affecting the remainder of the covenants. In 1900 the husband sold 85 acres of the property subject to the mortgage, which the purchaser covenanted to pay off, he giving a mortgage on the property sold, for $350 balance of the purchase money. The husband died in 1903,

having bequeathed to the plaintiff all his personal property, including the $350 mortgage, also the unsold 15 acres, the latter while she lived and remained unmarried, and thereafter to his son. The plaintiff had also became the owner of a second mortgage made by the purchaser on the property sold. She married again, and the son, on the loan company threatening sale proceedings, arranged with the defendant to obtain an assignment of the mortgage, which he did, and to take proceedings to realize on the 85 acres, in order that the 15 acres might be freed from the mortgage. The plaintiff offered to pay off the loan company's mortgage, on condition of getting an assignment of it, which was refused, but she was offered a discharge or an assignment of the debt covering the 85 acres with the 15 acres freed, which also was refused. In an action subsequently brought by her to compel an assignment or redemption: — *Held*, that the plaintiff's rights as second mortgagee were confined to the 85 acres, and that she was not entitled to a reconveyance or assignment of the mortgage of the whole 100 acres:—*Held*, also, that the design of the testator, as evidenced by his will, was to give the 15 acres to his son free from his mother's dower, and that her conduct in accepting the bequest under the will was a clear election to take under it. *Leitch* v. *Leitch*, 2 O. L. R. 223, followed. *Jones* v. *Shortreed*, 9 O. W. R. 705, 14 O. L. R. 142.

Surplus proceeds—*Payment into Court —Claim of caveator — Failure to establish lien—Priority of incumbrances—Land Titles Act, ss. 2 (7), 73, 81 — Effect of filing caveat.*]—Under the Land Titles Act, ss. 73 and 81, priority of registration gives priority of interest. The filing of a caveat is not registration of an incumbrance, nor is a caveat an incumbrance: Land Titles Act, s. 2, s.-s. 7.—Land having been sold under the plaintiff's mortgage, the surplus after payment of the plaintiff's claim was paid into Court, and R. & Co., who had filed a caveat against the mortgaged land before the registration of a second mortgage, asked for payment out of the surplus to them. They claimed a lien upon the land, but had not registered it nor established it:—*Held*, that until R. & Co. established by a judgment in an action that they were entitled to a lien, and that lien had priority over the second mortgage, they could have no claim to the moneys in Court, which should be applied towards the satisfaction of the next registered incumbrance. *Gilbert* v. *Ulterich* (1911), 16 W. L. R. 490, Sask. L. R. .

Tender of mortgage money—*Place and time of.*] — The defendants under a power of sale in a mortgage advertised a sale of lands near Kincardine, to take place there on the 19th January. On the 17th January, at eleven a.m., the mortgagor telegraphed to the defendants at Toronto asking amount required to pay mortgage, to which the defendants telegraphed a reply. At ten a.m. on the 19th January the defendants received at Toronto the amount named, but, in accordance with their office procedure, the accountant was not aware of this till about eleven a.m., when, knowing the property was up for sale, he telegraphed and telephoned the fact to Kincardine. The sale had, however, been made a few minutes before to the plaintiff. The defendants then returned the money to the mortgagor:—*Held*, that the plaintiff was entitled to specific performance, for the mortgagor had not tendered the amount at such a reasonable time before the sale as to make it obligatory to receive it as payment. *Gentles* v. *Canada Permanent & Western Canada Mortgage Corp.*, 21 C. L. T. 143, 32 O. R. 428.

Time for holding sale.]—Section 31 of the Sask. Interpretation Act declared mountain standard time to be the time for the province. Where lands were ordered to be sold at 12 o'clock noon and the sale was carried out on local time, one hour earlier than standard time, the sale was held to be irregular. *Great West Life* v. *Hill* (1909), 2 Sask. L. R. 158.

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14. Subsequent Incumbrances.

Advances for building — Mechanics' liens — Priority — Subrogation—Agreement to postpone. *Colonial Investment & Loan Co.* v. *McCrimmon*, 5 O. W. R. 315.

Collateral security — *Release — Discharge of mortgage — Rights of second mortgagee — Principal and surety—Priorities.*]—A mortgage, made to the plaintiffs, by a married woman, whose husband was a party, but did not join in the covenants, was given as collateral security for the payment of certain promissory notes made by the husband and wife to secure the husband's indebtedness. Further liabilities were incurred by the husband and payments made on account, and subsequently the whole indebtedness was adjusted, the plaintiffs taking the notes of the husband alone, maturing at several future dates, in substitution of the original notes, which the plaintiffs agreed to cancel and deliver up:—*Held*, that the effect of what took place was to extinguish the liability on the notes secured by the mortgage, and therefore the mortgage itself given as collateral security therefor, and which enured to the benefit of the holders of a second mortgage also given by the husband and wife, and that the rights so acquired were not affected by an agreement subsequently entered into between the wife and the plaintiffs that the plaintiffs' mortgage should be considered as still subsisting. *Waterous Engine Works Co.* v. *Livingston*, 24 C. L. T. 338, 7 O. L. R. 740, 3 O. W. R. 670.

Execution creditors — *Sale—Surplus —Collateral security.*] — Execution creditors, though they probably cannot sell under their writs the interest of their execution debtor in land subject to more than one mortgage made by him, are nevertheless incumbrancers upon that interest, and upon the proceeds thereof in the event of a sale of the land by a mortgagee, and entitled to payment thereout according to priority. A mortgagee who sells the land and pays off an incumbrancer who holds, to his knowledge, collateral security, must take over that collateral security for the benefit of execution creditors, and is liable to them for the value

thereof if he fails to do so. Judgment of a Divisional Court, 31 O. R. 552, 20 C. L. T. 66, affirmed; Maclennan, J.A., dissenting. *Glover* v. *Southern Loan & Savings Co.*, 21 C. L. T. 105, 1 O. L. R. 59.

Priorities — *Payment by sale of other property — Improvements — Security.*] — Action for a declaration of hypothec of immovables. The defendant moved for security that the immovables should be sold for an amount sufficient to pay him the whole of his claim, which he alleged was prior to the claim of the plaintiff, and that his hypothec was also prior. The plaintiff replied that the defendant had been paid his privileged or prior claim by the sale of other immovables hypothecated for the same debt. The defendant rejoined that he had not been paid his entire debt, and that a certain sum received by him had been expended in improvements on the property. The plaintiff denied the improvements, and alleged that, in any event, they were off-set by the rents and profits. Finally, the defendant denied the off-set:—*Held*, that the defendant had not proved his improvements; that he had received from the sale of other immovables a sum exceeding his claim; that his debt was therefore extinguished, and he was not entitled to security. *Desjardins* v. *Bastien*, 4 Que. P. R. 264.

Rents and Profits—*Collateral indebtedness — Appropriation of receipts.*]—A mortgagee, in receipt of the rents and profits of the mortgaged premises, from time to time sold goods to the mortgagor, and the latter upon a settlement of accounts assented to the receipts being applied first in payment of the account for goods sold:—*Held*, that an incumbrancer whose rights accrued after the settlement could not complain of this, and was not entitled to take the position that the rents and profits necessarily and irrevocably reduced the mortgage debt as they were received. *Mitchell* v. *Saylor*, 21 C. L. T. 224, 1 O. L. R. 458.

Title deeds — *Right of first mortgagee to possession of — Lien — Agreement to postpone — Evidence — Estoppel — Retention of deeds.*]—In an action for the recovery of title deeds in the possession of the defendant, upon which he claimed a lien, the judgment at the trial in favour of the defendant, was reversed, and judgment ordered to be entered for the plaintiffs for delivery up of the deeds.—The defendant alleged that the title deeds were deposited with him by J. to secure the performance by J. of a certain agreement between them. J. had applied to P. (the plaintiff's assignor) for a loan of $1,000, and it was arranged between J., P., and the defendant, that P. should be given a mortgage upon the property covered by the title deeds to secure the loan, and that that mortgage should be a first charge upon the land:—*Held*, *per* Macdonald, C.J.A., that a first mortgagee is entitled, as against his mortgagor, to all the title deeds; and the plaintiffs were entitled to them as against the defendant, who had consented to the giving of the mortgage as a first charge.—*Per* Irving, J.A., that the defendant's own evidence shewed that he led P. to believe that he would be safe in lending the money to J.; and the defendant was, therefore, estopped from setting up any right which would cut out the mortgage taken by P. to secure repayment of the loan; and there never was any agreement between J. and the defendant that the latter should have a lien.—*Per* Martin, J.A., that the facts in evidence did not warrant the application in favour of the defendant of the principle upon which the retention of title deeds may be justified. *Storey* v. *Gallagher* (1911), 16 W. L. R. 230, B. C. R. .

MORTGAGE COMPANY.

See Bills of Exchange and Promissory Notes.

MORTMAIN.

See Church—Will.

MOTION.

Affidavit — *Dismissal.*]—A motion which is not accompanied by the affidavit required by Art. 47 of the Rules of Practice, the facts alleged being denied by the opposite party, will be dismissed with costs. *Bédard* v. *Bayard*, 3 Que. P. R. 194.

Affidavits in reply — *Service — Time.*] —Affidavits to be read in reply were served on the day preceding the argument. Objection being taken to the sufficiency of the service:—*Held*, that the words "those used by applicant in reply not less than one day" in the General Rule of Hilary Term, 1890, mean one clear day; and the service was insufficient. Time for service extended and cause allowed to stand for a later day. *Ex p. Price*, 20 C. L. T. 86.

Rule nisi — *Necessity for.*] — The proceedings in this case were brought before the Court by writ of *certiorari* granted by consent. No rule to quash the order removed into Court was moved for. The cause was entered on the Crown paper by consent. The Court refused to hear the argument until a rule to quash had been regularly moved for and taken out. *Regina* v. *Wilkinson* — *Re Restigouche Salmon Club*, 20 C. L. T. 86.

MOTORING.

Constitutional law — *Provincial statute prohibiting use of — Validity—B. N. A. Act, 1867, ss. 91 and 92—Criminal law — Local works and undertakings — P. E. I. 8 Edw. VII. c. 13.*]—A writ or *certiorari* to remove a conviction for running a motor car in Charlottetown was quashed:—*Held*, that P. E. I. local legislature had authority to prohibit use of motor cars in the province and that the act in question did not trench on the criminal law. *Re Rogers*, 7 E. L. R. 212.

Edw. VII. c. 13 (Q.)—*Municipal by-laws —Speed of automobiles — Pleading.*]—The Quebec statute 6 Edw. VII. c. 13 having provided that no municipal by-law to regulate the speed of automobiles shall have any force or effect, an allegation in the declaration of an action (damages caused by collision) against the owner of such a vehicle, that he was unlawfully driving it at a speed "far in excess of that permitted by the by-laws of the locality," is irrelevant and will be struck out on demurrer. *Peck* v. *Ogilvie*, 31 Que. S. C. 227, 8 Que. P. R. 392.

Horse frightened by motor-car left unattended at side of highway — *Obstruction — Liability of owner of car for injury caused by horse bolting — Negligence—Motor Vehicles Act, ss. 10, 14, 18.*]—While plaintiff was driving down a hill his horse, becoming frightened at a motor car left standing unattended by the roadside, ran away and owner, horse, and buggy were injured. The jury having found it was not a reasonable user of the highway to leave the automobile so long unattended there was an unauthorised obstruction of the highway. Judgment for plaintiff. An appeal was dismissed. *McIntyre* v. *Coote*, 13 O. W. R. 1098.

Injury to pedestrian—*Negligence—Onus —Responsibility of owner — 6 Edw. VII. c. 46 (O.) — Chauffeur on errand of his own— Fines and penalties—Action for damages.*]—A chauffeur, having received permission to have his master's motor for a few minutes, in order to take some things to the house of a fellow servant, at the request of the daughters of the latter, took them for a ride, and, on returning with them to their father's house, injured the plaintiff. The jury found that the defendant had not proved that the accident did not arise through the chauffeur's negligence, and, also, that the latter was acting within the general scope of his employment at the time of the accident:—*Held*, that, having regard to the terms of 6 Edw. VII. c. 46 (O.) (an Act to regulate the speed and operation of motor vehicles on highways), which casts the onus on the defendant when his motor has occasioned an accident, and makes him responsible for any violation of the Act, there was enough evidence to support the findings. — *Semble*, that under the Act the chauffeur is to be regarded as the *alter ego* of the proprietor, and the latter is liable for his negligence in all cases when the use of the vehicle is with permission, though he may be out on an errand of his own.—*Semble*, also, that under s. 13 the owner of a motor vehicle for which a permit is issued is responsible, not only in regard to fines and penalties imposed by the Act, but also in damages for any violation of the Act or of any regulation provided by order of the Lieutenant-Governor in council. *Mattei* v. *Gillies*, 16 O. L. R. 558, 11 O. W. R. 1083.

Injury to traveller on highway — Frightening horse — Negligence — Violation of Motor Vehicles Act — Failure to reduce speed — Master and servant — Liability of master for acts of servant — Course of employment — Master's business — Unauthorised detour — Damages. *Smith* v. *Brenner*, 12 O. W. R. 9, 1197.

See NEGLIGENCE.

MUNICIPAL CORPORATIONS.

1. ADMINISTRATION OF JUSTICE.

Police magistrate — *Office — Stationery.*]—The police magistrate of a town cannot require the corporation to provide facilities for the transaction of business not strictly appertaining to his office of police magistrate, such as business relating to an adjoining county of which he is a justice of the peace, nor is he entitled to a private office in addition to a public one. It is sufficient if a suitable room or chamber for a police office is provided in any building belonging to the municipality (in this case the council chamber), although by doing so the hours for the transaction of police business may be limited.—A municipal corporation is liable to a police magistrate for a claim for stationery, although extending beyond a year. *Mitchell* v. *Pembroke*, 20 C. L. T. 70, 31 O. R. 348.

Special services—*Detection of crime — Accounts.*]—The gist of s. 12 of R. S. O. c. 101 is to empower a warden and county attorney to authorise any constable or other person to perform special services not covered by the ordinary tariff, which are, in their opinion, necessary for the detection of crime, or the capture of persons believed to have committed serious crime, and to do so upon the credit of the county corporation, and so to render them liable for the payment for such special services; and the liability may attach whether the amount is certified by the warden and county attorney, as required by the said section, or not. *Sills* v. *Lennox & Addington*, 20 C. L. T. 101, 31 O. R. 512.

2. Arbitration and Award.

Application to set aside award — *Time — Publication — Arbitrator—Oath—Lowering grade of highway — Compensation.*]—The six weeks allowed by s. 465 of the Municipal Act, R. S. O. c. 223, for an application to set aside an award, run from the publication to the parties of the award. The failure of the arbitrator to take the oath required by s. 458 of the same Act is fatal to his award; but when an award is moved against on the ground of such failure, it must be clearly shewn that the applicant was not aware of the omission until after the making of the award. An arbitrator to whom is referred a claim for compensation for injury to land by reason of the lowering of the grade of the adjoining highway by the municipality, has no power to direct the municipality to maintain a retaining wall. The arbitrator has power to include in his award compensation to the land-owner for injury to his land during the progress of the work by interference with the means of access thereto, and also the cost of work done to afford him such access. *Re Burnett & Durham*, 20 C. L. T. 13, 31 O. R. 262.

Costs—*Discretion.*] — An arbitrator appointed under s. 437 of the Municipal Act, R. S. O. c. 223, is given power by s. 460 "to award the payment by any of the parties to the other of the costs of the arbitration or of any portion thereof:"—*Held*, that the discretion thus given must be a legal discretion, and the arbitrator should be governed by the rule that where a plaintiff comes to enforce a legal right, and there has been no misconduct on his part, the Court cannot take away his right to costs. And there being nothing in this case to warrant any departure from the rule that the unsuccessful party should bear the whole costs of the litigation, the award was modified accordingly. *Re Pattullo & Orangeville*, 19 C. L. T. 388, 31 O. R. 192.

Evidence of arbitrator—*Admissibility of—Separation of territory from town and annexation to township—Valuation of assets and liabilities—Subjects of and mode of.*]—On a motion to set aside an award made by two of the three arbitrators—the third arbitrator dissenting—appointed under s. 18 of the Municipal Act, 1903, 3 Edw. VII. c. 19 (O.), for the settlement of the terms and conditions of the separation of territory comprised within the limits of a town, and its annexation to an adjoining township, and for the adjustment of the assets and liabilities on such separation, the evidence of the dissenting arbitrator as to the basis on which the valuation of the assets and liabilities was made is properly admissible. —In the valuation of the assets and liabilities: (1) school houses are not proper subjects of valuation, being vested in school boards whose limits of control may or may not be the same as that of the municipal corporations; (2) sidewalks are properly such subjects, for though under s. 500 of the Act the soil and freehold thereof are vested in His Majesty, yet the possession and control of and liability therefor are in the municipal corporations, and in no other body; (3) mistakes in the construction of works, *e.g.*, waterworks, should not be given effect to in the reduction of the value of the asset, being common incidents of such construction. *Re Southampton & Saugeen*, 12 O. L. R. 214, 7 O. W. R. 334.

Injury to lands of private owner — *Lowering grade — Arbitration — Vancouver Incorporation Act.*]—The owner of property abutting on a street, the grade of which has been lowered by the corporation, is entitled to an arbitration to determine whether his property has been injuriously affected. *Bishop of New Westminster* v. *Vancouver*, 14 B. C. R. 136, *S. C., sub nom. Re Roman Catholic Bishop of New Westminster and Vancouver*, 9 W. L. R. 587.

Lands injuriously affected — *Interest.*]—If in the construction of a public work by a municipality land of a private owner is injuriously affected, and the compensation therefor is determined by arbitration, interest cannot be allowed by the arbitrator on the amount of compensation awarded. Judgment in 19 C. L. T. 203, 26 A. R. 351, affirmed. *Re Leak & Toronto*, 20 C. L. T. 221, 30 S. C. R. 321.

Limitation of actions—*Mandamus.*]—The limitation of one year prescribed by s. 244 of the Municipal Clauses Act for commencing actions against a municipality, applies to *mandamus* proceedings to compel a municipality to appoint an arbitrator to determine the amount of compensation for land taken for road purposes. *Regina* v. *District of Mission*, 21 C. L. T. 398, 7 B. C. R. 511.

Removal of building — *Compensation —Damages—Motion to set aside award.*]—In an action to set aside an award made under the Towns Incorporation Act, 1888, s. 147, the award was set aside as bad on its face, because the subject of damages caused by the removal of a building and fence had not been properly dealt with; the arbitrators, in this connection, having considered only the item of the rent the owner lost while the building was being removed.—Arbitrators, in proceedings under this chapter, have no power to provide for compensation except by awarding money.—Effect of laches, in proceedings to set aside award, considered. *McAskill* v. *New Glasgow*, 40 N. S. R. 58.

3. Bonus.

Aid to railway — *By-law to issue debentures and to purchase shares in railway —Council refused to pass by-law—Manda-*

mus to council.]—Application for an order for a *mandamus* to compel the members of the township council of Blenheim to pass a by-law to aid the People's Railway, by issuing debentures to the extent of $15,000, and purchasing shares in the railway company. The by-law had been approved of by the ratepayers but the council refused to give the by-law its third reading:—*Held*, that it was not a case where the discretion of the council should be interfered with. Application refused. *Re Blenheim* (1910), 15 O. W. R. 186.

By-law — *Condition precedent — Part performance — Assignment of obligation—Notice — Signification.*]—An action for the annulment of a municipal by-law will lie, although the obligation thereby incurred be conditional, and the condition has not been and may never be fulfilled.—Where a resolutory condition precedent to payment of a bonus to a railway company, under a municipal by-law in aid of construction and operation of works, has not been fulfilled within the time limited on pain of forfeiture, an action will lie for the annulment of the by-law at any time after default, notwithstanding that there may have been part performance of the obligation undertaken by the railway company, and that a portion of the bonus has been advanced to the company by the municipality.—In an action against an assignee for a declaration that an obligation has lapsed and ceased to be exigible on account of default in the fulfilment of a resolutory condition, exception cannot be taken on the ground that there has been no signification of the assignment, as provided by Art. 1571 of the Civil Code of Lower Canada. The debtor may accept the assignee as creditor, and the institution of the action is sufficient notice of such acceptance. *Bank of Toronto* v. *St. Lawrence Fire Insurance Co.*, [1903] A. C. 59, followed. *Sorel* v. *Quebec Southern Ry. Co.*, 26 C. L. T. 70, 36 S. C. R. 686.

By-law—*Promotion of manufactures — Removal of industry "already established" —Motion to quash registered by-law — Delay.*]—By s. 9 of the Municipal Amendment Act, 1900, a new sub-section, 12, is added to s. 591 of the Municipal Act, R. S. O. 1897 c. 223, which new section provides that councils of municipalities may pass by-laws for granting aid by way of bonus for the promotion of manufactures within the limits of the municipality, but (e) "no by-law shall be passed by a municipality for granting a bonus to secure the removal of an industry already established elsewhere in the province:—*Held*, that by-laws of a town granting aid to persons who were carrying on a manufacturing business in a village, and who, as the by-law recited, were about to remove their plant and machinery and carry on the same business in the town, were illegal under cl. (e), notwithstanding that these persons had determined, before negotiating with the town, to remove their business from the village at all events, and to such other place as should offer the largest inducement. The by-laws were quashed upon an application made within three months after they were registered, and nearly three months after they were passed, notwithstanding that the industry had been in the meantime established in the town and the money paid over to the manufacturers. *Re Markham & Aurora*, 22 C. L. T. 205, 3 O. L. R. 609, 1 O. W. R. 289.

Expropriation of land — *Resolution of council—Confirming act—Plans.*]—A municipal council passed a resolution by which it agreed to pay for lands required for the right of way, station grounds, sidings, and other purposes of a railway, as shewn upon a plan filed under the provisions of the general Railway Act. At the time of the resolution, there were 4 such plans filed, each shewing a portion of the land proposed to be taken and including in the aggregate a greater area than could be expropriated for right of way and station grounds under the provisions of the Acts applicable to the undertaking of the railway company. The legislature passed an Act confirming such resolution. To an action by the owner of the land taken, on an award fixing the value of that in excess of what could be expropriated, the corporation pleaded no liability on account of such excess, and also that there was no specific plan on file describing the land: — *Held*, affirming the judgment in *McIsaac* v. *Inverness*, 38 N. S. R. 76, that the first defence failed because of the Act confirming the resolution, and, as to the second, that the four plans should be read together and considered to be the plan referred to in such resolution. *Inverness* v. *McIsaac*, 26 C. L. T. 187, 37 S. C. R. 75.

Guaranteeing debentures of company — *Approval of governor in council — Hypothec — Revenues — Debenture holders.*]—1. A by-law authorising a municipal corporation to guarantee debentures issued by a company, is not valid until it has been approved by the Lieutenant-Governor in council.—2. A general hypothec given by a company on its present and future property is null; and where special authority is conferred on a company by its charter to give such hypothec in favour of its creditors, or of the holders of bonds, debentures, and other securities, such special authority does not enable the company to give a valid general hypothec on present and future property in favour of a municipal corporation which has become surety for the debentures of the company.—3. In any event, the guaranty of the corporation, under the by-law in this case, was only to pay over two-thirds of the revenues collected, and as no revenues had been collected the action could not be maintained.—4. The warranty being invalid, even innocent holders of the debentures issued have no action against the warrantor (the municipal corporation.) *Pointe Gatineau* v. *Hanson*, 10 Que. K. B. 346.

Interest—*Illegal payment — Liability of councillors — Arbitration and award.*]—In the year 1896, by special Act, an agreement between the corporation of a town and a company was confirmed, by which on completion of certain works the company were to be paid a bonus. The works were proceeded with, but alterations became necessary, and a new agreement was entered into, in accordance with which the works were completed in January, 1900. In April of that year another special Act was obtained authorising the payment of the bonus notwithstanding the alterations, nothing being said as to interest. The bonus was thereupon paid, and the company claimed payment of

interest on the amount from the date of completion of the works. After some negotiation, the town and the company agreed to obtain the opinion of counsel, who, on an incomplete (as was found) statement of facts, advised the payment of the claim, and payment was made in spite of the protest of the plaintiff:—*Held*, in an action by the plaintiff on behalf of himself and all other ratepayers, that there was no right to interest; that the payment was illegal and a breach of trust; that there had not been an award by an arbitrator but merely an expression of opinion, which was no protection, and that the councillors who had authorised the payment, and the company who had received it, were bound to make good the amount to the corporation, which was made a party to the action to receive payment.—*Semble*, that the council of a municipal corporation may perhaps refer to arbitration a question of fact falling within their ordinary administrative duties, but cannot refer a question of law. *Patchell* v. *Raikes*, 24 C. L. T. 212, 7 O. L. R. 470, 3 O. W. R. 457.

Lease of municipal property—Bonus—Manufacturing industry — Submitting by-law to electors—Closing up public place—Exemption from municipal taxation—School taxes—Application to quash — Time—Promulgation—Discretion. *Re Lamb & Ottawa*, 4 O. W. R. 408.

Manufacturing corporation — *By-law closing part of highway—Private interest—Bonus clauses of Municipal Act—Reducing width of street — Rights of owners purchasing according to plan.*] — A municipal corporation passed a by-law to reduce width of a street and conveyed to a manufacturing corporation the part taken from the street as a bonus. There was no contract between the manufacturing and municipal corporations that the manufacturing corporation should employ additional men nor enlarge their plant:—*Held*, that this fact alone did not invalidate the by-law nor prove that the by-law was passed in interests of a private corporation and not in the interests of the public. The plaintiff purchased lands on the street in question according to a registered plan.—*Held*, that the fact that the registered plan showed the street to be 80 feet in width did not prevent the municipality passing a by-law to reduce its width to 66 feet. *Re Inglis & Toronto*, 5 O. W. R. 489, 9 O. L. R. 562.

Personal interest of councillors — *Necessity for by-law—Approval—Limitation of actions—Municipal code.*]—No member of a council can take part in the discussion of any question in which he has a personal interest.—2. The aid to a factory must be granted, not by a simple resolution, but by a by-law approved by the municipal electors and the Lieutenant-Governor in council.—3. The prescription enacted by art. 708, M. C. does not apply to regular actions in the Superior Court, but only to proceedings taken under the code. *Beauregard* v. *Roxton Falls*, 24 Que. S. C. 474.

Res judicata — *Construction of aqueduct—Exclusive privilege—Monopoly.*]—To an action brought to recover a bonus of $3,000 voted for the construction of an aqueduct, a municipal corporation cannot plead matters which it has already invoked and which have been pronounced against in an action which has been finally dismissed by the Supreme Court of Canada, and which was instituted by such corporation to set aside the contract in pursuance of which the bonus was voted.—2. A municipal corporation may pass a by-law granting a bonus to persons who undertake to construct an aqueduct within the limits of the municipality.—3. A municipal corporation, by virtue of art. 657, C. M., may grant an exclusive privilege for not more than 25 years to persons who undertake to construct an aqueduct within the limits of the municipality. Such privilege, if it is limited to the exclusive right to lay pipes in the streets, is not unconstitutional and does not constitute an illegal monopoly.—4. Even if the terms in which such privilege has been granted are of such a nature as to extend this privilege to a period exceeding 25 years, that would not make the contract and by-law totally void, and the bonus granted by such contract and by-law for the construction and working of the aqueduct can always be claimed. *Larivière* v. *Richmond*, 21 Que. S. C. 37.

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4. BOUNDARIES.

Assessment of island—*Shore or coast line.*]—Itala or Eagle Island is within the boundaries of the municipality of North Vancouver. The meaning of "coast" line and "shore" line considered. *Mowat* v. *North Vancouver*, 9 B. C. R. 205.

Charter — *Title to fisheries.*]—By its charter the city of St. John is granted "all the lands and waters thereto adjoining or running in, by, or through the same" within defined boundaries, including a course at low water mark: "as well the land as the water, and the land covered with water within said boundaries." The fisheries between high and low water mark of the harbour are declared by the charter to be for the sole use of the inhabitants, but by Act of Assembly they are directed to be annually sold by the city:—*Held*, that where the city is bounded by low water mark it has not a title to sell the right of fishing beyond such mark, though within the harbour. *St. John* v. *Wilson*, 22 C. L. T. 209, 2 N. B. Eq. R. 398.

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5. BRIDGES.

Bridge — *Definition of — County bridges —Municipal Act.*]—A structure for crossing the waters of a lake, with a wooden section 243 feet long spanning the waters at low water, and embankments at either end of 140 feet and 200 feet respectively, the whole width being covered at high water, is a bridge over 300 feet in length within the meaning of s. 617 (*a*) of the Consolidated Municipal Act, 1903, whereby certain bridges over that length may be declared county bridges.—*Semble*, that s. 617 (*a*) is not to be read as applying only to bridges crossing rivers, streams, ponds, or lakes, to the exclusion of bridges crossing ravines. *In re Mud Lake Bridge*, 12 O. L. R. 159; *In re Victoria & Carden*, 8 O. W. R. 1.

By-law—*Money—Illegality — Maintenance — Reconstruction.*]—When a municipal corporation claims payment of a sum of money which it alleges is due to it by virtue of a by-law, *procès verbal*, or resolution, by a person or corporation, the latter can defeat the demand by pleading specially that the plaintiff corporation cannot claim such payment because the by-law, *procès verbal*, or resolution is illegal, and the defendant can prove his allegations just as if he made them in an action to set aside the by-law, etc.—2. A by-law passed by a county council, even if so passed with the requisite formalities, is illegal if it imposes upon two municipalities the cost *en bloc* of a bridge which the county corporation has taken under its charge and declared to be a public bridge.—3. A by-law imposing upon two municipalities the cost of the rebuilding of an iron bridge without designating the lands which are to be bound to contribute to such cost, is void.—4. A by-law passed for the maintenance only of a wooden bridge, and involving but a trifling expense, cannot serve to authorise, without further formalities, the rebuilding in iron of this same bridge, which will cost much more. *Megantic* v. *Nelson*, 17 Que. S. C. 87.

Counties — *Board of delegates — Superintendent—Appointment of—Local work.*]—The council of the county of Hochelaga, having been served with a petition for the repair or reconstruction of a municipal bridge, which was under the charge of the counties of Hochelaga and Jacques Cartier, by virtue of old *procès-verbaux*, ordered the reference of the petition to the board of delegates of the two counties, and this board named a special superintendent to see to the work of repairing or reconstructing the bridge, with power to make all amendments to the *procès-verbaux* relating to the bridge. The superintendent accepted the commission, but afterwards, upon the ground that his powers were not extended enough, offered his resignation, and asked to be appointed anew with more extended powers, and particularly with power to declare that the bridge was a local one, in charge of the authorities at Sault au Recollet. The board of delegates accepted the resignation of the special superintendent, decided to leave the bridge a county bridge, under the authority of the board, and appointed anew the same special superintendent, with power to amend or abrogate the *procès-verbaux* in force, after having taken the advice of those interested at a meeting. The special superintendent proceeded anew, called those interested together, but, without consulting them on that point declared that the bridge was a local one; and his report was homologated by the board of directors:—*Held*, that the board of delegates had no power to appoint a special superintendent.—2. That the proper procedure was to have the special superintendent named by the council of the county of Hochelaga, and he would then have made his report to that council, who would then have submitted it to the board of delegates.—3. That the superintendent, besides, had no power to declare the bridge a local one, the board having decided, when appointing him, to leave it a county bridge. *Sault au Recollet* v. *Hochelaga*, 17 Que. S. C. 59.

Liability of county for maintenance of bridge crossing river—Width of river — Municipal Act, ss. 613, 616. *Re Newburgh & Lennox and Addington*, 10 O. W. R. 541.

Liability of county for maintenance of bridge over stream—Bridge or culvert — Definition of culvert. *Dufferin* v. *Wellington*, 10 O. W. R. 239.

Maintenance — *Local municipalities — Ratepayers and lands benefited.*]—When the board of delegates has declared a local bridge to be a county bridge, the local corporation charged with the maintenance of this bridge must determine by by-law which of its ratepayers shall contribute to the maintenance of such bridge; the effect of the decision of the board of delegates not being to charge the bridge upon all the ratepayers of the local municipality. Although it may be irregular to impose the work in connection with a bridge upon the owners of parcels of land designated on a plan by different numbers, without indicating the number of the lot which contains the land through which the stream flows, nevertheless such irregularity is not sufficient to make the by-law void, if it is proved that these lands, although they bear different numbers, form only one and the same parcel. Nevertheless, a municipal bridge being in principle a charge upon all the ratepayers of the range upon which it is situated (Art. 856, C. M.), certain ratepayers of this range cannot by by-law be exempted from the maintenance of this bridge, on the ground that they have already been charged with other bridges built over watercourses which such ratepayers have made to drain their own lands and in their own interests exclusively. *Dupuis* v. *St. Isidore*, 17 Que. S. C. 482.

Maintenance by counties — *Computation of length — Embankments — Municipal Act, 1903, s. 617a.*]—A bridge crossing Casselman creek, in the township of Williamsburg, was held not to be a bridge over 300 feet in length, within the meaning of s. 617a of the Consolidated Municipal Act, 1903, the Court being of the opinion that the embankments at the ends of the wooden structure (44 feet long) which spanned the creek were not, upon the evidence, to be regarded as forming part of the bridge. *In re Mud Lake Bridge*, 12 O. L. R. 159, distinguished.—Order of the senior Judge of the County Court of Stormont, Dundas, and Glengarry, declaring the bridge a county bridge, reversed. *Re Williamsburg & United Counties of Stormont, Dundas, & Glengarry, Re Casselman Creek Bridge*, 15 O. L. R. 586, 11 O. W. R. 235.

Maintenance by county—Bridge over 300 feet in length—Approaches—Evidence—Municipal Act, s. 617a. *Re Maidstone & Essex*, 12 O. W. R. 1190.

Non-repair — *Judgment for damages — Contribution by ratepayers—Assessment.*]—A municipal corporation cannot, under Arts. 1027 *et seq.*, C. M., levy by way of assessment from the ratepayers liable for the maintenance of a bridge the amount which such corporation has been condemned to pay by a judgment against the corporation for damages arising from an accident which happened by reason of the bridge being out of repair. Such a debt, resulting from a *quasi-tort*, is

due severally by all those who are charged with the maintenance of the bridge, and cannot be apportioned among them according to the extent of their properties and in the proportion in which they are liable for the work of the bridge. *Pinsonnault* v. *St. Jacques le Mineur*, 18 Que. S. C. 385.

Over river — *Connecting town and township — Out of repair — Assumption of bridge by county — Duty of county council to repair — Enforcement of—Municipal Act (1903), ss. 613-618.*]—A bridge crossing a river, the boundary between a town and township, became out of repair. The township applied to the County Judge under Municipal Act (1903), s. 618, as amended by 9 Edw. VII. c. 73, s. 29, and his Honour declared that the duty and liability of maintaining the bridge belonged to and rested on the county—Divisional Court *held*, that the effect of the statute, as amended, not only gave jurisdiction to the county, but it imposed upon the county the duty to maintain such a bridge as the one in question. Appeal dismissed with costs. *Re Pembroke & Renfrew* (1910), 16 O. W. R. 454, 21 O. L. R. 360, 1 O. W. N. 927.

Reconstruction — *Urgency — Irregular resolution—Liability for costs—Borrowing—Levying rate.*]—The council of a municipality had in July, 1895, by a simple resolution, declared that bridges and roads should be at the charges of the municipality, and in August, 1895, also by resolution, it was decided to reconstruct, at the expense of the corporation, a certain bridge. The reconstruction work having been done, the council on the 14th October, 1895, resolved to pay the accounts of those who had done it, and on the 4th November, 1895, the mayor was authorised to borrow $300 for this purpose upon a promissory note, which he did. On the 7th January, 1896, a by-law was passed ordering a levy upon the municipality, among other sums, of $310.50 for the cost of reconstruction of this bridge. The resolutions of July and August were quashed by the Superior Court (in a proceeding begun on the 1st October, 1895, the works being then nearly finished), upon the ground that the council having jurisdiction over the matter should have proceeded by by-law coming into force on the 1st January following; and in the present case, there was nothing in the evidence to shew that the bridge was a municipal bridge at the charges of all the owners or occupants of properties fronting on the road of which this bridge formed a part, or that it was a part of the works of the watercourse which it crossed and at the charges of the ratepayers who were liable therefor:—*Held*, Blanchet, J., dissenting, that, in adopting the two resolutions of July and August, the corporation had only acted in an irregular manner in a matter within its jurisdiction; that having caused to be performed the work of reconstruction—which was urgent—in virtue of such resolutions, it had made itself liable to those who had done the work; and that it could borrow money upon a promissory note to pay those persons and assess upon the municipality an amount sufficient to repay the loan. *Notre-Dame de Bonsecours* v. *Bessette*, 9 Que. Q. B. 423.

Township bridge — *User by other municipalities — Important means of communication — Repair and maintenance — Injustice to township—Liability of county.*]—By s. 617a of the Con. Mun. Act 3 Edw. VII. c. 19 (O.), where a township bridge is over 300 feet in length, the township council may, by resolution, declare that by reason of such length, and that it is being used by inhabitants of municipalities other than the township, and is situated on a highway, being on important road and affording means of communication to several municipalities, it is unjust that the township should be liable for its maintenance and repair and that such liability should be imposed on the county, and an application may be made to the County Court Judge to have it so declared:—*Held*, that such user need not be by the inhabitants of municipalities within the county, the material point being its extensive use for travel by neighbouring municipalities, whether in or out of the county; nor that the road which affords such means of communication should either be a line of road extending through the municipalities referred to or a main trunk road with branches into different municipalities; all that is necessary is that it should be an "important road" connected with other roads or ways forming a means of communication, whereby the inhabitants of such municipalities may pass and repass over the said bridge.—Judgment of a County Court Judge affirmed with a variation. *McNab* v. *Renfrew*, 11 O. L. R. 180, 6 O. W. R. 523.

Undertaking to repair and maintain bridge—Contract with ratepayers — Enforcement—Remedy by indictment. *Thompson* v. *Yarmouth*, 1 O. W. R. 556.

See RAILWAYS AND RAILWAY COMPANIES.

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6. BY-LAWS.

Action to quash municipal by-law—*Powers of Superior Court—M. C. 100, C. P. 50.*]—The remedy by suit before the Superior Court, authorised by 56 V. (Que.), c. 43, amending M. C. 100, and by C. P. 50, to quash, as being null and void, illegal and abusive decisions of municipal councils and of Courts of inferior jurisdictions, must not be interpreted to mean, however, that the Superior Court has the right to arbitrarily substitute its opinion for that of such corporations or minor Courts, particularly when they act legally, within the limits of their jurisdiction and from reasonable motives. *Fontaine* v. *Desrosiers* (1910), 17 R. de J. 95.

Animals running at large — *Fence—By-law—Establishment of closed districts—Resolution—Common law rule—Cattle at large.*]—The prevention of cattle going at large in a given district of a municipality may be brought about by a by-law of the municipal council made in respect to and applicable to the district in question, but the legislature, in delegating powers to the municipal councils in respect to the creation of closed districts, has limited that power by requiring that every by-law must be submitted to the Governor in council for his assent, thus enabling the district affected to be heard and the proposed by-law sent back for modification. A by-law enabling the municipal council, on petition of a majority

of the ratepayers, to set off any portion or area of the municipality as a closed district, and to make applicable to such closed districts such by-laws within its power as the council in its discretion may deem necessary, is *ultra vires*.—A resolution that the prayer of the petition for a closed district be granted, and that the bounds of the district be (naming them), is bad upon its face.—*Per* Meagher, J., dissenting on the point, that the presentation of a petition for a closed district gives the council to which it is presented power to hear and inquire into the matter, and their conclusion, if erroneous, can only be inquired into on *certiorari* and not collaterally.—*Per* Townshend, Meagher, and Russell, JJ. (Graham, E. J., and Longley, J., dissenting), that in Nova Scotia it is not lawful to suffer cattle to run at large upon the public highway. The common law rule on this subject is still in force, and has not been affected by the provincial statutes in respect to fences and the impounding of cattle, or the establishment of closed districts.—*Per* Russell, J., that the effect of the legislation in respect to closed districts is merely to confer more complete and convenient remedies, under by-laws passed by the municipal councils for the prevention of cattle running at large, than those afforded by the common law. *Dickie* v. *Gordon*, 39 N. S. R. 311.

Animals running at large — *Fences —By-law—Municipal Act, R. S. M. 1902 c. 116, ss. 643 (b), 644 (d)—Trespass.*]—At common law the owner of animals must keep them from trespassing on his neighbours' crops, though enclosed by no fence or by an insufficient fence.—2. A by-law of a municipality passed under ss. (b) of s. 643 of the Municipal Act, R. S. M. 1902 c. 116, which does not expressly permit any animals to run at large, is not sufficient to protect the owner of animals from liability for their trespasses on lands, even if unenclosed by a fence of the character required by the by-law.—3. A clause in such a by-law providing that no person shall be entitled to recover damages for injuries done to his crops by trespassing cattle, unless his fences are of the character required by the by-law, if enacted prior to the passage of the amendment of the Municipal Act which is now s.-s. (d) of s. 644, was *ultra vires* of the council of the municipality, and was not ratified or legalised by such amendment. *Rex* v. *Nunn*, 15 Man. L. R. 288, followed. *Wart* v. *Drysdale*, 6 W. L. R. 234, 17 Man. L. R. 15.

Annulment of a municipal by-law in a town — *Procedure — Direct action— Exception to the form — C. P. 174, 3 Edw. VII. c. 38, ss. 368, 372.*]—The right to contest a municipal by-law in a town is not limited to proceeding by petition as provided by Art. 368 and following of the Statute of 1903, concerning cities and towns, but may also be exercised by a direct action. *Allard* v. *St. Pierre & Montreal Light Heat & Power Co.* (1909), 10 Que. P. R. 433.

Application to quash — *Affidavits* — Time for filing. *Re Fox & Owen Sound*, 3 O. W. R. 654.

Application to quash — *Countermand — Substitution of another ratepayer.*] — A summary application to quash a municipal by-law was made at the instance and upon the behalf of nine interested ratepayers, who combined to make the necessary deposit, and put forward R., one of their number, as applicant. R. duly launched the application, but afterwards gave the respondents notice of discontinuing it. After the three months allowed by the Municipal Act for making such an application had expired, the application of R. not, however, having been dismissed, one of the remaining ratepayers applied to be added or substituted as an applicant.—*Held*, that he should be allowed to continue the proceedings in R.'s name, on the usual terms of indemnifying him against costs. *Re Ritz & New Hamburg*, 22 C. L. T. 410, 1 O. W. R. 574, 690, 4 O. L. R. 639.

Application to quash — Time for—Registration of by-law. *Re McClelland & Sutton*, 3 O. W. R. 278.

Application to quash—*Vacation.*] — The Court has no jurisdiction, during vacation, to hear a petition to annul a by-law of the city of Montreal. *Franklin* v. *Montreal*, 5 Que. P. R. 76.

Approval of class of ratepayers — *Submission to vote—Notice to ratepayers generally — Invalid by-law — Approval of Lieutenant-Governor.*]—When a municipal by-law requires approval by the majority of the class of persons interested, for example, the owners of land in a certain quarter of the municipality or in certain streets, a notice calling upon all the ratepayers of the municipality generally to vote is void, and a vote taken pursuant thereto is without effect. On this ground, a by-law, although it has received the approval of the Lieutenant-Governor, will be declared void for non-fulfilment of an essential formality. *Aubertin* v. *Village du Boulevard St. Paul*, 33 Que. S. C. 289.

Approval of electors — *Open voting — Violation of provisions of Municipal Code—Will of majority expressed — Absence of fraud — Validity of by-law — Saving clause.*]—It results from the tenor of the articles of the Municipal Code touching the ratification of certain by-laws by the vote of the municipal electors, that this vote ought to be taken publicly and not in private. This condition, however, is not imposed on pain of nullity. Therefore, although the mayor, presiding at the voting, excludes the public from the place where it is held, and only admits the electors to vote one by one, if the total vote given is that of the absolute majority of the inscribed electors, and if no proof is made of fraud or prejudice, it should be accepted and validated by the application of Art. 16 of the Municipal Code. *Robitaille* v. *Quebec*, 18 Que. K. B. 184.

Asphalting a street — *By-law quashed — Municipal Act, s. 674.*] — A Toronto by-law levying rates upon certain property to pay for asphalting the street in front of said property, was quashed on the grounds that the city had failed to serve the owner with the proper notice prescribed by

Municipal Act, s. 671. *Re Gillespie* (1892), 19 A. R. 713, affirmed by S. C. of Can., followed. When a statute confers a right, privilege, or immunity, the regulations, forms or conditions which it prescribes for its acquisition are imperative, in the sense that non-observance of any of them is fatal. *Gladman* v. *McNab* (1909), 14 O. W. R. 25, at p. 29, and *Barton* v. *Hamilton* (1909), 13 O. W. R. 1118, at p. 1131, followed. *Hodgins* v. *Toronto* (1909), 14 O. W. R. 642, 1 O. W. N. 31.

Billiard licenses — *Regulation of by-law—Prohibitive license fee—Object of municipal council.*] — Motion to quash a township by-law for the licensing and regulating the keeping of billiard tables for hire and fixing a license fee. — Middleton, J., *held*, that he could not, upon the material, find that this by-law was in its nature prohibitive, even though the result might be that no one would undertake to establish a billiard room in the township. There might be no reasonable demand for such a place, and the fact that even in the absence of any license or regulation until recently there was no such resort, indicated that this was the case. The motion dismissed with costs. *Re Foster & Raleigh* (1910), 16 O. W. R. 1012, 2 O. W. N. 65, 22 O. L. R. 26.

Billiard rooms — Licensing powers — Provisions as to times for closing—Lord's day observance—Constitutional law — Provision as to screens—Discrimination. *Re Fisher & Carman* (Man.), 1 W. L. R. 455.

Bonus — *Factory—Number of persons employed—Demand.*]—To satisfy a municipal bonus by-law requiring that the respondents should employ at least a hundred persons during the first year and from a hundred and fifty to two hundred during the second and subsequent years, it is sufficient to have employed and paid on an average the number of persons mentioned in the by-law.—The demand upon the appellants by two letters, the first coming from the respondents and the second from their solicitors, was sufficient, the respondents not being obliged to furnish proof that the conditions of the by-law had been fulfilled, seeing that the by-law itself did not require it. *Levis* v. *King*, 9 Que. Q. B. 1.

Breach of by-laws — *Injunction — Physical force — Superior Court — Jurisdiction — Penalties — Powers of corporation — By-law imposing fine and imprisonment.*] — While a municipal corporation may, like any other person, seek redress by action before the courts in respect of a specific wrong done it, in violation of the law, the courts have no jurisdiction, in the absence of such a wrong, to deal with a demand upon them by such a corporation to restrain breaches of its by-laws, or to authorise it to prevent them by physical means. —The Superior Court has jurisdiction of actions to recover penalties imposed by municipal by-laws, when of the amount of $100 in Montreal and Quebec, and of $200 in the other districts.—A municipal by-law which imposes a fine and imprisonment in default of payment, does not conform to the law which authorises the imposition of a fine not exceeding a given sum, or an imprisonment not exceeding a given number of days; it is therefore null and void, and cannot be enforced by action. *Corp. of the Parish of St. Laurent* v. *Roy*, 30 Que. S. C. 333.

Bringing into effect — *Printed roll—Attestation — Injunction — Action — Certiorari.*]—Where a revising by-law purports to bring into effect a number of by-laws contained in a printed roll alleged to be attested by the mayor and city clerk, but such roll was not, in fact, so attested until after the final passage of the revising by-law, such by-law has failed to bring into force any by-law contained in such roll. Sections 91 and 92 of the Municipal Clauses Act do not prevent suit to restrain a municipality from proceeding under a by-law which has not been quashed, but only prevent an action, for damages already suffered, till the by-law is quashed. The validity of such a by-law may be determined in *certiorari* proceedings. *Traves* v. *Nelson—In re Traves*, 7 B. C. L. R. 48.

Building by-law—*Tearing down—Damages.*] — The city of Montreal under its charter and by-laws, has the right to have a building erected within the city limits torn down when it is a menace to public safety by reason of its faulty construction. Nevertheless, the city will be liable for damages caused to the neighbouring proprietors by such tearing down. By-law (City of Montreal), No. 107, ss. 56, 57, 61. *Riopelle* v. *Montreal*, 16 R. L., n. s., 139.

Building regulations — *Conviction — Costs — Conveyance to gaol.*]—Mere disobedience of an order of the building inspector in the city of Montreal, under by-law 107, is not of itself an offence and is not sufficient to justify a conviction, and the mere statement by him, in a notice, that a breach of some building regulation has been committed does not prove its existence. The evidence must establish, and the conviction must set out, both the infraction and the notice to amend.—2. Section 11 of by-law 107 of the city of Montreal does not in express terms assert and require that the foundations of all buildings within the city must be of stone only.—3. When a statute or by-law states that imprisonment ends on payment of fine and costs, a conviction which requires in addition the payment of charges for conveyance to prison is illegal, and will be set aside. *Brunet* v. *Montreal*, 17 Que. S. C. 81.

Building regulations — *Ultra vires — Vancouver Incorporation Act, s. 125 — Power to regulate erection but not alteration.*] — Defendant was convicted for unlawfully altering a building without first having obtained a permit from a building inspector:—*Held*, that the by-law purported to be enacted under the above section is *ultra vires* and a conviction for not obtaining such permit before commencing to build or alter cannot be sustained. The power of the council to pass the by-law in question can be raised on a motion to quash the conviction. The "good rule and government" clause of the above section not extended to cover the present case, the alterations being made to convert the building into a gambling house. *Loo Gee Wing* v. *A. P. Amor* (B.C.), 10 W. L. R. 383.

Buildings — *By-law — Mistake of officers of corporation — Liability for damages.*]—Where the by-laws of a town impose on those who desire to build houses therein the preliminary obligation of having the level and alignment according to which the foundations must be laid fixed by officers of the town corporation, an error in the figures and plans furnished by such officers makes the town corporation responsible for the damages which are the immediate and direct consequence of the error. *Dubois* v. *St. Louis*, 30 Que. S. C. 289.

By-laws passed enacted in good faith under provincial statutes should not be set aside unless they appear to be so unreasonable, unfair or oppressive as to be a plain abuse of the powers conferred upon the municipal council. *Beauvais* v. *Montreal* (1906), 42 S. C. R. 211, reversing 17 Que. K. B. 420 and 30 Que. S. C. 427.

Cattle — *Highway—License fee.*]—A by-law passed by a township council under s. 546 (2) of R. S. O. 1897, c. 223, prohibiting the running at large of cattle, horses, sheep, swine, or geese, and for impounding those contravening the by-law, was amended by a by-law subsequently passed, whereby milch cows, heifers, and steers under two years, were permitted to graze on the public highways of the township, on payment of an annual fee of $2 for each animal, such animal to have securely fastened thereon a tag bearing a registered number, furnished by the clerk at the township's expense, the township also furnishing a book to contain such registered numbers, all moneys received to be the common property of the township. The by-law also contained a provision for the appointment of inspectors:—*Held*, that the amending by-law was valid; that the sum named as a license fee was not excessive, and was merely for the purpose of meeting the expenses of carrying out the by-law, and not for raising a revenue; and that the permission to graze on the highways was not *ultra vires* of the corporation. *In re Fennell & Corporation of Guelph*, 24 U. C. R. 238, distinguished. *In re Ross & Township of East Nissouri*, 21 C. L. T. 287, 1 O. L. R. 553.

Closing road allowance—*Notice of — —Sufficiency—Providing way.*]—A farm lot occupied by the owner as one farm was diagonally divided by a railway into two separate parcels, having a farm crossing provided by the railway company, giving access from one parcel to the other. In addition to a road which afforded access to the parcel where the residence was, there was another road which gave access to the other parcel, and which, except by the farm crossing, was the only mode of access thereto:—*Held*, that the latter road came within s. 629 (1) of R. S. O. 1897, c. 223, and could not be closed up by the municipal council, unless, in addition to compensation, another road or way was provided in lieu thereof. A by-law passed by the council directing the closing up of such road, without the requirement of the statute being complied with, was therefore quashed. Order of Boyd, C., 21 C. L. T. 122, reversed. *Per* Boyd, C.: A notice providing that anyone desiring to petition against the passing of a by-law to close a road must do so within one month from the date thereof, is sufficient under s. 632 (1) (a) of the Act. *In re Martin & Moulton*, 21 C. L. T. 376, 1 O. L. R. 645.

Closing street — *Ordinance lands — Dominion of Canada — Consent—Void by-law — Subsequent consent — Amending by-law.*]—The Consolidated Municipal Act, 3 Edw. VII. c. 19, s. 628, provides that, without the consent of the Government of the Dominion of Canada, no municipal council shall pass a by-law for the stopping up or altering the direction or alignment of any street made or laid out by the Dominion of Canada, and a by-law for any of the purposes aforesaid shall be void unless it recites such consent. On the 26th September, 1904, the municipal council of Toronto passed by-law 4420, stopping up and closing a certain portion of Strachan avenue in that city. It was afterwards discovered that Strachan avenue was a street which had been laid out by the Dominion of Canada, being part of the Ordinance survey, and the consent of the Dominion Government was sought and given by an order in council of the 6th October, 1904. On the 10th October, 1904, the city council passed by-law 4428 amending by-law 4420 by reciting the consent of the Dominion Government. A motion to quash the by-law was launched, and notice served on the 1st October, 1904, before the passing of the amending by-law:—*Held*, that when by-law 4420 was passed, the powers of the city council were spent, and, as it was a void by-law by reason of the consent of the Dominion Government not having been obtained, it could not be given life and rendered valid by the subsequent consent of the Dominion Government and the passing of the amending by-law, and must be declared invalid. *In re John Inglis Co. & Toronto*, 24 C. L. T. 396, 8 O. L. R. 570, 4 O. W. R. 253.

Closing street—Private interests — Notice to persons affected—Increased expense of maintenance. *Re Waterous & Brantford*, 4 O. W. R. 355.

Confirmation of hotel license—*Action to quash resolution—Collector of revenue—Issue of license—Interest of ratepayer—Irregularity.*]—A municipal council, when it confirms a certificate to obtain a hotel license, under Art. 18 of the License Act, does not represent the municipal corporation, but is a special authority created by that Act.—2. Such corporation cannot be sued in an action to quash the resolution confirming the certificate.—3. The collector of revenue is the sole judge of the legality of such resolution.—4. One who, by an action before the Superior Court, seeks the quashing of such resolution, must have an interest as a contributory or elector to do so, and such interest no longer exists after the collector of revenue has, upon production of the confirmed certificate, issued a license in favour of the person named in the certificate.—5. A resolution of a municipal council should not be annulled no matter what irregularity it may be tainted with; it should be annulled only by reason of the absence of essential formalities; or for irregularities which are of such a nature as to cause prejudice.—6. The indication of its date upon a certificate for a hotel license, and the competence of the officer who takes the affi-

davit accompanying it, are not essential things, and any defect in these regards does not constitute an irregularity which causes prejudice. *Duhaime* v. *Parish of St. Francois du Lac*, 19 Que. S. C. 162.

Construction of sidewalk — *No by-law authorising — Injunction restraining construction until by-law is passed.*]—Plaintiffs moved to restrain defendants from constructing a sidewalk.—Middleton, J., *held*, that no by-law had been passed by the council authorising the construction of the walk, and there was no authority in the municipality to construct the walk without a by-law, and granted an injunction restraining the construction of the walk in question unless and until a by-law is passed in accordance with the requirements of the Municipal Act. Costs fixed at $40 to plaintiff. *McLean* v. *Sault Ste. Marie* (1910), 16 O. W. R. 966, 2 O. W. N. 41.

Diversion of road — Interests of individuals—Contrary to public interest. *Re Pelot & Dover*, 1 O. W. R. 792.

Dog tax — *Summary conviction—Amendment — Duplicity — Special Act—Application of general Act.*]—Amendment of clerical errors is permissible after proof, in summary matters.—2. Allegations of violation of two clauses of a by-law is not a cause for the dismissal of a complaint.—3. The Town Corporations Act clauses are not applicable against the special authorisation of a city charter.—4. The head of a household, inscribed as a voter on the valuation roll, is liable for the dog tax. *Bell* v. *Parent*, 23 Que. S. C. 235.

Early closing by-law — *Constitutional law — Legislative jurisdiction — Property and civil rights—B. N. A. Act, 1867, s. 91, s-s. 2, s. 92, s-ss. 8, 13, 16-57, V. c. 50 (Que.).*]—Provincial legislation authorising a municipality to regulate the closing of shops of a particular character within its limits, is a subject which falls within the classes of matters enumerated as being within the exclusive jurisdiction of provincial legislatures under s.-s. 13 or s.-s. 16 of s. 92 of the British North America Act, 1867, and is not an interference with the exclusive legislative jurisdiction of the Parliament of Canada conferred by the second s.-s. of s. 91 of that Act. Unless a by-law, enacted in good faith under the authority of the Quebec Statutes, 57 V. c. 50, and 4 Edw. VII. c. 39, appears to be so unreasonable, unfair or oppressive as to be a plain abuse of the powers conferred upon the municipal council, it should not be set asiae. Judgment of Supreme Court of Canada confirmed. Judgments of Court of King's Bench for Quebec and Superior Court, District of Montreal, set aside. *Beauvais* v. *Montreal*, C. R., [1906] A. C. 459.

Early closing by-laws authorised by provincial legislatures are valid. *Beauvais* v. *Montreal* (1909), 42 S. C. R. 211, reversing 17 Que. K. B. 420 and 30 Que. S. C. 427.

Early closing of shops—*Ultra vires—Penalty — Imprisonment—Special charter—Private rights.*]—It is *ultra vires* of a municipal corporation to pass a by-law ordering the early closing of shops, and imposing for an infraction thereof, a penalty with the alternative of imprisonment, under the sole authority of 57 V. c. 50, when there is no specific provision in its charter to pass such a by-law.—2. When a municipality is acting under a special charter the provisions of the Municipal Code do not apply.—3. A by-law containing a penal clause with alternative of imprisonment, must be directly and specifically authorised by the Legislature.—4. *Semble*, that a by-law ordering the closing of all shops at a certain hour is tyrannical, oppressive, arbitrary, not in the general interest of the public, and an unwarrantable and unjust interference with private rights. *Coaticook* v. *Lathrop*, 22 Que. S. C. 225.

Enforcement—*Mandamus.*]—A municipal corporation will not be ordered by *mandamus* to enforce its by-laws, any person of full age having the right to institute a prosecution against those who contravene such by-laws. *Perron* v. *Belair*, 6 Que. P. R. 408, 408.

Enforcement — *Penalty—Fine and imprisonment.*]—Municipal council can enforce their by-laws only by fine or imprisonment, and not by both at once. *Bigaouette* v. *Corporation de la Petite Rivière*, 25 Que. S. C. 220.

Establishment of municipal electric light plant — Issue of debentures — Voting on by-law — Irregularities — Defective publication — Failure to appoint day for final consideration by council—Curative provisions of Municipal Act — Special Act. *Re Cartwright & Napanee*, 6 O. W. R. 775, 11 O. L. R. 69.

Explosives — *Statute—Construction — Ejusdem generis rule — Constitutional law —Petroleum Inspection Act.*]—The defendant was convicted for a breach of a city by-law, which enacted that no larger quantity than three barrels of rock oil, coal oil, or other similar oils, nor any larger quantity than one barrel of crude oil, burning fluid, naphtha, benzole, benzine, or "other combustible or dangerous materials," should be kept at any one time in a house or shop in the city, except under certain limitations. The by-law was passed under s.-s. 17 of s. 542 of the Municipal Act, R. S. O. c. 223, such section being headed, "Storage and Transportation of Gunpowder," and providing "for regulating the keeping and storing of gunpowder and other combustible or dangerous materials," and being one of a group of sections under division VI. of the Act, headed, "Protection of Life and Property," sub-division 3 of the said division, which included s. 542 being under the heading "Prevention of Fires:"—*Held*, that s.-s. 17 authorised the passing of the by-law, and that the conviction could be supported thereunder, for that the words "other combustible or dangerous materials" were not limited by the *ejusdem generis* rule to gunpowder or other similar substances, but would include the substances set out in the by-law; and that such legislation was not superseded by Dominion legislation, for the Petroleum Inspection Act, 1899, 62 & 63 V. c. 27 (D.), dealing with

the subject, was expressly made conformable thereto. *Rex* v. *McGregor*, 22 C. L. T. 290, 1 O. W. R. 358, 4 O. L. R. 198.

Factories—*Regulation of location of — Decision as to locality left to council—By-law should designate places.*]—A by-law of a municipal corporation, by which "the establishment or operation within the limits of this municipality of any factory, saw mill, or other mill run by steam is forbidden without in the first place conferring with the council, and obtaining permission to erect such mill, said council to determine where such mills may be established," is null and void, as not complying with the provisions of Arts. 616 and 648, C. M., and a by-law of this kind, to be valid, should contain in plain terms an enumeration of all the conditions on which the council will give leave to build, and should designate the places in the municipality where such works may be established. Judgment in 24 Que. S. C. 461, reversed. *Ste. Agathe-des-Monts* v. *Reid*, 26 Que. S. C. 379.

Fireman killed on duty — *Resolution —Indemnity to heirs.*]—A resolution by a municipal council that "an indemnity of $1,000 shall be paid to the heirs of firemen killed in the fulfilment of their duties," is valid and binding on the corporations, under a general clause of its character empowering the council to make by-laws "for the peace, order, good government and general welfare" of the municipality. It is further valid, under a clause of the charter which gives the power to pass by-laws to hire firemen, as a condition to such hiring. Nor is the validity of the resolution in question affected by the circumstances that a clause in a former charter, that gave the power in express terms to grant such gratuities by by-law, is omitted from the existing one. *Enright* v. *Montreal* (1910), 37 Que. S. C. 449.

Fireworks — Discretion as to enforcement — Injury to person — Nonfeasance. *Brown* v. *Hamilton*, 4 O. L. R. 249, 1 O. W. R. 271.

Formation of new school section — Publication of by-law—Filing notice to quash —Laches—Uncertainty as to land included—Notice to dissentients—Pending appeal—New territory of township — Provision for only part. *Re White & Sydenham*, 3 O. W. R. 631.

Garbage — By-law establishing system for collection and disposal of—Operation by contractors—Disposal within municipality—Purchase of land—Special rate—Vote of ratepayers—Limitation of private rights — Confiscation of private property. *Re Jones & City of Ottawa*, 9 O. W. R. 323, 660.

Houses — *Construction of—Conviction — Certiorari.*]—A municipal by-law may forbid the construction of houses of less than two storeys which are not cottages, and a conviction under such a by-law will not be quashed upon *certiorari*. *St. Pierre* v. *St. Henri*, 5 Que. P. R. 362.

Illegality — *Limit of time for attacking —Meeting of council—Notice—Minutes — Time for by-law going into operation.*] — The right to attack a municipal by-law for illegality is prescribed after 30 days, counting from its coming into force: Art. 708 of the Municipal Code.—2. The absence of any mention in the minutes of the meeting of a municipal council at which a by-law had been attacked, that notice of the meeting has been sent to the absent councillors, is without effect upon the validity of the by-law, if in fact that notice has been given.—3. By-laws, unless the contrary is expressed, come into force 15 days after their promulgation, and a notice given by the secretary-treasurer of a corporation that a by-law would come into force 30 days after the notice, has not the effect of retarding the coming into force of the by-law. *Filiatrault* v. *Coteau Landing*, 21 Que. S. C. 302.

Illegality — *Rules of construction.*]—A by-law having for its object the closing of the Craigflower road read thus: "That portion of the Craigflower road by-law No. 527, being the 'Craigflower road re-opening by-law, 1900,' declared to be a public highway, is hereby stopped up and closed to public traffic." The word "by" was omitted inadvertently from between "road" and "by-law," and by the strict grammatical construction a former by-law dealing with the same road was declared closed instead of the road itself:—*Held*, that the words "by-law No. 527, being the Craigflower road re-opening by-law," in the enacting clause, should be regarded as a parenthetical expression and as descriptive of the portion of the road referred to, thus giving the by-law a sensible meaning and the one intended. The Court will not hold any legislation to be meaningless or absurd unless the language is absolutely intractable. *Esquimalt Waterworks Co.* v. *Victoria*, 24 C. L. T. 105, 10 B. C. R. 193.

Injunction to restrain de facto council from passing a by-law — *Illegality of election of councillors.*]—Motion to continue an injunction restraining defendants and their council from passing a by-law on the grounds that the council had been illegally elected. *See Rex ex rel. Black* v. *Campbell*, 13 O. W. R. 553. A *de facto* council should not be restrained. It is improper for a council to attempt to pass a by-law while election attacked. Action dismissed without costs, if parties consent, otherwise it may go to trial as to disposal of costs. *Martin* v. *St. Catharines*, 13 O. W. R. 559.

Invalidity — *Remedy—Petition to quash —Action.*]—Although, by virtue of the provisions contained in ss. 4376, 4389, 4390, 4391, of the Revised Statutes of Quebec, the quashing of by-laws, *procès-verbaux*, and resolutions of town councils may be demanded by petition of the Superior Courts, such quashing may also be claimed in an ordinary action. *Farwell* v. *Sherbrooke*, 24 Que. S. C. 350.

Invalidity of—Payment of money under —Recovery from corporation. *Cushen* v. *Hamilton*, 4 O. L. R. 265, 1 O. W. R. 441.

Laundry—*Municipal Ordinance — Ejusdem generis rule.*] — By s.-s. 33 of s. 95 of the Municipal Ordinance, municipalities may pass by-laws for "controlling, regulating,

and licensing livery, feed, and sale stables, telegraph and telephone companies, telegraph and telephone offices, insurance companies, offices and agents, real estate dealers and agents, intelligence offices, or employment offices or agents, butcher shops or stalls, skating, roller or curling rinks, and all other business industries or callings carried on or to be carried on within the municipality":—*Held*, that a by-law imposing a license fee of $25 per annum on every person carrying on a laundry business could not be supported under the foregoing provision, inasmuch as it was unreasonable and oppressive, as many women in destitute circumstances who earn a meagre support by taking in washing would be included within its terms. The application of the *ejusdem generis* rule discussed. *Re Sang Lee & Edmonton*, 5 T. L. R. 466.

Lease—*Moneys to be expended by lessee—Repayment by municipality—Actual loan—Approval of electors and Lieutenant-Governor in council—Publication—Contestation—Time.*]—A by-law to authorise a town corporation to lease, for a nominal rent, premises which the lessee undertakes to repair at a cost of $7,000, to be reimbursed by the corporation, is a by-law for a loan, and is therefore subject to the double requirement of the approval of the majority in number and value of the owners of lands, being municipal electors, who vote upon it, and that of the Lieutenant-Governor in council.—The publication of such a by-law must not be made until after these two requirements have been complied with, and the notice of publication must mention the date of it. Consequently, the period of three months allowed for contesting the by-law does not commence to run until it comes into force, fifteen days after such publication. *Newell* v. *Richmond*, 28 Que. S. C. 406.

License — *Cancellation — Delegation of powers.*]—A municipal corporation cannot delegate to a board of health any power to cancel a license which it may have under 62 V. secs. 2, c. 26, s. 37 (2); and a by-law delegating such power was quashed. *Hodge* v. *Regina*, 9 App. Cas. 117, and *Regina* v. *Burah*, 3 App. Cas. 889, followed. *Re Foster & Hamilton*, 20 C. L. T. 40, 31 O. R. 292.

Licensing — *Lodging house keepers.*]—Where a by-law requiring lodging house keepers to take out a license did not define what was meant by keeping a lodging house:—*Held*, that it did not apply to a person not engaged in such occupation for profit. *Re Gun Long*, 7 B. C. R. 457.

Limiting number of tavern licenses and prescribing accommodation — Liquor License Act — Special meeting of council—Notice of—Objections to procedure—Validity of by-law. *Re Caldwell & Galt*, 6 O. W. R. 340, 10 O. L. R. 618.

Livery stable keeper — Damage to vehicle—Refusal of hirer to pay for—Conviction—Fine. *Brothers* v. *Alford*, 1 O. W. R. 31.

Money—*Borrowing — Necessity for by-law—Resolution.*]—The provisions of Art. 492 *et seq.*, C. M., which forbid municipal corporations to borrow otherwise than under a by-law, do not apply to a temporary borrowing, of a small amount, to provide for immediate needs. Therefore it is legal for a municipal council to pass a resolution authorising the mayor and the secretary-treasurer to borrow, upon promissory note, in the name of the corporation, a sum of $500, to provide for urgent repairs to sidewalks and roads. *Giroux* v. *Cotcau Landing*, 17 Que. S. C. 271.

Money — *Borrowing—Recital of existing debt—Statutes.*]—The Municipal Act, R. S. O. c. 223, by s. 685 (2), after declaring that debentures issued under local improvement by-laws of a municipality, on the security of special assessments therefor, form no part of the general debt of such municipality, provides that it shall not be necessary to recite the amount of such local improvement debt in any by-law for borrowing money on the credit of the municipality, but that it shall be sufficient to state in any such by-law that the amount of the general debt of the municipality as therein set forth, pursuant to s. 384 (10), is exclusive of local improvement debts secured by special Acts, rates, or assessments:—*Held*, that this concluding clause is directory only, and the omission to observe it will not alone invalidate the by-law. *Ward* v. *Welland*, 20 C. L. T. 9, 31 O. R. 303.

Monopoly—*Validating statute — Constitutionality — License—Revocation.*]—Under a by-law of the Hull city council, afterwards declared valid by the appellants' incorporating Act (Quebec 58 V. c. 69), the appellants obtained an exclusive right of establishing a system of electric lighting for a certain term of years in the said city, and thereupon sued to revoke a license previously granted by the city to the respondents for a similar purpose:—*Held*, that the Quebec Act, passed in favour of a purely local undertaking, was within the exclusive competence of the Provincial Legislature, and none the less so because it excluded for a limited time the competition of rival traders:—*Held*, also, that by the true construction of the by-law the city did not themselves revoke the license to the respondents under which they were actually supplying electric light to the municipality nor give to the appellants the right to have it revoked, and that the respondents were free to carry on their operations until revocation was effected. Judgment in 10 Que. Q. B. 24, affirmed. *Hull Electric Co.* v. *Ottawa Electric Co.*, [1902] A. C. 237.

Motion to quash — *Loan by-law — 9 Edw. VII. c. 89, s. 43.*]—By-law raising loan of $20,000 to build a public school, quashed on grounds that the by-law had not been sanctioned by the ratepayers, that the council instead of the school board had chosen the site for the school building, and that the school board had made no application to the council to pass a by-law for borrowing money by the issue and sale of debentures. *Re McGloghlon & Dresden* (1909), 14 O. W. R. 734, 1 O. W. N. 74.

Motion to quash —*Practice — Petition — Security for costs.*]—In attempting to quash a by-law of a town municipality, the applicant must not proceed by

an ordinary action, but by a summary petition presented to the Superior Court or a Judge thereof, the petitioner having, before service of the petition, given security for costs; otherwise the action will be dismissed upon exception to the form. *Allard v. St. Pierre*, 10 Que. P. R. 191.

Motion to quash — [*4 Edw. VII. c. 23, ss. 61, 65.*] — On a motion to quash a township by-law, it was shewn that the assessment roll for 1909 was duly returned to township clerk on 30th April, and the Court of Revision sat on 18th May, and the vote was taken on the 21st May. The last day for appealing against the assessment roll was 14th May; under 4 Edw. VII. c. 23, s. 65, the Court of Revision could not sit until 10 days later, or 24th May, by s. 61, or three days after the voting. *See Tobey v. Wilson* (1878), 43 U. C. R. 239:—*Held*, that the vote was not taken on the last revised assessment roll of the municipality within the meaning of s. 384, as the last revised assessment roll would be that of the previous year. By-law quashed accordingly. *Re Dale & Blanshard* (1900), 14 O. W. R. 704, 1 O. W. N. 65.

Motion to quash application to be allowed to intervene—*Proper and necessary parties—Pecuniary interest in result—Prejudiced by change of council—Costs.*]—Application to be allowed to intervene and be heard by counsel in support of the by-law in question on appeal from the judgment of Divisional Court, 18 O. W. R. 1, 2 O. W. N. 529, 23 O. L. R. 21, on appeal from judgment of Middleton, J., 17 O. W. R. 210, 2 O. W. N. 152.—Court of Appeal made an order allowing the school board as a proper party if not a necessary party to be heard in support of a debenture by-law, it having a pecuniary interest in the moneys to be raised, and the personnel of the council supporting having been changed.—The school board to appear at its own expense, and to undertake to abide by any order as to costs on the appeal.—*Dumoulin v. Langtry*, 13 S. C. R. 258, followed. *Henderson v. West Nissouri* (1911), 19 O. W. R. 292, 2 O. W. N. 1131.

Motion to quash by-laws — Proof of by-laws — Status of applicant — Resident of town — By-law closing lane or highway —Gift or bonus to railway company—By-law passed in interest of company — Prejudice of ratepayers. *Re Loiselle & Red River* (Alta.), 7 W. L. R. 42.

Motions to quash—*Time for moving — Municipal Code—Action to annul—Interest of plaintiff — Ratepayer — Special and peculiar interest.*]—The remedies given by the Municipal Code for the quashing of by-laws and resolutions of municipal councils are open to all the ratepayers, provided they are exercised within the delays fixed. They are not exclusive of the action at common law, but the latter can only be brought by one who has at least an eventual interest in the subject-matter and one that is peculiar to himself. The interest which ratepayers have in common in the proper administration of municipal affairs is not sufficient. *Emard v. St. Paul*, 33 Que. S. C. 155.

New road—*Compulsion—Uncertainty.*]—Upon the request of certain cotton mill companies, a parish municipality adopted a by-law requiring the plaintiffs to open a municipal road to communicate with the rest of the parish. This road was intended to give a means of communication with the public road to the occupants of cottages built for workmen in the mills. In order to open the road ordered by this by-law, the plaintiffs would have been obliged to remove several of their posts, to pull down houses, and to erect works of considerable value. The by-law stated that for its whole course the road should be as far as possible of the length fixed by law for front roads; that the level should be raised wherever necessary by means of earth, stone, etc.; and that the width should be 36 feet, and if that was not possible, of the greatest width possible. The plaintiffs were already maintaining a road in front of their property:—*Held*, that the by-law was vague and uncertain, that it did not fulfil the conditions required by law, and was, besides, oppressive. *Montmorency Electric Power Co. v. Beaufort*, 16 Que. S. C. 305.

Penalty—*Recovery of corporation—Exemption—Pleading.*] — A suit for the recovery under a by-law of a penalty, belonging wholly to the corporation, is properly brought in the name of the corporation. And the plaintiff corporation are not obliged to put defendant *en demeure* to shew that he is exempt under a special clause of the by-law. *Cleveland v. Ledoux*, 22 Que. S. C. 85.

Preventing crowding in public places — *Intra vires — Obstruction of highway — British Columbia Summary Convictions Act, s. 103.*]—Defendant was convicted by the police magistrate of Vancouver for obstructing the highway. By-law 576 of the city of Vancouver held to be valid. Conviction held to be right. The merits having been tried, the statute is imperative that the conviction shall not be quashed. *Rex v. Taylor*, 10 W. L. R. 20.

Privilege to private person.] — A municipal council has no power to permit a private person to construct a reservoir in the ditch at the side of a public road, even if it causes no inconvenience; and a resolution authorising such a thing will be declared illegal. *Roy v. Corp. of St. Anselme*, 19 Que. S. C. 119.

Proceedings to quash—*Status of plaintiff — Municipal elector — Loss of qualification by alienation of other property — Necessity for submission of by-law to vote of class of electors—Premature proceeding to quash.*]—A remedy given by law, by reason of the qualification of the person who exercises it, is subject to the condition that that qualification shall be retained until judgment. Therefore, a municipal elector who, having brought an action to quash a municipal by-law, ceases in the course of the action, by reason of the alienation of his immovables to be a municipal elector, cannot afterwards proceed with his action. The subsequent acquisition of an immovable of the value required by law does not restore to him the qualification lost; it is necessary for him further to be inscribed upon the list

of electors, the inscription of his vendor not being available to him.—2. A by-law subject to the ratification, expressed by vote, of a class of persons, remains in the position of a proposed by-law, as long as the vote has not been taken; and a proceeding to quash it taken during the interval is premature. *Boivin* v. *St. Jean*, 24 Que. S. C. 256.

Prohibition of use of steam power — *Violation — Injunction — Intervention.*]— A municipal corporation, which has adopted a by-law prohibiting the construction and operation of any factory, saw-mill, or other building containing machinery moved by steam, without the permission of the council (Art. 648, C. M.), has a remedy by injunction against any person who, in violation of the by-law, builds a mill to be operated by steam within the limits of the municipality. 2. The owner of such building has a sufficient interest to be allowed to intervene in the proceedings for injunction. *Village of Ste. Agathe Des Monts* v. *Reid*, 24 Que. S. C. 461.

Public vehicles — *Conviction—Information — Variance — Penalty — Appropriation — Construction of By-law.*]—A conviction for an offence against a by-law of police commissioners of a city, relating to express waggons, was not in accordance with the information, which charged an offence against a by-law of the city.—*Held*, that s. 559, s.-s. 5, of the Municipal Act did not conflict with the powers conferred upon police commissioners by s. 484. 2. That, as an offence was disclosed in the information, and it would have been unobjectionable had the reference to a by-law been omitted, as a by-law had been proved at the hearing, as the defendant had not been deceived or misled, and no adjournment had been refused, the variance was not fatal. *Martin* v. *Pridgeon*, 1 E. & E. 778, distinguished. 3. That the penal clause of the by-law was not invalid because silent as to the appropriation of the penalty. *Re Snell & Belleville*, 30 U. C. R. 81, distinguished. 4. That some reasonable meaning must be attributed to the clause of the by-law prohibiting the driver of a waggon from leaving it unattended on the stand; that the nature or disposition of the horse had nothing to do with the interpretation of the regulation, the object of which was to compel the driver to remain in close proximity to his horse and vehicle; and the defendant had not complied with it when he took up a position 120 or 130 feet away. *Regina* v. *Duggan*, 21 C. L. T. 35.

Quashing — *Procedure — Costs.*]—The quashing of resolutions of a municipal council may be ordered as well in an action as upon a petition, except as to the question of costs, which is left to the discretion of the Court. *Patry* v. *Corp. of Levis*, 16 Que. S. C. 310.

Quashing — *Procedure — Time.*] — Where a resolution passed by a municipal council is attacked under the provisions of the Municipal Code, the rules of the Code must be followed, and the proceedings be begun within 30 days; but if the procedure of the common law is adopted before the Superior Court, the plaintiff is not tied down to the rules or the prescription of the Municipal Code. *Roy* v. *Corp. of St. Gervais*, 17 Que. S. C. 377.

Quashing by-law — *Action at common law — Recourse by way of complaint provided by the statute regarding towns and cities, 1903 — Exception to the form.*]— Every taxpayer whether an elector or not, in a city, is entitled to bring an action in the Superior Court to quash a by-law *ultra vires*, notwithstanding the special provisions by way of complaint provided in ss. 368 *et seq.* of the statute regarding towns and cities, 1903; this recourse does not exclude the former. *Allard* v. *Saint-Pierre*, (1909), 36 Que. S. C. 408, 10 Que. P. R. 433.

Quashing by-law — *Right to ask — Prescription — Notarial agreement between the parties—Inscription in law, C. P. 191, R. S. Q. 5376, 4397.*]—The right to object to the legality of an assessment imposed by a municipal by-law is not prescribed by the lapse of three months (R. S. Q. 4397), if there is a notarial agreement apparently including a settlement of the matters in litigation. *Joyce* v. *Autremont* (1909), 10 Que. P. R. 328.

Quashing by-law — *Ultra vires—Action direct—Exception to the style of cause.*] —The petition to quash a municipal by-law, as being *ultra vires*, ought to be by action direct; the plaintiff is not bound to proceed by petition according to the municipal laws. *Lennon* v. *Westmount* (1909), 10 Que. P. R. 410.

Quashing proceedings of — *Power of Superior Court—Petition of ratepayers — Withdrawal of signatures.*]—The Superior Court may always quash the proceedings of a municipal body when they are unjust, arbitrary, or not in the public interest, nor in that of the taxpayers for whose benefit the proceedings are intended.—*Semble*, that by virtue of Art. 52 C. M., the county council must have before it, during the whole time that it is proceeding upon a petition, at least two-thirds of those interested, in order to have jurisdiction; the taxpayers who have signed such petition in error or under false representations have the right to withdraw their signatures from the said petition. *Martin* v. *Arthabaska*, 20 Que. S. C. 329. Reversed on appeal.

Quashing resolutions of municipal councils — *Resolution appointing mayor and councillors — Necessity to make the parties so appointed parties to the action, to a motion to set aside the resolution — Formalities exacted on pain of nullity — Notice of a special meeting to appoint mayor and councillors.*]—A judgment which quashes a resolution of a municipal council appointing a mayor or a councillor in the cases provided for in the municipal code, has the effect of disqualifying those so appointed. Hence, the plaintiff is bound on pain of having his motion set aside, to make them parties and to serve them with a copy of the complaint, Art. 16 C. M. not applying to a case where a formality is exacted on pain of nullity and Art. 127 C. M. prescribing in these cases the notice of a special meeting to appoint a mayor, etc. Irregularity in these notices involves a nullity of the resolution

containing the appointment, passed at such a meeting. *Laboie* v. *St. Alexis*, 36 Que. S. C. 7.

Rate for ordinary expenditure—Irregular procedure — Costs. *Cartwright & Napance, Re* (1910), 1 O. W. N. 502.

Regulating and licensing hackmen—*Powers of council—Municipal ordinance—Cities Act (Sask.)—Delegation of authority to issue or refuse license to officers of municipality — Illegality — Restraint of trade — Public policy — Damages — By-law not quashed — Action — Declaration of invalidity — Injunction.*]—The defendant city passed a by-law providing that no person shall keep a hack without having obtained a license from the city. This was subsequently amended so as to require the payment of license fee, and the recommendation of the chief of police. Plaintiff having been refused a license sued for damages:—*Held*, that he cannot recover but by-law held invalid. A by-law may be incidentally questioned other than by motion to quash. *Hall* v. *Moose Jaw* (1909), 12 W. L. R. 633, 3 Sask. L. R. 22.

Regulating erection of wires and poles in streets — *Permit — Revocation — Compensation — Removal of poles and wires — Intra vires — Reasonableness — Special privileges of electric company—Statutes and agreements.*]—A by-law of the city of Winnipeg, passed to regulate the erection and maintenance of electric poles and wires, specially provided that it should not be applicable to poles or wires erected or required to be erected for the purpose of operating an electric street railway system, and that as to other poles and wires it purported to regulate their erection or maintenance only upon streets and public places vested in or under the control of the city. Subject to these limitations, paragraph 1 of the by-law provided that no pole or wire should be erected without a permit from the city; paragraph 3, that every permit should be subject to revocation by the city at any time, in the absence of an agreement ratified by by-law, without compensation, that the acceptance of a permit should constitute an agreement, and that upon revocation poles and wires should be removed within 14 days after notice, etc.; and paragraph 4, that the officers of the city were authorised and directed to cut down poles and wires not removed after notice of revocation, etc. Upon a motion to quash the by-law:—*Held*, having regard to the provisions of the Winnipeg charter, and specially s. 703, s.-s. 123, that the provisions of the by-law were not *ultra vires*, unreasonable, or oppressive. —*Held*, also, that the by-law did not interfere with the vested interests of the applicants under the various statutes incorporating them and granting them certain powers and privileges and under agreements made pursuant to these statutes.—*City of Winnipeg* v. *Winnipeg Electric Rw. Co.*, 13 W. L. R. 21, 16 W. L. R. 62, referred to. *Re Winnipeg Electric Rw. Co. & Winnipeg* (1911), 16 W. L. R. 654, Man. L. R.

Regulating issue of liquor licenses—Validity—Powers of license commissioners—Wholesale license — Discretion—Mandamus—Practice — Summons or motion. *Re Dundas & Chilliwack* (B.C.), 1 W. L. R. 94.

Regulating repairs to buildings—*Permit—Fire limits—Wooden building—City of Edmonton Charter, tit. 22, s. 1, s.-s. 2—By-law going beyond authority—Property rights of individual—Conviction for violation of by-law.*]—By s.-s. 2 of s. 1 of title 22 of the charter of the city of Edmonton, "the council may make by-laws for the peace, order, goodwill, and welfare of the city of Edmonton, and for the issue of licenses and the payment of license fees in respect of any business, provided that no such by-law shall be contrary to the general law of the Territories, and shall be passed *bona fide* in the interests of the said city of Edmonton." By-law No. 207, passed by the city council, being a by-law to regulate the construction, alteration, repair, removal, and inspection of buildings and prevent accidents by fire within the city, divided the city into fire limits, known as the first-class, second-class, and third-class, and provided, by s. 8, that "any removal, raising, enlarging, repair, or alteration of any wooden building in the first-class fire limits, shall be considered a re-erection, and shall be subject to the terms of this by-law." By another section of the by-law, the owner of a building was required to obtain from the building inspector a permit for the repair of a building. The defendant was the owner of a wooden building within the first-class fire limits, and, wishing to make certain alterations in it, applied to the inspector for a permit, which was refused; he then went on and made the repairs, which were not such as to prolong the life of the building nor to increase the fire risk; and was convicted and fined for a violation of the by-law:—*Held*, that the by-law, being passed under the general authority of the provision of the city charter above quoted, and not being authorised by any other statute, was *ultra vires*, in so far as it purported to prohibit generally the making, without a permit, of any repairs or alterations not involving the prolonging of the life of the building or an increase in the fire risk, inasmuch as it sought to prevent the exercise of an individual's property rights under the general law; and the conviction was quashed. *R.* v. *Chisholm* (1910), 15 W. L. R. 650, Alta. L. R.

Regulating victualling houses — *Closing up during certain hours on Sunday —Not beneficial to public—Motion to quash by-law.*]—City of Chatham passed a by-law providing that every victualling house, etc., shall be closed every Sunday from 2 p.m. till 5 p.m., and also from 7.30 p.m. Sunday till 5 a.m. on the following Monday. Plaintiff moved to quash the by-law on various grounds as not being beneficial to the public, because it prevented people from obtaining meals during the prohibited hours. It was shewn that some late travellers had had to go to bed supperless.—Boyd, C., dismissed the application with costs, 15 O. W. R. 1, 20 O. L. R. 178.—Court of Appeal dismissed an appeal from above judgment on the ground that the by-law was within the jurisdiction of the city council and was a proper regulation of business. — Meredith, J.A. (*dissenting*), *held*, that the by-law was not for purpose of regulating business, but for the better observance of the Lord's Day, and was beyond the jurisdiction of the city council, being within the exclusive jurisdic-

tion of the Dominion Parliament. — *Re Karry & Chatham* (1910), 16 O. W. R. 686, 1 O. W. N. 1053, 21 O. L. R. 596.

Regulation of taverns — *Music — Publications.*]—The by-laws passed by the council of the city of Montreal are public laws within the limits of that city, without publication or promulgation.—2. The council of the city of Montreal has the power to pass a by-law prohibiting musical saloons or establishments where intoxicating liquors are sold, and vocal or instrumental music used for the purpose of attracting customers, and imposing a penalty upon persons keeping such establishments, and a conviction under such a by-law will not be quashed on a writ of *certiorari*. *In re Ménard & Montreal*, 2 Que. P. R. 434.

Regulation of trade — *Provision for weighing all coal sold on city scales—Ultra vires—Conviction under, quashed—Municipal ordinance, s. 91 (16)—City of Strathcona Act, tit. xxi., s. 2.*]—A by-law of a city providing that all coal must be weighed on the city scales before being sold, was *held*, to be beyond the powers of the city council; the power given by the Municipal Ordinance, R. O. c. 70, s. 91, s.-s. 16, not extending beyond a by-law to compel dealers in coal to weigh on the city scales, if requested by the purchaser; and a conviction of a dealer for selling coal without weighing, where there was no request by the purchaser, was quashed.—*Held*, also, that authority to pass the by-law could not be derived from title xxi., s. 2, of the city charter, a general clause, giving power to pass by-laws "for the peace, order, good government, and welfare of the city." *R.* v. *Frankfeldt* (1910), 12 W. L. R. 108.

Repair of buildings — *Fire limits — Ultra vires — Validation by legislation.*]—Under s.-ss. (a) and (b) of s. 607 of the Municipal Act, R. S. M. 1892 c. 100, as amended prior to the 8th May, 1899, a municipal council has no power to pass a by-law requiring the submission of plans and specifications of proposed repairs to a building inspector and the obtaining of his certificate before the commencement of repairs of any building; and the conviction of the defendant for breach of such by-law was quashed. And a council has no power to enact that, if the proposed repairs to a building should cost 40 per cent. of its actual value, they should be considered a re-erection thereof, subject to the terms of the by-law; and where the owner had made repairs to a frame building within the first-class fire limits, which had been damaged by fire, a rule *nisi* to prohibit a magistrate from proceeding with a prosecution as for alleged unlawful re-erection of the building, in breach of the by-law, was made absolute. The amendment by the city council of other provisions of the same by-law, under powers conferred by legislative amendments of the section of the Municipal Act referred to, made after the passing of the by-law, had not the effect of re-enacting the provisions objected to. The effect of s. 6 of the Winnipeg Charter, 1 & 2 Edw. VII. c. 77, which provides that the by-laws, etc., of the city, "when this Act takes effect, shall be deemed . . . the by-laws . . . of the city of Winnipeg, as continued under or altered by this Act, was merely to provide that the then existing by-laws should stand as they stood before the passing of the Act, with only such force, effect, or validity as they previously had, and not to declare that all such by-laws were legal and valid. *Rex* v. *Nunn, Re Rogers & Nunn*, 15 Man. L. R. 288, 1 W. L. R. 559.

Resolution — *Powers of council—Payment to press representatives.*] — By-laws and resolutions of public corporations ought to be benevolently interpreted by the Courts, and supported, if possible. The city of Montreal have the power through their council, under the welfare or good government clause of their charter, 62 V. c. 58, s. 290, to grant by resolution a sum of $400 to be paid to the representatives of the press who occupy a room in the city hall, for contingencies. *Montreal* v. *Tremblay*, 15 Que. K. B. 425.

Resolution authorising the mayor and secretary to have an authentic Act drawn and to sign it—*Official duty —Mandamus.*]—The authorisation given by a resolution of a municipal council to its mayor and secretary to have an authentic Act prepared and to sign it on behalf of the corporation, is an act of simple mandate, and is not a duty imposed upon them by virtue of their office, the accomplishment of which can be enforced by a writ of *mandamus* issued at the request of third parties. *Municipal Homes & Invs. Co.* v. *Legare* (1909), 37 Que. S. C. 417. (Pending an appeal.)

Resolution of a council authorising the spending of money — *Precedent formalities—Their omission and resulting invalidity—Penalties and forfeitures inflicted on members for illegal acts.*]—When a statutory charter of a municipality decrees that no recommendation to spend money must not be adopted by the council "without, as a condition precedent, having been submitted to the finance committee and approved by it," a resolution of the council to accept an invitation to a celebration, to delegate the mayor for that purpose and to give instructions to the finance committee to place at his disposal the sum necessary to cover the expense of the trip, passed, without observing the above formalities, is null and void. The provisions of the charter ordering the levying in the estimates a reserve to cover unforeseen expenses and among other declarations authorised by the council, and the existence of a part thereof more than sufficient, does not dispense with observing the formalities, 62 V. c. lviii., ss. 42, 344, 344b. The provision in the charter that "no resolution of the council or of a committee authorising the spending of sums of money shall be adopted nor be effective until a certificate of the controller has been produced shewing there are funds at the disposal of the city for "the service and the purpose for which the expense is intended," must be strictly observed. Failure to comply therewith invalidates the resolution above. The signatures of the controller on the order sent on by the finance committee is not equivalent to the certificate as aforesaid. If, from the provisions of the charter, all the resolutions authorising the spending

of money must fix the amount (as is the case here), the failure to do it invalidates the resolution. The members of council who form the finance committee in authorising a spending of money to carry out a resolution of council, invalidated for the reasons above mentioned, incur the pains and forfeitures inflicted by the charter on those who authorise an outlay of money beyond the sum provided and voted and legally placed at the disposal of the council or the committee. *Larin* v. *Lapointe*, 1909, 36 Que. S. C. 249.

Right of municipalities to grant industrial privileges, whether temporary or perpetual, or exclusive or competitive—*Remedy to have such grants set aside.*] —The exclusive right granted by a municipal corporation by a by-law to a company giving it the exclusive right to establish and operate, during a period of twenty years, an electric light and power plant, is legal. In any event, the setting aside of such by-law could not be incidentally raised in a suit at law to which the company in question has not been made a party.—The granting of a perpetual right, although not an exclusive one, made in the same way and for the same purposes, is beyond the powers of a town corporation and is *ultra vires* and null. *Dubuc* v. *Chicoutimi*, 37 Que. S. C. 281.

Street railway — *By-law — Penalty.*]—When a municipal by-law has a proviso to be carried out upon an order to be given by the council, the adoption by the latter of a report of one of its committees empowered to deal with the matter recommending performance and that instructions be given for the purpose, amounts to a substantive order, as required by the by-law.—A clause in a by-law imposing a penalty, that its enforcement shall devolve upon an officer named, makes it his duty to initiate and carry on proceedings, but does not mean that he must do so in his own name. *Montreal Street Ry. Co.* v. *Recorder's Court*, 37 Que. S. C. 311.

Submission to electors—*Adoption by Council—Motion by ratepayer to invalidate —Vote of councillor—Bribe.*]—A ratepayer who is interested in the granting of licenses for the sale of intoxicating liquors in the municipality, may apply to have it declared that a by-law which the electors of the municipality have approved by their votes, and which has been transmitted to the collector of revenue for the district in order to prohibit the granting of licenses, was not adopted by the council of the municipality and is inexistent. 2. A municipal council has no right to declare that one of its members is incompetent to vote upon questions relating to the granting of licenses for the sale of spirituous liquors, on the ground that he has been bribed by a person soliciting such a license. *Gway* v. *Malbaie*, 25 Que. S. C. 269.

Submission to electors — *Approval — Majority.*] — When a special statute provides that a by-law shall not come into force until after it has been approved by a majority of the municipal electors having the right to vote at the election of a municipal councillor, there must be an absolute majority of the electors. *Mercier* v. *Corporation of Warwick*, 6 Que. P. R. 78.

Submission to electors — *Qualification of electors — Motion to quash — Status of company interested.*] — Certain persons not qualified and others not authorised having voted on a municipal by-law authorising the grant of electric lighting and water franchises:—*Held*, that the by-law was defective and must be quashed.—*Held*, also, that upon the motion to quash, only the applicant and the municipal corporation had a status to be heard, and not the company interested in the grant. *In re MacLean & Fernie*, 12 B. C. R. 61, 3 W. L. R. 512.

Supply of electric light by village to county house of refuge—Necessity for submission to electors — Extraordinary expenditure. *County of Grey* v. *Markdale*, 6 O. W. R. 978.

Support of the poor by a municipality—*Is a municipality responsible therefor?*]—M. C. 587.—The authorisation which the law gives to municipal corporations to adopt by-laws for the purpose of supplying the wants of and aiding and assisting the poor of a municipality, is absolutely a discretionary one with such municipalities to pass such by-laws or not. The right to contribute to charity does not imply that there is any obligation to do so—and the fact that a destitute person has no relatives or others responsible for his support cannot create in his interest a right to have a municipal corporation obliged to maintain him. *Guerin* v. *St. Philomene* (1911), 16 R. de J. 265.

Telephone company—*Regulation of.*]—The council of the plaintiff municipality were authorized by 59 V. (Que.) c. 56, s. 18, cl. 10, to order by by-law the painting of all poles then or subsequently erected within the town; and the by-law complained of in this case was not *ultra vires*. *Coaticook* v. *People's Telephone Co.*, 21 C. L. T. 351, 19 Que. S. C. 535.

Time of coming into force—*Municipal code, arts. 450, 454, 455.*] — By the combined result of arts. 454 and 455, M. C., municipal by-laws do not come into force until at least 15 days after their passing. The words, "if it is not otherwise prescribed by the provisions of the by-laws themselves," in art. 450, apply only to a delay exceeding 15 days.—A provision in a by-law for bringing it into force before the expiration of the delay of 15 days from its promulgation renders it void. Judgment in *Charette* v. *Corporation de la Pointe Gatineau*, 33 Que. S. C. 47, affirmed. *Corporation de la Pointe Gatineau* v. *Charette*, 17 Que. K. B. 376.

Trimming of trees in streets—*Resolution—Necessity for by-law.*] — Motion to quash resolution of the council of the town of Naiscance that "the street committee have instructions to see that the street trees, where necessary, be properly trimmed:"—*Held*, that under s. 574, s.-s. 4, of the Municipal Act, R. S. O. 1897 c. 223, municipal

corporations have power to deal with the trimming of all trees the branches of which extend over the streets of the municipality, but that it is a matter which should be dealt with not by resolution, but by by-law, as indicated by s. 575 of the Municipal Act. *In re Allen & Napanee*, 22 C. L. T. 412, 1 O. W. R. 634, 4 O. L. R. 582.

Trimming of trees in streets.]—Under s. 574, s.s. 4, of the Municipal Act, R. S. O. 1897 c. 223, municipal corporations have power to deal with the trimming of all trees the branches of which extend over the streets of the municipality, but that it is a matter which should be dealt with not by resolution, but by by-law, as indicated by s. 575 of the Municipal Act. *In re Allen and Town of Napanee*, 22 C. L. T. 412, 4 O. L. R. 582, 1 O. W. R. 634.

Unjust or oppressive by-law—*Remedy —Appeal to county council — Motion to quash.*]—The remedy of persons who complain of municipal by-laws on the ground that they are unjust or partial is by appeal to the county council. A motion to quash made to the Court is only competent in the case of illegality or of excess of powers. *Corporation of St. Pierre de Broughton* v. *Marcoux*, 17 Que. K. B. 172.

Violation—*Toleration by corporation — Liability for damages.*]—A city corporation has no right, in the administration of its by-laws, to act with partiality, and where it tolerates the violation of an existing by-law, it is responsible for the damages thereby caused. *Brunet* v. *Montreal*, 23 Que. S. C. 262.

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7. Cabs.

By-law—*Cab-rank—Private grounds.*]—The corporation of the city of Montreal cannot by by-law prevent a licensed cabman from taking up his station upon the private property of a hotel proprietor, with the consent of the latter. *Desmarais* v. *Samson*, 5 Que. P. R. 167.

License—*Chief constable—Discretion — Mandamus.*]—The chief of police of the city of Montreal has a discretion to exercise in the granting of permits or licenses to cabmen, and the Court will not by *mandamus* interfere with the exercise of this discretion, unless the chief of police has acted in bad faith and with evident injustice. 2. The fact that the chief of police has granted a permit to a cabman, after the latter has committed reprehensible acts, is not a ground for granting a permit to him for the following year, if the chief of police is satisfied that he should not have granted the first one. *Carrière* v. *Legault*, 23 Que. S. C. 449.

License — *Mandamus.*]—A cabman who alleges that his license has been taken away from him illegally, cannot obtain a *mandamus* against the municipal corporation by which the license was granted, to compel the return of it. *Laberge* v. *Montreal*, 22 Que. S. C. 473.

Regulation of cabmen—*Establishment of stand—Committee of council—Resolution —Action.*]—The council of the city of Montreal has no power to delegate to a committee the authority, vested in it by the charter of the city, to prescribe standing places or stations for cabs. 2. The resolution of a committee of the council cannot be considered a by-law so as to bring it within the provisions of s. 394 of the charter of the city, 62 V. c. 58 (Que.), concerning the annulment of by-laws, on petition of any ratepayer, on the ground of illegality. 3. A licensed cabman has, as such, no special or individual interest sufficient to justify an action for the annulment of a resolution of a committee of the city council establishing a cabstand. Judgment in 23 Que. S. C. 256 reversed. *Samson* v. *Montreal*, 23 Que. S. C. 500.

Vehicles standing on highway — Agreement with railway companies—Injunction—Quashing by-law — Public interest. *Canadian Pacific R. W. Co.* v. *Toronto*, 1 O. W. R. 253.

Vehicles waiting for hire—*Standing in streets—Engagement by hotel company—Nominal consideration — Agreement—Validity—Conviction.*] — An hotel company engaged three vehicles from a livery man to keep standing at their doors constantly ready for immediate use by guests of the hotel, the hotel company paying one cent per hour from time of attendance until dismissed or engaged for use by a guest; the hotel becoming responsible for the payment by the guests of the fees charged for such service.—*Held*, the liveryman did not commit a breach of a municipal by-law which provided that no cab should stand upon any street while waiting for hire or engagement, by keeping these vehicles waiting on the street for the use of the guests under the above agreement. *Rex* v. *Maher*, 6 O. W. R. 247, 10 O. L. R. 102.

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8. Common.

Town limits—*Erection of house—Ejectment — Demand — Improvements—Tender.*]—Certain lands were by order in council and Act of Assembly vested in the municipality of Victoria for the use and benefit, as a common, of the inhabitants of the town of Grand Falls. By subsequent legislation they were transferred to and vested in the town of Grand Falls "to the same extent as was given to the said municipality." By another Act a portion of the common without the town limits was transferred to the town. Upon the land within the town limits the defendant entered and commenced to erect a house. The plaintiffs thereupon brought ejectment:—*Held*, (1) that the action was properly brought in the name of the town of Grand Falls instead of the town council of Grand Falls; (2) that the action of ejectment would lie; (3) that the evidence shewed sufficient demand of possession; (4) that it was not necessary to make a tender for improvements, as 38 V. c. 42 only applied to improvements on the land at the time of its passage; (5) that 50 V. c. 69 does not abridge or take away any of the rights to the common within the town. *Grand Falls* v. *Petit*, 34 N. B. Reps. 355.

9. CONTRACTS.

Action to set aside — *Resolution — Security — Amendment — Summary procedure.*]—1. The security given in an action to set aside a resolution of a municipal council and a contract awarded thereunder is insufficient, the sole surety not having justified in respect of real estate, the plaintiff will be allowed, on payment of costs, to set it right.—2. An amendment to a petition will be allowed on motion, upon verifying the amendment by affidavit on payment of costs.—3. An action to set aside a resolution and a contract cannot be brought summarily, and the Court, upon *exception à la forme*, will order to be struck out everything relating to the setting aside of the contract. *Bédard* v. *St. Henri*, 3 Que. P. R. 212.

Agent—*Designation of principal—Change of principal—By-law—Approval of ratepayers — Ronan—Mandamus—Specific performance.*]—Where a principal has been named by the agent charged with the negotiation, the latter cannot afterwards designate a different person as his principal, and more particularly where the negotiation would not have been entered into if the principal secondly designated had been disclosed at the outset. 2. Where a contract with a municipal corporation required the sanction of a by-law approved by the ratepayers, and a by-law substantially embodying the terms of the contract, with the name of the principal first designated, was rejected by the ratepayers, the corporation were held not subject to any further liability. 3. The contract in question, although disguised as a sale with a consideration of one dollar, really amounted to a bonus, and in manner and form, as made, was *ultra vires* of the corporation. [The question whether there was a right to a *mandamus* to enforce specific performance of a contract, under the circumstances, was not decided.] *Real Estate Investment Co.* v. *Richmond*, 23 Que. S. C. 151.

Agreement between municipalities *as to building and maintaining roads—Agreement not legally binding — Resolution — Absence of by-law and seal — Payment of money — Executed contract.*] — Action to compel defendants to build and maintain a portion of a highway dismissed, no by-law having been passed nor has any act been done binding them. *East Gwillimbury* v. *King* (1909), 14 O. W. R. 122.

Bonus to company on conditions—*Company gave hypothec as security for fulfilment of conditions — Company became insolvent — Power of directors to hypothec.*]—A municipal corporation voted by by-law, a bonus to a manufacturing company and granted them exemption from taxation for 20 years, on conditions that the company establish a factory in the municipality and operate the same for 10 years without intermittance. The company gave a hypothec on their real estate in the municipality as security for the fulfilment of their obligations. The company became insolvent and the defendant company became purchasers of the plant on condition that they would carry out the condition set forth in the deed of hypothec in favour of the municipality. The municipality brought action to recover bonus paid, alleging breach of conditions contained in the deed of hypothec. The defendants pleaded that the directors of the original company did not have the power to accept a conditional bonus, nor give the hypothec: — *Held*, that the directors of a joint stock company incorporated under R. S. C. c. 119, have the power under the "general powers" clause, s. 35 of the Act, to accept a conditional bonus and to hypothec the immovable property of the company to the municipality, without the approval of the shareholders.—*Held*, also, that even if the approval of the shareholders were required the failure to get it would not defeat the right of the municipality to the security, on the ground of the hypothec being null, but the company would be bound to cure the irregularity by giving a valid deed of hypothec.—*Held*, further, that the reservation by the assignee, in a deed of assignment of the hypothecated property, of his right to repudiate the claim of the municipality, or to contest the validity of the hypothec, can not affect the legality of either the claim or the hypothec. Judgments of the Court of King's Bench for Quebec, 17 Que. K. B. 274, and of the Superior Court of Quebec, affirmed. *St. Jerome* v. *Commercial Rubber Co.*, C. R., [1908] A. C. 444.

Borrowing powers—Temporary loan—Local improvements — Contract — Validity — By-law — Resolution — Liability to contractors for work done — Subrogation. *Equity Fire Insurance Co.* v. *Weston*, 12 O. W. R. 221.

Breach—*Damages—Construction of sewers — Interference by reason of other city sewers.*]—The plaintiff entered into a contract with the corporation of the city of Ottawa to construct certain sewers. In the course of his work the contents of certain city sewers, which existed in the streets in which the plaintiff was required to build the sewers he had contracted to construct, the existence of which was not known to and was not disclosed to him, flowed into the trenches dug by him and impeded and delayed him in the work and caused him additional expense in doing it:—*Held*, that the plaintiff was entitled to recover damages from the defendants, for the loss he had thus sustained, for the defendants owed him a duty to do nothing to prevent or interfere with his doing the work he had contracted to do, and in discharging through the sewers under their control upon his work the sewage and other matter which they carried, they committed a breach of duty for which they were answerable to him in damages. *Bourque* v. *Ottawa*, 23 C. L. T. 263, 6 O. L. R. 287, 2 O. W. R. 701.

Building contract—*Municipal hall — Reference — Law and fact — Non-proof of by-law — Waiver — Amendment — Plans and specifications.*]—On a reference of an action, it is inadvisable, unless the line between the questions of law and fact is clear and distinct, to divide up the reference by first directing the evidence to the question of legal liability, leaving the *quantum* of damages and all other matters to be afterwards disposed of. An objection as to the non-proof of a by-law authorizing a contract by a municipality for the erection of a town

and fire hall, raised for the first time at the close of a reference, in an action to recover a balance due under the contract, was overruled, where the contract was declared on and referred to in the statement of defence, and identified by the mayor on the application for the reference by the defendants, and made part of the defendants' material, and treated as the contract throughout the whole reference, and upon which large sums of money had been paid under by-laws passed therefor. An application for leave to amend so as to set up such objection was also refused. Plans and specifications—the latter being divided under the headings "notes," "conditions," and "specifications," all bound up together and forming one document—drawn up for the erection of the said buildings, and (on the execution of the contract) an indorsement, initialled by the contractor and mayor, made on the specifications, stating that they were those referred to in the contract, must be read together as constituting one entire contract. *Ryan* v. *Carleton Place*, C. L. T. 230, 31 O. R. 639.

By-law—Contract with electric power company—Supply of electrical energy—Construction of contract — Previous by-laws authorising contracts with Hydro-Electric Power Commission—Repugnancy—Necessity for submitting by-law to electors—Municipal Act, s. 389, s. 566, s.-s. 4, cl. A, s. 563, s.-s. 5,—Commencement of term—Uncertainty —Funds for construction of works and purchase of plant — Previous application for *mandamus*—*Res judicata*—Period for which contract binding—Obligation for one year—Appropriations in future years. *Smith* v. *Hamilton & Hamilton Cataract Power Light & Traction Co.*, 13 O. W. R. 66.

By-law—*Purchase of land—Conveyance to corporation — Attempted rescission.*]—A municipal council, desiring to maintain as required by statute (3 Edw. VII. c. 19, s. 524) an industrial farm, passed a by-law directing that "a farm be purchased for an industrial farm." Tenders were then called for; a committee was appointed to examine the properties offered, that of the plaintiff being among them; the plaintiff's tender was accepted; the title to his property searched by the corporation's solicitor; and a conveyance of the property to the corporation obtained and registered. A cheque in the plaintiff's favour for the purchase money was made out and signed by the proper officers, but before its delivery to the plaintiff a by-law was passed by the council rescinding the former by-law, ordering the cheque to be cancelled, and directing the property to be reconveyed to the plaintiff:—*Held*, that the transaction was an executed one, the benefit of which the corporation had obtained, and, notwithstanding the absence of a by-law specifically authorizing it, could not be rescinded against the will of the plaintiff, in whose favour judgment for the purchase money was accordingly given. *Macartney* v. *County of Haldimand*, 10 O. L. R. 668, 6 O. W. R. 805.

By-law to aid company — *Mortgage back to secure advance—Damages for breach of contract—Reference.*]—Plaintiff municipal corporation by by-law intended to grant aid to defendant company to extent of $10,000 —$5,000 by way of bonus and $5,000 by way of a loan. Defendants gave a mortgage back for $10,000, partly to secure the $5,000 loan, which contained a provision that if the company should carry on business for at least 10 years continuously during at least 10 months of each year, and employ not less than 30 persons, etc., and if it failed to do so to pay $500 for each year, except the first year, in which it should employ less than that number. The by-law was attacked and a settlement made, whereby the company relinquished the loan, accepted the bonus, and was to employ not less than 30 persons. By an error the mortgage was executed disregarding the modifications of settlement. Defendants did not employ 30 persons, and plaintiffs brought action, claiming payment of said $500:—*Held*, (1) that the pleadings should be amended to follow the true agreement between parties, and, if necessary, the mortgage should be reformed accordingly. This being for the benefit of defendants, it is not a bar to plaintiff's recovery. (2) That the conditions of trade and other circumstances existing in 1907 and 1908 gave defendants the benefit of excepting clause. (3) That the provision as to the $500 was a penalty. Reference ordered as to damages. *New Hamburg* v. *New Hamburg Mfg. Co.* (1910), 15 O. W. R. 435, 1 O. W. N. 495.

By-law—*Variation—Necessity for by-law —Mode of payment for work.*]—A city made a contract for supply of dynamo and station systems for a plant to furnish electric lighting for their streets. The contract was executed by a by-law under the corporate seal of the city, subject to the approval of the city engineer. He inspected and approved of the work subject only to re-armaturing, if it should be necessary, during the next five years. It was arranged that a part of the purchase money should be retained as a guarantee for the same:—*Held*, a contract, being manifested in and adopted by by-law, can be changed in some important details without the means of another by-law, such as changing the mode of payment. *Thompson* v. *Chatham*, 5 O. W. R. 156, 9 O. L. R. 343.

Certificate of engineer—*Delay in issuing—Loss to contractor.*]—Where, under a contract with a municipal corporation which made the right of the contractors to receive payment for the construction of certain works dependent upon the certificate of an engineer who was also sole arbitrator of all disputes, the engineer unjustifiably delayed the issue of the certificate for seven months and acted in a shifting and vacillating, though not fraudulent, manner, and probably caused heavy loss to the contractors by his mistakes:—*Held*, that in the absence of collusion on the part of the corporation, the certificate could not be set aside. Impropriety of certain acts of the corporation remarked upon. *Walkley* v. *Victoria*, 7 B. C. R. 481.

Construction—*Arbitration and award*—A term of the agreement between the city of Hamilton and the company was that if by new discoveries in the electric art, the cost of production of electric light was lessened, the city was to give six months' notice of their intention to ask for a reduction. This notice was given by city on 21st December, 1904, but arbitrator did not make

his award until 12th March, 1908, when he awarded a reduction on each lamp, and that the city was entitled to be repaid from 21st June, 1905, to 31st October, 1907, on the amount which had been paid during that period at the contract rate. Court of Appeal held that arbitrator had exceeded his powers in directing the above refund, and referred award back, leave being given to adduce new evidence. *Re Hamilton & Hamilton Contract*, 13 O. W. R. 121.

Contract — *Settlement of action—Necessity for seal.*]—The exceptions to the rule that a municipal corporation can only act by its seal are in regard to; firstly, insignificant matters of every day occurrence or matters of convenience amounting almost to necessity; secondly, where the consideration has been fully executed; and thirdly, contracts in the name of the corporation made by agents or representatives who are authorised under the seal of the corporation to make such contracts:—*Held*, that in this case a settlement come to in respect to certain claims against it, and in respect of which the council of the defendants had passed a resolution accepting it, was not binding on the defendant corporation as not coming within any of the above cases. *Leslie v. Township of Malahide*, 10 O. W. R. 199, 15 O. L. R. 4.

Contract with member of council—*Money paid — Action to recover—Illegality —Statute—Penalty—Pleading.*]— R., being reeve of the plaintiff municipality, did certain work repairing a stone crusher, for which work the municipal council voted him $75, such sum being shewn in the accounts as expenses. Subsequently, he spent considerable time, at the request of the council, in advocating the passage through the legislature of a loan bill, in respect of which time he was voted $100. An action was brought for the recovery of these two sums of money as illegal payments in contravention of s. 21 of the Municipal Clauses Act, and also for penalties under s. 22 for sitting and voting as reeve after the receipt of these respective sums. The claim for penalties was abandoned at the trial, and the action resolved itself into a question of law, as to whether the statement of claim disclosed a cause of action in the circumstances:—*Held*, that the statement of claim did not disclose a cause of action, as the contract was not made void by the statute, and there were no grounds alleged on which it might be declared void in equity.—The statute does not prohibit the making of a contract, although it imposes a penalty for acting or voting subsequently thereto. *Municipality of South Vancouver* v. *Rae*, 12 B. C. R. 184, 4 W. L. R. 98.

Counsel.]—The mayor and councillors of a municipal corporation have the power to employ, at the latter's expense, counsel in matters in which the corporation has interest at stake. Moreover, the corporation, by approving of the account submitted to it by counsel for the value of their services, thereby ratified the act of those who engaged them, such ratification being equivalent to a prior engagement made by itself. *Amyot* v. *Bedard & Quebec*, 37 Que. S. C. 14.

Electric light company—*Permission to use streets of town for 10 years—Continuance after 10 years—Notice—Action for removal of poles and equipment—Parties—Attorney-General—Charter of company—Condition precedent to exercise of powers—Vested right—Estoppel.*] — Taking into consideration the duties of municipal corporations, under the Municipal Act, with respect to their streets and highways, and the responsibilities cast upon them, it is within the power of a municipal corporation, without the intervention of the Attorney-General, to protect their streets and guard against the liabilities which they might incur through improper and irregular use of them, and this action, brought for a declaration that the defendants had no right to maintain their electric system within the plaintiffs' municipality, for an injunction, and for the removal of the defendants' poles and equipment from the streets of the town, was properly instituted by the town corporation without making the Attorney-General a party to it.—The defendants' charter gave them a right, subject to a condition precedent, to enter upon any highway or public place for the purpose of constructing and maintaining lines for the conveyance of electric power. It was provided in the charter that nothing therein contained should authorise the defendants to occupy or use any streets or highways, without the special consent of the municipal council having jurisdiction over such streets or highways:—*Held*, that obtaining permission from the plaintiffs was a condition precedent to the plaintiffs occupying and using the streets and highways, and that permission could be made conditional and limited as to time.—*City of Winnipeg* v. *Winnipeg Electric Ry. Co.*, 9 Man. L. R. at p. 267, followed.—And *held*, that, as the permission of the plaintiffs to use their streets was for 10 years only, at the end of that time the rights and privileges of the defendants ceased; and the defendants, by continuing after the expiration of the 10 years, and erecting new poles and otherwise improving their plant, to the knowledge of the plaintiffs, and having supplied the plaintiffs with electric light, had not acquired a vested right; and the plaintiffs were not estopped from denying the alleged rights of the defendants.—The plaintiffs had the power, at any time after the expiration of the 10 years, to call upon the defendants to cease their operations within the town; and, having exercised that power, were entitled to a declaration, an injunction, and an order for removal, as prayed. *Selkirk* v. *Selkirk Elec. Light & Power Co.* (1910), 15 W. L. R. 703, Man. L. R.

Electric lighting — *Use of streets — Poles and wires—Rights of rival companies—Injunction.*]—The plaintiffs and defendants were respectively companies incorporated to produce and supply electricity for heat, light, and power, and each had authority from the corporation of the city of Ottawa to erect and maintain poles and wires along the sides of, across, and under the streets of the city for certain periods. The plaintiffs had obtained their rights before the defendants, and had erected their poles and wires before the defendants were incorporated. The agreement between the city corporation and the defendants provided that the latter should not, without the express

permission of the corporation, erect additional poles on certain streets:—*Held*, that, as the plaintiffs and defendants were both electric light companies, and therefore on an equal footing in regard to the business they were respectively chartered to carry on, the fact that the plaintiffs were in prior occupation of the streets gave them no exclusive right or privilege to use such streets or the particular sides of such streets occupied by their poles and wires. But, being first in occupation and using the streets under an authority conferred by the municipality, they were entitled to protection against a company subsequently using the street under a like authority in such a manner as would be likely to injure the property of the plaintiffs or endanger their workmen or servants. *Semble*, that the plaintiffs could not by extending cross-arms on their poles occupy space not required for the present or immediate future service:—*Held*, that danger apprehended by the plaintiffs from the use by the defendants of their wires in the condition in which they were strung or threatened to be strung, was ground for moving for an interim injunction. *Ottawa Electric Co.* v. *Consumers' Electric Co.*, 22 C. L. T. 140, 1 O. W. R. 154, 2 O. W. R. 767.

Electric railway company—*By-law — Confirmation by statute—Effect of—Conditions of contract — Fulfilment — Condition precedent—Power-plant outside the city — Forfeiture — Waiver — "Operation" of railway lines — Distribution of power generated outside city — Commercial purposes — Erection of poles and wires — Consent of city corporation — Permit of engineer—Authority — Estoppel — Operation of cars — Power generated by others in city—Right to use.*]—The plaintiffs sought a declaration that the defendants had not the right to use any electric power for the operation of their street railway lines, except such as was developed within the city of Winnipeg, and that the defendants had failed to fulfil the conditions of their contract with the plaintiffs relating to the operation, conduct, and arrangement of their railway lines system, and that their enjoyment of the privileges conferred by by-law 543 of the plaintiffs should cease until they fulfilled such conditions. This was based upon the last sentence of paragraph 11 of the by-law, to the effect that the defendants (or their predecessors) should "place and keep within the city limits all their engines, machinery, powerhouses, repair-shops, and construction-shops." The plaintiffs contended that the defendants' hydro-electric power plant at Lac du Bonnet, outside the city, was a power-house within the meaning of that clause:—*Held*, upon a consideration of the recitals and other clauses in the by-law, that the terms and conditions stated in the by-law, in so far as they related to the operation, conduct, and management of the railway lines or system, or any part thereof, and to the fulfilment thereof, were conditions precedent to the continued enjoyment by the defendants of the rights and privileges conferred by the by-law; and that the plant at Lac du Bonnet was a power-house within the meaning of paragraph 11.—By-law 545 was, by statute, "validated and confirmed in all respects as if the said by-law had been enacted by the legislature:" — *Held*, that this language gave the by-law no greater effect than if it had been confined to confirming it only; and that the contract, though continued by the legislature, still remained a contract, which could be waived by the parties, and for breach whereof the Court could award damages.—*Kingston* v. *Kingston, etc., Electric Rw. Co.*, 25 A. R. 463, 468, and *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, [1900] 2 Ch. 352, followed:—*Held*, also, that the clause of the by-law as to keeping the power houses and machinery within the city was not a term or condition relating to the "operation, conduct, and management" of the railway lines or system or any part of the same." The placing of the power-houses and machinery within the city was not a term or condition as to conduct or management; and the word "operate" was used throughout the by-law, and the word "operation" was so used in this clause, as meaning "to put into or continue in activity," and in a sense different from "construct" or "maintain." — *Held*, also, that the plaintiffs, having by unequivocal acts recognised the continued existence of the defendants' contract, after knowledge of their use of the power-plant at Lac du Bonnet, had waived the forfeiture. —*Semble*, that the plaintiffs might be entitled to damages for breach of the contract; but damages were not sought in this action. —The plaintiffs also sought to prevent the distribution by the defendants in the city of power generated outside its limits and the erection of poles and wires for that purpose, without the plaintiffs' consent. By the statute incorporating a power company which became amalgamated with the defendants, the company had power (by s. 7) to lay all necessary works for the transmission and supply of electricity, including poles, wires, pipes, conduits, and appliances of every kind necessary or advisable therefor, which might, with the consent of the council of any municipality affected, be erected in any of the streets or highways of the province, and (by s. 9) an appeal was given to the Lieutenant-Governor in council in the event of a failure to agree "as to the terms upon which the company should be allowed to exercise any of its franchises or rights hereby conferred:"—*Held*, reading these two sections together, that the plaintiffs might refuse to give their consent for the erection of poles or wires within the city until the company had agreed to reasonable terms.—It was admitted that the company never did apply to the plaintiffs for permission to erect poles and wires for the purpose of distributing the current developed at their hydro-electric plant; and that the plaintiffs had never in terms consented to the erection of poles and wires for that purpose; but it was contended that the plaintiffs had done what was equivalent to a consent, or had by acts of waiver and acquiescence estopped themselves from now asserting that they had not consented: — *Held*, in the circumstances set out below, that the defendants could not rely on any permit issued by or with the authority of their engineer as granting the consent required by statute; and that there was no evidence upon which an estoppel could be based; and that the defendants had no right to erect poles or wires upon the city streets for the purpose of transmitting electric cur-

rent developed outside the city for electric light or commercial power: — *Held*, also, that it was not necessary for the defendants to generate their own power for the purpose of operating their cars; they were entitled to use for that purpose the direct current generated at the Mill street station, without the consent of the plaintiffs; but were not at liberty to use that current for any other purpose until the plaintiffs had passed a by-law authorising them to do so. —The plaintiffs also asked a declaration that the defendants had not the right to make use of any electric power for the operation of their cars, except such as was developed within the city:—*Semble*, that the plaintiffs had failed to shew that the defendants were so using such power; but the question of their rights was not decided. *Winnipeg* v. *Winnipeg Electric Rw. Co.* (1910), 13 W. L. R. 21.

Above judgment was, upon appeal by defendants and cross-appeal by plaintiffs, set aside, and it was declared by Court of Appeal: (1) that plaintiffs were not entitled to the relief claimed in respect of the alleged breach of clause 11 of by-law 543; (2) that the defendants had not acquired a right to erect, maintain, or re-erect, poles or wires on the streets, lanes, and highways of the city of Winnipeg for the transmission of electric energy for any purpose other than for their street railway; and (3) that the defendants should, upon due notice, remove from the streets, lanes and highways of the city, the poles and wires used by the defendants for any purpose other than for their street railway.—Special order as to costs of action and appeal. *Winnipeg* v. *Winnipeg Elec. Rw. Co.* (1910), 16 W. L. R. 62, Man. L. R. .

Employment of a secretary-treasurer—*Dismissal without cause—Salary — Damages.*]—The employment of a secretary-treasurer for a fixed period by a municipal corporation is illegal and *ultra vires*, seeing that by Art. 143 M. C. a secretary-treasurer remains only during the pleasure of a municipal council. He who is employed for a fixed period and who is dismissed without good cause cannot sue the person who employed him for the remaining period of his engagement without alleging that he has suffered damages. *Demers* v. *St. Sebastian*, 16 R. L. n. s., 3.

Employment of city engineer — *Calgary charter, s. 117 (7)—"Officer"—"Official" — "Employee" — Master and servant — Yearly hiring — Reasonable notice of dismissal.*]—A servant or employee engaged under a yearly hiring is entitled to reasonable notice of dismissal; and in the case of a city engineer a six period less than six months is not reasonable notice. In a statute providing that municipal corporations may pass by-laws in relation to certain enumerated matters, the word "may" is permissive only, and does not prohibit such corporation from exercising their jurisdiction otherwise than by by-law; and *held*, that s. 117 of the Calgary charter, "The council may pass by-laws for (*inter alia*) (7) appointing such officials under such names as the council may deem necessary for carrying out the work of the corporation, defining their duties, and providing for their remuneration," does not render necessary either a by-law or a contract under seal for the engagement of such an official or employee as the city engineer. *Bernardin* v. *North Dufferin*, 19 S. C. R. 581, applied and followed. —At the time of the engagement of the plaintiff there was a city by-law in force which enacted that "all officers appointed by the council shall be deemed to hold their respective offices during pleasure unless otherwise provided by Ordinance or by-law, and office hours except for the mayor, city solicitor, and auditors, shall be," etc.:—*Held*, that, while the city engineer may be termed an "official," he is not an "officer," which latter word is intended to apply to such officers as the city clerk, treasurer, assessor, etc.; whose powers and acts are primarily, and for the most part, of an executive and coercive or quasi-coercive character, and are binding upon and affect the rights of the inhabitants and ratepayers of the municipality. The city engineer is an employee or servant, not an "officer." *Speakman* v. *Calgary*, 1 Alta. R. 454, 9 W. L. R. 264.

Employment of counsel—*Services at civic investigation — Powers of council — Absence of by-law or contract under seal—Insufficiency of resolution — Performance of work beneficial to corporation — Necessity for formal acceptance — Implied contract to pay for services.*]—The plaintiff, a barrister and solicitor, was employed by a special committee of the council of the defendants, a city corporation, as counsel for the corporation upon a civic investigation before a County Court Judge, and acted as counsel. The report of the committee recommending that they be empowered to employ counsel was adopted by resolution of the council. In an action by the plaintiff to recover his fees and charges for the services rendered to the defendants at the investigation:—*Held*, that the defendants had power to employ and pay counsel.—*Re Rural Municipality of Macdonald*, 10 Man. L. R. 294, distinguished.—*Held*, however, that the defendants had not so contracted as to be bound, there being no by-law or contract under seal, and the employment of counsel not being one of the matters in regard to which the council have the right to bind the corporation by resolution.—Although the employment of the plaintiff was within the purposes of the defendants, and the work done was beneficial to the defendants, the defendants were not liable because they had done nothing since the work was completed from which the law would imply a contract to pay; they had neither accepted nor adopted the plaintiff's work.—In the great majority of cases the party seeking to charge a corporation in an informal contract has produced something which the latter may accept or reject at its option; if it accepts, it becomes liable to pay; that does not apply to advocacy, the acceptance of which can be indicated only by some formal act.—Review of the English and Canadian cases.—*Campbell* v. *Community General Hospital*, 20 O. L. R. 467, criticised.—The bare performance of work, within the purposes of a corporation and of beneficial character, is not sufficient to raise an

implied contract to pay. *Manning* v. *Winnipeg* (1910), 15 W. L. R. 33.

Erection of library building—*Donor—Principal and agent—Conditional gift in aid of library—Approval of gift by ratepayers—Power of city council to enter into contract.*]—Plaintiffs' plans and specifications having been accepted by the library committee, tenders called for and the defendant council having accepted the report of the committee, the defendants are liable to pay for these plans and specifications. On appeal the amount allowed was increased. *Chappell* v. *Sydney*, 7 E. L. R. 486.

Erection of public library—*Resolution rescinding contract—Statutory authority—Attorney-General—Relator—Consideration.*]—The Attorney-General, on the relation of M., a ratepayer of the city of Halifax, applied for an injunction to restrain the defendants, the city council of Halifax, from carrying into effect a resolution seeking to rescind a previous resolution accepting an offer made by C. to furnish a sum of money for the purpose of erecting a free public library building in the city, on condition that the city would provide a specified sum of money for its maintenance, and would provide a free site for the building. An interlocutory injunction was granted (23 C. L. T. 24), from which the defendant appealed: —*Held per* Townshend, J., that the city council, in passing the rescinding resolution, was acting within the scope of its corporate powers, and that, assuming there was a breach of contract, no one except the other party to the contract could legally complain of its action, or adopt remedies for the enforcement of the contract; that no public right of interest was endangered to justify the intervention of the Attorney-General. *Per* Meagher, J., concurring (without discussing the position of the relator or of the Attorney-General), that the question was one that was imminently proper for the consideration and action of the city council. *Per* Graham, E.J., (McDonald, C.J., concurring), affirming the judgment appealed from, that the corporation, having accepted the offer, were bound by its terms, and that the passing of the rescinding resolution was a breach of contract which the Court had power to restrain, the council being agents or trustees of the citizens in securing the gift; that the council could not without like authority rescind a contract entered into by statutory authority; that the Attorney-General could sue either with or without a relator; that the words "will guarantee to support," were responsive to the words "pledge itself by resolution to support;" that the detriment to the city incurred at the request of C. the promise to support, and the rates being bound, was consideration to support the promise on the part of C.; that where a promise to support the "library" was asked, and the resolution was to support the "library building," the word "building" should be rejected as *falsa demonstratio*. *Attorney-General ex rel. Mackintosh* v. *Halifax*, 36 N. S. R. 177.

Execution by mayor—*Authorisation by council—Want of consensus ad idem.*]—A municipal corporation can be bound only by the acts of those who have the right to represent it, and if, in a case in which it can only be represented by its council, the mayor shall execute an instrument other than that which the council has authorised him to sign, such instrument is void as against the corporation.—2. If by reason of a misunderstanding one of the parties to a contract supposes that he is to undertake a certain work, while the other party wishes him to execute another work, there is no contract between them. (Reversed by the King's Bench.) *Can. Pac. Ry. Co.* v. *Montreal*, 21 Que. S. C. 225.

Lighting—Reduction of price—Execution of contract—Part performance—Tax by-law. *Citizens Telephone & Electric Light Co.* v. *Rat Portage*, 1 O. W. R. 42; *Rat Portage* v. *Citizens Electric Co. of Rat Portage*, 1 O. W. R. 44.

Lighting of town—*Necessity for by-law—Invalidity of contract—Part performance.*]—The power conferred on a municipal council by Art. 628, M. C., to provide for the lighting of the municipality in any manner deemed suitable, can only be exercised in the manner indicated by the municipal code, viz., by by-law (Art. 616); and the council has, therefore, no authority to contract for such purpose under a simple resolution.—2. The part execution of a void or non-existing contract does not give it validity. Judgment in 21 Que. S. C. 241, reversed. *Town of St. Louis* v. *Citizens' Light and Power Co.*, 13 Que. K. B. 19.

Master and servant—*Hiring at monthly salary at pleasure of master.*]—The hiring of a municipal servant "at the pleasure of the council at $75 per month," is a monthly hiring at the pleasure of the municipality, and the employee cannot, upon leaving his employment in the course of any month, recover any salary in respect of that part of the month which has elapsed. *Sheddon* v. *City of Regina* (1907), 6 Terr. L. R. 280.

Offer of money to build library—*Special Act of Legislature—Power to procure site—Contract for building—Powers of municipality.*]—A sum of money was offered the city of Sydney for a public library on condition that the city procured the site and provided for its maintenance. An Act of the legislature empowered the city to purchase a site and tax the ratepayers for the cost. The library committee of the city council entered into a contract with C. for plans of the building, which were prepared, but the scheme afterwards fell through, the money offered was not paid, nor the library built. In an action by C. for the price of the plans:—*Held*, that the city had no power to make a contract for the building, and the action could not be maintained.—Appeal allowed with costs. *Sydney* v. *Chappell Bros.* (1910), 30 C. L. T. 689, 43 N. S. C. R. 478.

Purchase and sale of electrical energy—Powers of corporation—Special Act—Construction. *Ottawa Electric Co.* v. *City of Ottawa*, 6 O. W. R. 930.

Rescission—*Charter—Prescription.*]—An action to avoid a resolution and for cancellation of a contract as *ultra vires* of a municipality, is not subject to the conditions

and prescriptions enacted by its charter. *Aubertin* v. *Town of Maisonneuve*, 7 Que. P. R. 305.

Resolution of town council to cancel contract for the construction of a building that has been commenced (Art. 1691 C. C.), and to indemnify the contractor for expenses, labour and damages, is *intra vires* and valid, even though there are no disposable funds for the purpose and no provision is made to levy them by a special assessment during the year. The contractor may therefore recover, by action, the amount of promissory notes subscribed by the mayor and secretary-treasurer in virtue of the resolution. *Ethier* v. *Ste. Rose* (1911), 39 Que. S. C. 458.

Sale of corporation lands—Action by ratepayers to set aside—Sale at less than value placed upon it by assessor—Fair value —Absence of fraud. *Robertson* v. *Toronto* (1909), 1 O. W. N. 259.

Sale of land acquired in satisfaction of arrears of taxes—*Specific performance —Resolution of council—Redemption—Damages.*]—At a tax sale in November, 1899, as the price offered for a lot owned by one B. was less than the arrears of taxes, it was bid in by the corporation. In September, 1902, the plaintiff wrote the corporation asking if they would accept "the taxes and costs" for the property, and the next day the council passed a resolution reciting the plaintiff's offer and resolving to accept for the property the amount of "taxes, costs, and interest," amounting to $88, and the reeve and clerk were authorised to issue a deed for that price, and a deed in the statutory form of conveyance by the officers upon a sale for taxes was prepared and signed and the corporate seal attached, but was not delivered to the plaintiff, who then demanded the deed and tendered his cheque for $88. Subsequently the clerk received from the agent of B. $88, and returned the plaintiff his cheque, informing him that B. had redeemed his property. The plaintiff sued for specific performance:—*Held, per* Hunter, C.J., at the trial, that no cause of action existed against the corporation, and that the action lay, if at all, only against the reeve and clerk as *persona designatæ*.—*Held*, on appeal, reversing that decision (Irving, J., dissenting), that a contract had been made out, and that the plaintiff had a good cause of action against the corporation, but that, as the land had been redeemed by the original owner, specific performance could not be granted, and it was therefore referred to the registrar to assess the damages. *Per* Irving, J.:— The resolution of September did not satisfy the requirements of s. 26 of the Municipal Clauses Act, which requires all contracts to be made under seal; a resolution to sell must be followed up by a contract under the corporate seal, placed there by order of the council. *Tracy* v. *District of North Vancouver*, 10 B. C. R. 235. Reversed by the Supreme Court of Canada 10th November, 1905.

Simple guarantee provided for by statute in matters of quasi-delict — *Defence by the guarantor in an action on guarantee—Obligation to contest the principal action or to indemnify the party damnified.*] — Recourse on a simple guarantee against the claims to recover damages for accidents caused by the bad condition of the sidewalks, etc., given by 62 Vict. c. 58, s. 300 of s.s. 92 Que., to the city of Montreal against the owners or occupants bound to maintain them, is only open in case of failure on their part to conform to the statute and civic by-laws, or for the failure to carry out some obligation in this regard. Hence, an owner or an occupant sued on a guarantee can set up against the claim the fact that up to the time of the accident the sidewalk was in good order and in the state of maintenance prescribed by the statute and by-laws. He is only bound to intervene and contest the principal action or to indemnify the city after he has been found responsible by judgment. *City of Montreal* v. *Parish of St. Agnes Montreal*, 18 Que. K. B. 258.

Specific performance—*Contract by a joint stock company in consideration of a loan from a municipal corporation.*]—*Held*, a joint stock company that undertakes, in consideration of a loan of money to it by a municipal corporation, to refund it by annual instalments extending over a period of years, during which it agrees to work a factory within the municipality, giving employment to a stated number of inhabitants for a minimum expenditure in wages, becomes indebted for, and may be compelled at the suit of the corporation, to pay the full amount of the loan, in case of insolvency and of default in the specific performance of the obligations so contracted. *Chambly* v. *Canadian Aluminum Works* (1909), 35 Que. S. C. 517.

Specifications — Injunction. *Allen* v. *City of Toronto*, 1 O. W. R. 518.

Statutes—*Repugnancy—Act confirming agreement between city corporation and street railway company—Clause in agreement in effect repealed by section of statute—Power to carry freight.*]—An Act of the British Columbia legislature, c. 63 of 1894, confirmed an agreement contained in a schedule thereto, made between the plaintiffs and defendants, whereby the defendants were given power to construct a system of street railways in the city, and proceeded to make certain other provisions with respect to the rights and obligations of the parties. By clause 25 of the agreement, which was in existence and acted upon before the Act was passed, it was provided that cars should be used exclusively for the carriage of passengers; but by s. 16 of the Act (beginning "In addition to the powers conferred by the agreement"), the defendants were authorised and empowered to carry freight:—*Held*, that the two provisions were repugnant; that s. 16 should be treated as the later enactment and as governing; and therefore the defendants should not be restrained from constructing a line of rails for the conveyance of gravel within the city. *City & South London Rw. Co.* v. *London County Council*, [1891] 2 Q. B. 513, followed. *The St. Hyacinthe case*, 25 S. C. R. 168, distinguished. —Judgment of Martin, J., affirmed. *Victoria* v. *B. C. Electric Rw. Co.* (1910), 13 W. L. R. 536.

Supply electrical power — *Action to set aside contract — Contract validated by legislature—Action stayed thereby.*]—Plaintiff brought action against the city corporation, on behalf of himself and all other rate-

payers, to have declared void a contract entered into between the corporation and the Hydro-Electric Power Commission of Ontario, for the supply of electrical power to the inhabitants of the city. The action in substance attacked the validity of several provincial statutes, 6 Edw. VII. c. 15, 7 Edw. VII. c. 19, superseding the former except as to contracts already entered into, 8 Edw. VII. c. 22, and 9 Edw. VII. c. 19, both providing for the validation of by-laws and contracts made under the former Acts. At the trial, judgment was given staying the action pursuant to 9 Edw. VII. c. 19, s. 8, and not making any other order. Plaintiff appealed to the Divisional Court and asked that judgment be entered for plaintiff as prayed:—*Held*, that the whole ground of attack had been taken away by the legalization of the by-law contract, the result was that no ground of interference appeared, and the legislation being within provincial competence, there could be a declaration to that effect, but no further order. No costs allowed. See S. C. (1908), 11 O. W. R. 1148, (1909), 13 O. W. R. 1148, 19 O. L. R. 139, 14 O. W. R. 148. *Smith* v. *London* (1909), 14 O. W. R. 1248, 1 O. W. N. 280. *Beardmore* v. *Toronto* (1909), 14 O. W. R. 1262, 1 O. W. N. 278.

Court of Appeal affirmed above judgment, approving of *Smith* v. *London*, 14 O. W. R. 1248, 20 O. L. R. 133. *Beardmore* v. *Toronto* (1910), 16 O. W. R. 604, 21 O. L. R. 505, 1 O. W. N. 1039.

Supply electrical power — *By-law — 9 Edw. VII. c. 75—Con. Mun. Act, s. 568—Pleading—Rule 261—No cause of action.*]—Where a municipality entered into an agreement with a company to supply electrical power to the municipality for public purposes for 5 years from 15th March, 1909, it was held valid, under Con. Mun. Act, s. 568, although not submitted to the electors, and 9 Edw. VII. c. 75 did not apply as that Act only affects by-laws passed after 16th March, 1909. Pleadings that plaintiff is a ratepayer of the city of B. and brings action on behalf of himself and all other ratepayers and electors of B. to have by-law (above mentioned) declared *ultra vires* and quashed because it has not received assent of electors, disclose no cause of action, and should be struck out with costs under Con. Rule 261. *Hogan* v. *Brantford* (1909), 14 O. W. R. 1117, 1 O. W. N. 226.

Supply electrical power — *By-law — Non-submission of contract to ratepayers—Injunction granted—Con. Mun. Act, s. 565, s.-ss. 1 and 4—9 Edw. VII. c. 75, s. 2 (1).*]—An agreement between the town of Trenton and defendant company providing for the sale of certain water power privileges, and also a by-law authorising the making of said agreement were set aside as invalid under Con. Mun. Act, s. 565 (4) as the by-law had not been submitted to the ratepayers and it was not competent of the corporation to sell their interest in said water privileges or to enter into a contract to sell the same without that being done. An injunction was granted restraining defendant company from erecting the works contemplated by the agreement, as they had not received the assent of the electors as required by 9 Edw. VII. c. 75, s. 2 (1). *Abbott* v. *Trenton* (1909), 14 O. W. R. 1101, 1 O. W. N. 218.

Supply electrical power — *Publication of by-law — Non-submission of contract to ratepayers—Injunction granted—6 Edw. VII. c. 15, 9 Edw. VII. c. 19, s. 11.*]—Motion for an injunction to restrain the council of a municipality from executing a contract with a company for supplying electrical power to the municipality, and from attaching the corporate seal thereto:—*Held*, that the by-law submitted under the Act of 1906 was invalid, because it did not publish the estimates and the contract so as to enable the voters to judge of that on which they were asked to vote; that the submission was not within s. 11 of the Act of 1903, because it was not and was not intended to be a general submission of the question, but had relations to the Act of 1906; and the submission of the by-law and contract was insufficient and illegal for the want of proper publication; that there was in fact no proper submission under s. 533, and therefore s. 11 of the Act of 1909 could not be invoked to support the by-law; that the council had no right to enter into the proposed contract, and an injunction should go to the hearing to restrain it from so doing. *Horrigan* v. *Port Arthur* (1909), 14 O. W. R. 973, 1 O. W. N. 169; affirmed, 14 O. W. R. 1087, 1 O. W. N. 216.

Supply of electric light for streets —Construction of contract—"Discoveries or advances in the electric art"—Reduction in price—Arbitration and award—Scope of submission—Powers of arbitrator—Refund of money paid—Delay—Profits—Reference back —Costs. *Re Hamilton & Hamilton Cataract Power Co.*, 13 O. W. R. 121.

Supply of gas to municipality—*Contract with gas company — Breach — Right of consumer to recover damages—Elements of damage—Loss of profits—Vis major—Burden of proof.*]—Under a contract between a municipal corporation and a gas company for the supply of gas to the inhabitants, each one of the latter has an action against the company, to recover damages caused him by breach of the contract.—2. Such damages, in the case of a laundry establishment run by gas, include the wages paid to the employees during the stoppage of the work, but do not extend to profits of merely possible realisation.—3. The burden of proof of irresistible force is on the party who sets it up as a defence, and such proof must establish the absolute impossibility of discharging the obligation. Proof of circumstances that merely render it more onerous or difficult, is insufficient. *Markham* v. *Montreal Gas Co.*, 34 Que. S. C. 10.

Supply of water—Evidence. *Morden* v. *Town of Dundas*, 2 O. W. R. 856.

Supplying electrical energy—*Delivery —Use of force—Payment of flat rate—Sale of commodity — Agreement for service.*]—A contract for the supply of electrical energy provided that the company should furnish to the city, at the switchboard in its pumping station, through a connection to be there made by the city with the company's wires, an electric current, equivalent to a certain number of horse-power units, during specified hours daily, and the city agreed to pay for the same at the rate of "$20 per horse-power per annum for the quantity of said electrical current or power *actually de-*

livered" under the contract:—*Held*, that by supplying the current on their wires up to the point of delivery the company had fulfilled their obligation under the contract and was entitled to payment at the flat rate per horse-power per annum for the energy furnished, notwithstanding that the city had not utilized the force supplied during those specified hours by allowing it to pass into the city's motor.—*Per* Girouard and Anglin, JJ.: —The agreement was a contract for the sale of a commodity. — Appeal dismissed with costs. *Montreal* v. *Montreal Light, Heat & Power Co.* (1909), 42 S. C. R. 431, 30 C. L. T. 175.

Surety imposed by municipal law—*Procedure—Trial by jury.*] — The duty of riparian owners and occupiers of streets in Montreal provided for in s.-s. 92 of s. 360 in the charter (62 Vict. c. 58 Que.), to guarantee the city against claims of indemnity for accidents caused by the bad condition of their sidewalks arises from this statute alone (Art. 1057 C. C.) and not from *delict* or *quasi-delict*. — Recourse on the guarantee springing from it does not therefore fall under the heading of Art. 421, C. P., and cannot give rise to a trial by jury. *Parish of St. Agnes* v. *Montreal*, 18 Que. K. B. 263.

Transfer of lands of corporation — *Action for specific performance—Authority to affix seal—Evidence that affixing of seal not authorised—Minutes of council—Parol evidence to prove authority—Necessity for by-law authorising contract—Mistake of fact —Purchaser not a party to mistake.*]—Certain litigation was pending between the plaintiff and defendants (a city corporation) with reference to certain land, and negotiations for settlement took place between a committee consisting of members of the council of the defendants and the plaintiff, during which an offer of settlement was made to the plaintiff, who did not immediately accept. The committee reported to the council, and, as a result of what transpired, the defendants' solicitor was instructed to draw up an agreement embodying the offer of settlement. This agreement was signed by the mayor, who submitted it to the plaintiff, who also signed it, and it was then executed by the secretary-treasurer of the defendants, and the corporate seal affixed, the plaintiff then paying the purchase price agreed. No minutes were kept of the meeting which resulted in the agreement being drawn up, the defendants' solicitor suggesting that minutes be not kept. It was, however, admitted that settlement was discussed at the meeting in question. In drawing up the agreement a mistake was made, it was alleged, by the defendants, whereby land was included which it was not intended should be conveyed, and, on discovery of this mistake, the purchase price was tendered back to the plaintiff, and the defendants refused to complete. The plaintiff refused to accept the money tendered, and brought an action for specific performance: —*Held*, that the execution of the agreement in question by the mayor and secretary-treasurer was *prima facie* evidence that they had the necessary authority to execute the agreement on behalf of the corporation, and, in the absence of evidence that such authority was not given, the agreement was valid and binding.—2. That, while oral evidence is admissible to prove what transpired at a meeting of the council, yet, as it appeared in evidence that some action in regard to the execution of the agreement in question had been taken at a meeting of the council, and that all reference to such action was deliberately omitted from the minutes, contrary to the provisions of the Municipal Ordinance, at the suggestion of the defendants' solicitor, the defendants should not be permitted to give oral evidence of what transpired at such meeting to contradict the solemn contract entered into with another person under the corporate seal, especially when that person, on the faith of the contract, had fully performed his part of it.—3. That the defendants had power to dispose of any land not acquired or held for a specific purpose, by resolution, and a by-law was not required to authorise the sale.—4. That where there has been a mistake on the part of one of the parties to a contract, the other party not being a party to the mistake, and where nothing has been done by such party to induce the mistake, there must be hardship amounting to injustice in keeping the party making the mistake to the contract before specific performance will be refused. *Milestone* v. *City of Moose Jaw*, 1 Sask. L. R. 440, 8 W. L. R. 901.

Work and labour—Authority of chairman of board of works—Employment of superintendent—Remuneration — Ratification— Adoption—Absence of by-law or resolution— *Quantum meruit*—Parties—Costs—Scale of —Solicitor and client costs — Liability between defendants. *McIntosh* v. *City of Grand Forks*, 9 W. L. R. 8.

See Drains — Municipal Elections — Penalty—Street Railways.

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10. Debentures and Bonds.

Bond — *Form of — Statute authorising — Parish commissioners — Liability.*]—An Act of the New Brunswick legislature authorised the county council of Gloucester county to appoint almshouse commissioners for the parish of Bathurst, in that county, who might build or rent premises for an almshouse and workhouse, the cost to be assessed on the parish. The municipality were empowered to issue bonds, to be wholly chargeable on the parish, under their corporate seal and signed by the warden and secretary-treasurer, the proceeds to be used by the commissioners for the purposes of the Act. G. purchased from the secretary-treasurer of the county a bond so signed and sealed, and headed as follows: "Alms House Bond—Parish of Bathurst." It went on to state that "this certifies that the parish of Bathurst, in the county of Gloucester, Province of New Brunswick, is indebted to George S. Grimmer . . . pursuant to an Act of Assembly" (the above-mentioned Act). In an action by G. on the bond:—*Held*, reversing 35 N. B. R. 255, that, notwithstanding the above declaration that the parish was the debtor, the county corporation were liable to pay the amount due on the bond. *Grimmer* v. *Gloucester*, 22 C. L. T. 276, 32 N. B. R. 305.

Bonus — *Special rate — Railway.*]—By a by-law passed under the provisions of ss.

386, 694, and 696 of the Municipal Act, R. S. O. 1897 c. 223, a township corporation was authorised to raise a sum by issuing debentures, to be met by special rate, to provide a bonus in aid of a railway company, payable upon its compliance with certain conditions, no time for compliance being limited. The debentures were duly executed, but remained unissued in the possession and under the control of the municipality:—*Held*, that until the sale or negotiation of the debentures there was no debt on the part of the township, and that the special rate was not leviable, though the time fixed for payment of some of the debentures had passed. Judgment below, 32 O. R. 135, 2 C. L. T. 384, reversed. *Bogart* v. *King*, 21 C. L. T. 229, 1 O. L. R. 496.

Borrowing powers—*Condition imposed by statute — Purchaser — "Provided."*] — Under the N. S. Act of 1898, c. 65, s. 13, the city of Halifax was authorised to borrow certain sums of money, including "the sum of $6,500 for the extension north of the Esplanade, provided the owners of the property north of the contemplated extension give and convey to the city the necessary land required for such extension." The work was required for the abatement of a nuisance of which the property owners in the vicinity had been complaining for some time, and, it being understood that the property owners would convey to the city the land required for the purpose, the city treasurer recommended to the council that all sums required during the year 1898-99, including that required for the carrying on of the work at the Esplanade, be borrowed at the same time, as, by doing so, the expense would be lessened, and a better price obtained for the debentures. This recommendation was adopted by the city council, and the amount in question was included with other amounts to be borrowed, and debentures issued for the whole. The plaintiff, a ratepayer, whose rates were increased by the amount of 84 cents annually for interest on the loan, applied for a writ of *certiorari* to remove into the Supreme Court the record of proceedings of the committee on public accounts, the tenders committee, and of the city council relative to the borrowing of the amount represented by the loan, as part of the consolidated fund of the city, and the estimates of income and expenditure of the city for the year 1902, the principal ground being that the rate which was made upon the basis of the estimates included interest on the sum of $6,500:—*Held*, that, with respect to the issue of bonds for the amount in question, there was not merely a defective execution of a power, but a total want of it; that the word "provided" in the Act was intended to create a condition precedent to the exercise of the borrowing power; that the purchaser of the debentures was bound to examine the statute under the authority of which they were issued, and, had he done so, would have been made aware of the fact that the terms of the statute had not been satisfied, there being nothing in the face of the debentures, or in any of the proceedings of the council, so far as disclosed, to convey any intimation that the condition subject to which the power was to be exercised had been performed; that the word "provided," as used in the Act, was an apt word to create a condition, being synonymous with "if," "when," and "as soon as." *Hart* v. *Halifax*, 35 N. S. R. 1.

Borrowing powers — *Resolution of council — Ultra vires.*] — A town corporation has not the power to borrow money nor to issue debentures in repayment, except for fixed purposes provided by statute. Therefore, a resolution of a town council which, after a recital of repairs to be made, without specifying the cost, and of the opportunity of obtaining an engine and of installing it at the price of $10,000, authorises a borrowing of $50,000, "to cover these expenses, and, if there is ground, for every purpose of public interest provided by statute," does not sufficiently determine the object and the use to be made of the money, and upon these grounds is void.—2. An offer made to a municipality for the purchase of its debentures at a specified rate, which is feigned and simulated, is void, and a resolution accepting it is equally void. *Ménard* v. *La Ville de Bordeaux*, 34 Que. S. C. 335.

By-law — *Estimates—Sinking fund.*]—A by-law to raise $3,000 by debentures to build a $10,000 bridge will be set aside when not in conformity with the provisions of arts. 494 and 495, M. C. Such by-law should be based upon precise estimates and provided for the levying of a sinking fund as well as interest upon the loan. *Pritchard* v. *Wakefield*, 24 Que. S. C. 100.

By-law authorising borrowing—Sale of debentures at discount—Validity—Interest. *Vian* v. *Maisonneuve*, 4 E. L. R. 559.

By-law guaranteeing — *Statute—Construction — Approval by ratepayers and Lieutenant-Governor.*] — A by-law enacted under the Towns Corporation Act (c. 1, tit. 11, Revised Statutes of Quebec, 1888), by the respondent corporation guaranteed debentures to a specified amount to be issued by a company with which the corporation contracted for the execution of a public work within the municipality; but the same had not been submitted to the municipal electors for their approval or to the Lieutenant-Governor for his authority:—*Held*, in a suit by debenture-holders against the corporation, that the guarantee was in consequence *ultra vires*:—*Held*, also, with regard to the special Act (60 V. c. 78) under which the company was incorporated, that the above contract involved a financial obligation on the part of the corporation within the meaning of s. 7 (c). Both under that section and s. 27, which should be read together, a by-law must be approved by a majority of the whole body of ratepayers. Judgment in 11 Que. K. B. 77 and 33 S. C. R. 50, affirmed. *Hanson* v. *Grand Mère*, [1904] A. C. 789.

Defective by-law — *Remedial statute.*] —A municipal by-law was passed in 1892, on which debentures were issued, which provided for payment of the interest, but failed to provide for payment of the principal. The statute 3 Edw. VII. c. 18, s. 93 (O.), enacts that "where in the case of any by-law heretofore or hereafter passed, the interest for one year or more on the debentures issued under such by-law and the principal of the matured debentures (if any) has or shall have been paid by the municipality, the by-law and the debentures issued thereunder remaining unpaid shall be valid and binding:"—*Held*, that the effect of this is to make one payment of interest validate the debenture in

respect to which it is paid, and one payment of principal validate the debenture in respect to which it is paid; and that accordingly the debentures here in question fell within the scope of this remedial enactment. *Standard Life Assurance Co.* v. *Tweedie*, 23 C. L. T. 324, 6 O. L. R. 653, 2 O. W. R. 731, 747, 922, 983.

Form of — *Sinking fund — Assent of Lieutenant-Governor.*]—A by-law (not being for local improvements) which provides for the postponement of the payment of the principal to the end of the term over which the debentures are to run, and for the same being met by a sinking fund, instead of providing for the payment of the principal by equal instalments, is not in accordance with the Municipal Ordinance (C. O. 1898 c. 70), and for that reason the Lieutenant-Governor in Council is warranted in withholding his assent thereto. *In re Edmonton By-law*, 24 C. L. T. 100, 4 Terr. L. R. 450.

Guaranteeing — *Approval of ratepayers.—Held*, following *Corporation de la Pointe Gatineau* v. *Henson*, 19 Q. R. 346, that a by-law authorising a municipal corporation to guarantee debentures issued by a company, is not valid until it has been approved by a vote of the ratepayers, and by the Lieutenant-Governor in Council. And compliance with these conditions is not affected or dispensed with by s. 27 of 60 V. c. 78 (Q.). *Hanson* v. *Grand Mere*, 11 Que. K. B. 77.

Guaranteeing payment of manufacturing co.'s debentures—*Bonus—Assent of ratepayers—Application to quash—Con. Mun. Act, 1903, (O.), ss. 366, 384, 591a.*]—An application to quash a town by-law authorizing the corporation to guarantee payment of certain debentures of Robert Bell Engine & Threshing Co., on the ground that it created a debt but provided no way of paying the same.—Meredith, C.J.C.P., *held*, that s. 384 of the Con. Mun. Act, 1903 (O.), applies only in the case of the municipality being the primary debtor, not, as here, where it was only guarantor and might never, in fact, be required to pay. Application dismissed with costs. *Re Holmested & Seaforth* (1910), 17 O. W. R. 1060, 2 O. W. N. 464.

Illegal assessment — *Validity of debentures — Motion to quash whole rate — Certiorari.*]—By c. 65 of the Nova Scotia Acts of 1898, the council of the city of Halifax were authorised to borrow on the credit of the city of Halifax a sum not to exceed $6,500 for the extension north of the esplanade; provided the owners of property in front of the contemplated extension should give and convey to the city the land required; and it was enacted that the sum when borrowed should form part of the consolidated fund of the city, and debentures should be issued by the city therefor under the provisions of c. 24 of the Acts of the legislature of Nova Scotia for 1880. The said sum of $6,500, together with other sums, was subsequently borrowed, and debentures issued to cover the amount of the loan. There was nothing to distinguish the debentures issued in respect of the sum of $6,500 from those issued with respect to the balance of the loan. The owners of property in front of the proposed extension refused to convey, and it was not disputed that the loan was prematurely made. The application was for a writ of *certiorari* to remove the whole rate for 1901 into the Supreme Court. On behalf of the city corporation it was contended that the holders of the debentures could enforce against the city payment of the debentures and the interest, and therefore the rate should not be quashed. By reason of the loan the rate of the applicant was increased 84 cents a year:—*Held*, that the application must be refused. *In re Hart and City of Halifax*, 21 C. L. T. 480.

Issued to assist a railway—*Purchase by mayor and his co-partner—Resale at a profit.*]—P. C. *held* him a trustee for the city and ordered him to account for the profit. It made no difference that the profit was made by the mayor and his partner jointly and not by the mayor alone. *Bowes* v. *Toronto* (1858), C. R. 3 A. C. 10, 11 Moo. P. C. 463. Digested under TRUSTS AND TRUSTEES.

Loans — *Appropriations — Sinking fund — Mandamus — Deposit — Interest—Action—Status of plaintiff.*] — *Mandamus* lies to compel the corporation, but not the treasurer, a mere official acting under the orders of the council, to deposit in an incorporated bank, or the hands of the provincial treasurer, appropriations in hand, but not those of previous years diverted to other uses, to the credit of interest and sinking funds on loans made in virtue of by-laws, passed under the provisions of 56 V. c. 52, ss. 374, 375, 376, 380, and 412. 2. It is a duty imposed by law, and not discretionary with the council, to make such deposit, and once appropriations are made to pay interest and sinking funds, the council cannot afterwards change such appropriations, nor divert the funds. 3. After payment of the absolutely necessary expenses of municipal government, the balance of the revenue should be applied to payment of interest and sinking funds, and not to improvements, betterment of streets, etc., debts for which are not privileged and take no preference over sinking funds. 4. Where appropriations for payment of interest and sinking funds for previous years, had been collected from the taxpayers, and diverted, and no money remained in the treasury to pay except the current year's interest and sinking funds—as the city had exceeded the limit of its borrowing powers—to order the city to pay the previous years' interest and sinking funds so diverted, from the current year's appropriations, would be to suspend its function of municipal government; and the petitioners' demand was granted for the current year's appropriation only. 5. An occupant not an elector paying municipal taxes, is, with the electors, interested in municipal administration, and has the right to compel the city to perform the duties imposed by law upon the corporation. *Trudel* v. *Hull*, 24 Que. S. C. 285.

Motion to quash debenture by-law—*Admitted illegal—Costs against municipality —Delay to obtain legislative sanction of by-law refused.*]—Motion to quash a municipal debenture by-law, admitted by counsel to be illegal. Counsel urged that the municipality should not pay costs as the applicant was

receive for 1907, 1908, and 1909, and that it was due to his failure to raise enough money for these years that it became necessary to raise money by debentures, and asked for a delay to obtain legislative sanction of said by-law. Riddell, J., quashed the by-law with costs. Delay refused. *Re Davis & Beamsville* (1910), 17 O. W. R. 986, 2 O. W. N. 423.

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11. Drainage—*See* Drains.

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12. Electrical Works.

By-law — *Motion to quash — Irregularity.*]—Motion to quash a municipal by-law for the construction of electric light works, upon the ground that s. 569 (5) of the Municipal Act, 1903, 3 Edw. VII. c. 19 (O.), had not been complied with, inasmuch as there had been only publication in four weekly issues of a weekly paper instead of for one month, and also upon the ground of the omission to appoint and give notice of the appointment of a day for finally considering the by-law in council:—*Held*, that under the circumstances the jurisdiction to quash should not be exercised, although the first objection was a substantial one, inasmuch as the by-law might be validated by registration under s. 390 and the irregularities had not affected the result.—The jurisdiction to quash on motion conferred by s. 378 of the Municipal Act, 1903, ought, generally speaking, to be exercised in every case of an illegal by-law which cannot be validated; but in the case of one which can be validated, it should be exercised only, generally speaking, when the irregularities in question affected or might have affected the passing of it. *Cartwright* v. *Napanee*, 11 O. L. R. 69, 6 O. W. R. 773.

By-law regulating electrical construction — Scope of — Permit necessary before work done—Conviction. *Rex* v. *Cope & Frey* (B.C.), 4 W. L. R. 253.

Electric light company — *Right to place poles on highway.*]—The defendants, an electric light company, placed poles upon plaintiffs' highway without express permission. Plaintiffs passed by-law allowing poles to remain on payment of rental, the execution of bond to indemnify the plaintiffs against actions for damages, and payment of costs of obtaining legislation to confirm the by-law. This the company failed to do. The plaintiff issued a writ claiming the rent provided for in the by-law:—*Held*, that the defendant company had no right upon the highway without legislative sanction. *Bucke* v. *New Liskeard* (1909), 14 O. W. R. 841, 1 O. W. N. 123.

Electrical works — Statute authorising —Imperative or permissive — Damages to lands by dam—Temporary structure—Independent contractor—Control by corporation. *Clipsham* v. *Orillia*, 4 O. W. R. 121.

Hydro-Electric Power Commission Act — *By-law authorising contract with commission for supply of power — Price limited thereby—Approval of electors—Contract without limitation as to price—By-law authorising execution—Refusal of mayor to execute — Mandamus.*]—Under the Hydro-Electric Power Commission Act, 6 Edw. VII. c. 15 (O.), and the substituted Act, 7 Edw. VII. c. 19 (O.), municipal corporations are empowered to submit by-laws to the electors authorising the entering into contracts with the Commission for the supply of power, and, on receiving the electors' assent, to enter into such contracts. A by-law was submitted to and approved by the electors of a town, and passed by the council, authorising the entering into of such a contract, at a price from $17.37 to $22 per horse power, which was to include all charges. A further by-law was passed authorising the borrowing of $60,000 for such purposes, which was also sanctioned by the electors. A contract, in the form given in schedule B of the Act of 7 Edw. VII. c. 19 (O.), was submitted by the Commissioner to the corporation for execution, which did not contain any limitation as to price; and a by-law ratifying and accepting this contract was introduced and received the necessary three readings by the council, but was not submitted to the electorate, to which, as well as to the contract, the mayor refused to affix the corporate seal, on the ground that the contract did not contain any limitation as to price:—*Held*, that his refusal was justifiable, for the by-law was a breach of faith towards the electorate, in view of the by-law which had been submitted to and approved of by them, while the contract was illegal as contrary to 6 Edw. VII. c. 15 and 7 Edw. VII. c. 19 (O.).—An application for a *mandamus* to compel execution by the mayor was therefore refused.—Section 333 of the Municipal Act, 3 Edw. VII. c. 19 (O.), under which execution by a mayor may be compelled, applies where the matter is one of policy merely, and not where, as here, the validity of the council's action is in question, and they are acting without jurisdiction.—*Held*, also, that the contract was not validated by 8 Edw. VII. c. 22 (O.), as that Act only applies to validate contracts which have been assented to by the electors. *Re Town of Galt By-law No. 964, Re Scott & Patterson*, 12 O. W. R. 637, 17 O. L. R. 270.

Ownership of electric light works—Light supplied to house—Remedy for non-payment — Lien — Enforcement against landlord on tenant's default. *Stewart* v. *Edmonton* (Alta.), 8 W. L. R. 62.

Purchase and sale of electrical energy — *Special Act — By-laws — Contract.*]—A special Act, 57 V. c. 75 (O.), enacts that the defendants shall, in addition to the powers conferred by the Municipal Light and Heat Act, which is thereby incorporated, have power to produce, manufacture, and use, and supply to others to be used, electricity for motive power and for any other purpose to which the same can be applied . . . and to acquire and hold lands, water powers, machinery, and all other property . . . necessary therefor, and shall for and with respect to such powers and purposes have all and every the powers which are by the said Act conferred on municipal corporations with respect to light and heat. In reliance on this Act, the defendants passed a by-law providing for the execution of an agreement with a private

company for the supply to the defendants of electrical power, which they contemplated using and supplying to others by means of a certain property and plant which they had acquired from another company:—*Held*, that the by-law was *ultra vires* because the special Act did not authorise the defendants thus to purchase electricity for using and supplying to others, but only themselves to enter upon the process of production and manufacture of electricity so produced and manufactured, and to supply it to others. *Ottawa Electric Light Co.* v. *Ottawa*, 12 O. L. R. 290, 8 O. W. R. 204.

13. EXPENDITURE.

Acquisition of lands at tax sale — *Sale by tender — Resolution of council to accept lower tender—Action by higher tenderer to restrain sale — Insufficient reasons for accepting lower tender.*]—This was a motion to quash appeal by defendant corporation to Divisional Court from the judgment of Magee, J., upon an action to restrain defendants, the corporation of the City of Belleville, from proceeding with a sale to defendant Caldwell of certain lots acquired by the corporation under the Assessment Act in satisfaction of arrears of taxes. This action was dismissed by Street, J., and the plaintiff appealed to a Divisional Court, which held (5 O. W. R. 319), that the plaintiff was entitled to succeed, unless the defendant corporation could prove at a further trial good reasons which induced them to sell to defendant Caldwell. The defendant corporation elected to have a further trial, and it took place before Magee, J., without a jury, at Belleville, on 2nd May, 1905:—*Held*, plaintiff not entitled to have his offer accepted nor to prevent the corporation from selling for less than the amount of his offer, but he was entitled to an injunction to restrain them from closing the sale to Mr. Caldwell on the basis only of the action of the special committee or of the council, 6 O. W. R. 1. Upon motion to quash above appeal, it was held that the mere payment of money as directed by a judgment is not a bar to an appeal from that judgment by the party making such payment (reference to *Pearce* v. *Palmer*, 12 P. R. 308), and if the existing injunction was removed and the appellants were declared to be at liberty to carry out the sale, there was nothing to support the contention that the defendant Caldwell could not purchase the lands in question; also, that there was nothing to prevent his co-defendants from taking steps by appeal to relieve themselves from an onerous judgment which they allege to have been pronounced in error. *Phillips* v. *Belleville*, 6 O. W. R. 129, 10 O. L. R. 178.

Appeal — *Quo warranto — Action by ratepayer — Municipal corporation — Payment of money — Statutory procedure — —Matter of form — "Montreal City Charter," ss. 42, 33¼, 338 — 3 Edw. VII., c. 62, ss. 6, 27.*]—An action by a ratepayer of the city of Montreal to compel the members of the finance committee of the city council to reimburse the city for moneys which it was alleged they authorised to be illegally expended and asking for their disqualification under s. 338 of the "City Charter," is not a proceeding in *quo warranto* under the provisions of Arts. 987 *et seq.* of the Code of Civil Procedure.—By s. 334 of the Charter (3 Edw. VII., c. 62, s. 27), the city council of Montreal must at the end of each year appropriate the sums at its disposal from the revenues of the city for the services during the coming year, including a reserve of 7 per cent., 2 per cent. of which is to provide for unforeseen expenses. By s. 42, as amended by 3 Edw. VII., c. 62, s. 6, the finance committee of the council must consider all recommendations involving the expenditure of money, unless an appropriation has been already voted. An item of unforeseen expenditure, namely, the payment of expenses of a delegation to France, came before the council and was passed and sent to the finance committee, which directed the city treasurer to pay the amount, and it was paid accordingly:—*Held*, the Chief Justice and Girouard, J., *contra*, that the reserve of 2 per cent. for unforeseen expenses was not an appropriation of the amount so directed to be paid. — *Held*, also, the Chief Justice and Girouard, J., dissenting, that under the provisions of the charter it is essential that every recommendation for the payment of money where there has been no appropriation for the payment, must receive the consideration of the finance committee and its sanction or refusal to sanction such payment before final action thereon by the council. That such a payment without this formality even though *bona fide*, and though in fact sanctioned by the finance committee after being finally dealt with by the council, and though the city was not prejudiced thereby, is an illegal expenditure and involves the consequences provided by s. 338 of the "City Charter." Appeal allowed with costs. *Larin* v. *Lapointe* (1909), 42 S. C. R. 521; 30 C. L. T. 175.

Borrowing powers — *"Ordinary expenditure" — School purposes—Costs.*]—The power conferred upon a municipality by the Municipal Act, R. S. O. 1897 c. 223, s. 435, of borrowing money to meet current expenditure is distinct from the power conferred by that section of borrowing money for school purposes, and the amount borrowed for the former purpose must not exceed eighty per cent. of the amount collected in the preceding municipal year for the current expenditure of the municipality, apart from the expenditure for school purposes. Where this limit had been exceeded, but before the action was tried the money had been repaid, the plaintiff, who sued on behalf of himself and all other ratepayers, was held entitled to have the merits of the case disposed of, and, in the result, his costs awarded to him, and this although the borrowing had taken place to enable the municipality to carry on prior litigation pending between the plaintiff and the municipality. *Holmes* v. *Goderich*, 23 C. L. T. 12, 5 O. L. R. 33, 1 O. W. R. 367, 814.

Compulsory audit — Appointment of auditor — Payment for services—Demand — Attorney-General. *Williamson* v. *Elizabethtown*, 2 O. W. R. 977.

Credit legally voted — *Expenses incurred—Payment—Treasurer—City charter.*]—What Art. 336 of the charter of the city of Montreal forbids to its council and its committees, and what Art. 338 punishes, is not the ordering of payment of expenses already incurred without their being covered by a credit

legally voted, but the incurring of them without such a credit. The prohibition against paying these expenses is only directed to the treasurer of the city.—2. The restrictions provided by Arts. 336, 338, and 339 of the charter only apply to the expenses which the council has discretion to incur, and do not apply to disbursements which are provided for by statute or by a contract legally made by the council. *Stephens* v. *Préfontaine*, 22 Que. S. C. 11.

Expenses of criminal justice — *Liability for—Certificate—Powers of provincial legislatures.*]—A municipality is liable for the fees and expenses of a justice of the peace or a constable, payable in relation to the prosecution of indictable offences, only where they have been certified to be correct by the Attorney-General or other counsel acting for the Crown, and have been ordered to be paid by the Judge presiding at the Court in which the indictment is presented. The Act of Assembly, 57 V. c. 19, s. 1, whereby certain expenses in criminal prosecutions are made chargeable upon the municipalities, is not *ultra vires* of the Provincial Legislature. *McLeod* v. *Kings, Morison* v. *Kings*, 35 N. B. R. 163.

Illegal expenditure — *Action by ratepayer—Intervention of Attorney-General—Validating Act—Right of appeal.*]—Prior to the passing of the Act of the legislature of Nova Scotia, 7 Edw. VII. c. 61, the city council of Halifax had no authority to pay the expenses of the mayor in attending a convention of the Union of Canadian Municipalities.—Where a municipal council illegally pays away money of the municipality to one of its officers, an action to recover it back may, if the council refuses to allow its name to be used, be brought by a ratepayer suing on behalf of all the ratepayers, and need not be in the name of the Attorney-General.—Pending such an action the legislature passed an Act authorising payment by the council of any sums for principal, interest, and costs incurred by the defendant "in the event of judgment being finally recovered by the plaintiff:"—*Held, per* Fitzpatrick, C.J., and Maclennan, J., that the meaning of the words quoted was that the action might proceed to a finality, including any competent appeal, and that they did not put an end to the appeal to this Court.—*Per* Fitzpatrick, C.J., and Maclennan, J.—*Quære*, whether the action should not have been brought on behalf of all the ratepayers and inhabitants of the municipality?—Judgment appealed from, *Hart* v. *MacIlreith*, 41 N. S. R. 351, *Hart* v. *Halifax*, 2 E. L. R. 118, 158, 468, affirmed. *MacIlreith* v. *Hart*, 39 S. C. R. 657, 4 E. L. R. 468.

Illegal expenditure — *Action by ratepayer to recover — Status — Parties — Attorney-General — Moneys paid to mayor and city engineer — Liability to refund.*]—The defendants M. and D., the mayor and city engineer of the city of Halifax, were appointed by the city council and board of works of the city respectively, delegates to attend a convention of the Union of Canadian Municipalities, held in July, 1905, and were paid their expenses incurred in that connection out of the funds. The plaintiff, a ratepayer, in an action against the city and the officials named, sought a declaration that the payments made were illegal, and claimed repayment thereof with interest. Before action brought, he sought leave to sue in the name of the city, which was refused:—*Held*, that the city corporation, having a proprietary right to maintain, could have brought the action in the corporate name, and that the Attorney-General, in such case, was neither a necessary nor proper party; that the corporation having refused to permit the name to be used, the ratepayers, or one of them, having a direct pecuniary interest, could sue in the interest of the corporation and without joining the Attorney-General; that the defendant M. (mayor), being a member of the city council, must be held to have had notice that the statute did not permit the expenditure made, but that the defendant D. (engineer), having been instructed to attend the meeting, and the payment of his expenses having been authorised by the city council, was entitled to assume that every act had transpired necessary to make the payment legal, and that having received payment without notice of its illegality, the transaction was completed, and there was no implied contract on his part to make repayment.—*Per* Longley, J. (dissenting on this point), that corporate bodies have inherent powers in connection with the appropriation of money for matters of general advantage, which may be exercised apart from any special enactment. *Hart* v. *Halifax*, 2 E. L. R. 118, 158, 468; *Hart* v. *MacIlreith*, 41 N. S. R. 351.

Illegal expenditure — *Purchase of necessary article — Authorisation by mayor —Waterworks — Sum voted for.*]—1. The forfeiture of office provided by a municipal statute in respect of the members of a council who authorise forbidden expenses, is not incurred by the mayor who causes a necessary article to be bought by a municipal officer, declaring to him that if the municipality does not pay the price, he will pay it himself.—2. The prohibition against expenditure "before the detail and the cost of the object of it have been submitted to the council and approved by two-thirds of its members," is not violated by the purchase of a necessary thing for a department (*e.g.*, the waterworks), if the price of it can be taken out of a sum previously voted in the above manner "for the enlargement, improvement, the unforeseen expenses, inspection, etc., of the waterworks." *Massé* v. *Ekers*, 35 Que. S. C. 424.

Illegal payments — *Action by ratepayer —Defence of action brought against constable—Resolution of council—Ratification—Parties—Costs.*]—A constable appointed by by-law of a town arrested a man as a vagrant, and for so doing was sued for false arrest and imprisoned: — *Held*, that he was not acting as the servant of the corporation, and "respondeat superior" did not apply; that the corporation were not liable to the person arrested; that a resolution of the council retaining an advocate to defend the constable and agreeing to indemnify him, was *ultra vires*, and payment by the corporation to such advocate of his costs and to the advocate for the person arrested his costs of such action, was illegal.—2. That the payment by the corporation of a fee to an advocate for his opinion as to the liability of the council and

councillors was a legal payment.—3. That, though the resolution of the council and the payments thereunder might amount to a ratification of the act of the constable so as to render the corporation liable to the person arrested, the payment could not be so made legal as against a complaining ratepayer.—4. That the constable was a proper party to an action by a ratepayer.—5. That ss. 268 and 269 of the Municipal Ordinance of 1898, c. 70, are merely permissive, and do not oust the general jurisdiction of the Court, in an action to quash by-laws, resolutions, etc.—6. That s. 273 affords protection for acts done under a by-law or resolution, but does not bar an action to restrain the corporation from enforcing it.—7. That a ratepayer, on behalf of himself and all other ratepayers, has a right to bring an action for a refund of the moneys illegally paid.—8. That the corporation not having paid the moneys under mistake, and having no right to recover them from the constable as moneys paid to his use, the plaintiff had no greater right. *Pease* v. *Moosomin*, 5 Terr. L. R. 207.

Payment of money — *Instalments — Debentures — Sinking fund.*] — Since the amendment of the N. W. T. Municipal Ordinance, 1894, part VI., ss. 10 and 11, by the amending Ordinance of 1897, whereby s. 11 was left out and ss-s. (b) of s. 10 was repealed and a new sub-section substituted, and a new section, 222 (now 218), was enacted, a money by-law (not being for local improvements) which provides for the postponement of the payment of the principal to the end of the term over which the debentures run, and that such payment is to be met by a sinking fund, instead of providing for the payment of the principal by equal instalments, is invalid. In this case the by-law not being in accordance with the Ordinance, the Lieutenant-Governor in council was warranted in withholding assent to it. *In re Edmonton*, 21 C. L. T. 103.

Public Parks Act, Man. — *Municipal Act—Expropriation—Power of board—Entry—Trespass — Remedy of owner — Action — Arbitration.*]—1. Section 755 of the Municipal Act, R. S. M. 1902 c. 116, giving power to the council of a city to acquire by purchase or expropriation land for park purposes, read together with s. 769, does not authorise the council to enter upon the land, without the consent of the owner, without first taking steps to expropriate the land and obtain an award of arbitrators and paying the amount awarded for compensation.—2. Section 44 of the Public Parks Act, R. S. M. 1902 c. 141, does not warrant the parks board of a town in entering upon land, or doing anything to injuriously affect it, without the consent of the owner, until after they have regularly expropriated and paid for the property; and a person whose land has been thus entered upon or injuriously affected has a right of action for damages against the parks board, and is not restricted to the remedy by arbitration under the expropriation and arbitration clauses of the Municipal Act. *Smith* v. *Public Parks Board of Portage la Prairie*, 15 Man. L. R. 249, 1 W. L. R. 257.

Purchase of land for industrial farm — Delivery and registration of conveyance—Refusal to pay purchase money — Executed contract—Deed of re-conveyance—By-law—Statute of Frauds—Power of corporation—Extraordinary expenditure—Estimate—Assessment. *Macartney* v. *Haldimand*, 6 O. W. R. 805, 10 O. L. R. 608.

Ratepayer no right to maintain action — Attorney-General's intervention necessary. *Tanton* v. *Charlottetown*, 1 E. L. R. 282.

Ratepayer no right to maintain action — Corporation must sue or else Attorney-General for ratepayers. *Hart* v. *Halifax*, 2 E. L. R. 118.

Resolution — *Payment of newspaper reporters — Ultra vires — Action to annul — Ratepayer — Compelling refund.*]—The only powers a public corporation can exercise are those expressly given, or, by implication, those necessary to carry the former into effect. No power to pay newspaper reporters their contingent expenses is expressly, or by necessary implication, to be found in the charter of the city of Montreal, and a resolution of the city council to that effect is *ultra vires*, null and void.—A ratepayer has a right to bring an action to have such a resolution annulled, but he cannot ask a condemnation against the parties who have received money in virtue thereof, to refund it. *Tremblay* v. *Montreal*, 28 Que. S. C. 411.

Sanatorium — *Proposed expenditure — Submission of question to electors — Injunction.*]—There is nothing in the Municipal Act permitting a municipal council to take a plebiscite, and there is no express prohibition against doing so. Taking a vote of the electors upon questions or upon authorised by-laws is open to grave objections. And where a council sought to take such a vote on the question of a money grant in aid of a sanatorium, which they had not power to make, with a view to inform the Legislature of the result, and, if favourable, to use the result as an argument in attempting to obtain for the council legislative authority to make the grant, they were restrained by injunction from so doing. *Helm* v. *Port Hope*, 22 Gr. 273, followed. *King* v. *Toronto*, 23 C. L. T. 92, 5 O. L. R. 163, 1 O. W. R. 843.

Statute authorising — Dam — Temporary structure — Injury to land — Independent contractor—Control by corporation — Maintenance of dam—Navigable river — Unlawful act—Nuisance—Abatement — Request. *Clipsham* v. *Orillia*, 5 O. W. R. 298, 786.

Valid debt — By-law — Contract—Injunction—Costs. *Whelihan* v. *Hunter*, 1 O. W. R. 788, 2 O. W. R. 20.

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14. EXPROPRIATION OF LAND.

Abandonment — *Damages — Costs.*]—The city commenced expropriation proceedings, and forthwith took possession of the plaintiff's land, constructed works thereon, and incorporated it with a public street. Subsequently, in virtue of a statute granting permission to do so, the city abandoned the expropriation proceedings without paying indemnity or returning the lands so occupied and used:—*Held*, that the plaintiff had been

illegally dispossessed of his property, and was entitled to have it returned to him in the state in which it was at the time it had been so taken possession of, and also to recover compensation for the illegal detention.—*Held*, further, that in the present case the measure of damages, as representing the rents, issues, and profits of the lands usurped by the city, should be the equivalent of the interest upon the value of the property during the period of its illegal detention. Judgment below, 8 Que. Q. B. 534, varied, with costs against the appellants. *Montreal* v. *Hogan*, 21 C. L. T. 6, 31 S. C. R. 1.

Absence of by-law — *Payment to landowner — Resolution of council — Nullity — Ratepayer — Reimbursement of corporation.*] —A resolution of the city council of St. Henri to pay a sum to a land owner as indemnity for lands which the city has appropriated for the purpose of opening up roads, without an expropriation by-law, is void, as is also a payment made by virtue of such resolution; and three ratepayers, municipal electors of the city, have a right of action for a declaration of such nullity and to compel the owner to reimburse the city corporation the sum which has been paid to him. *Marsan* v. *Guay*, 28 Que. S. C. 145.

Appointment of third arbitrator — *Notice — Time — Irregularity — Extension — Arbitration — View of locus — Award — Service — Certificate — Form of award — Omission of formalities — Municipal Code.*]—The naming of a third valuator by the prothonotary for the purpose of an expropriation under Art. 916 (1) of the Municipal Code, may be made upon the demand of one of the parties without notice to the other.—2. The five days' notice to the parties whose lands are expropriated, prescribed by Art. 912 of the Municipal Code, is not required on penalty of nullity. Therefore, the party who receives a two days' notice only, may demand an extension of the time, and, if he does not do so, he will not be permitted to object to the irregularity.—3. The examination of the locus referred to in Art. 913 of the Municipal Code is only applicable to a case where the valuators do not know it sufficiently. Where it is otherwise, they are dispensed from it.—4. The valuators are not bound to have their award served. The certificate which they deposit in the office of the municipal council is sufficient to bring it to the knowledge of the parties interested.—5. The law prescribes no particular form for this award; it is sufficient if the certificate deposited mentions the sum which the valuators fix as representing the value of the property expropriated.—6. The provision of art. 16 of the Municipal Code applies to expropriation as well as to other municipal acts. Therefore, a person who makes a claim on account of injury is not in a position to complain of the omission of formalities unless it results in real injustice, the onus of proof of which is upon him. *Jacques* v. *Contrecœur*, 32 Que. S. C. 469.

Arbitration and award — Appeal from award — Injury to land owner — Proposed diversion of stream — Water Privileges Act — Evidence on appeal — Affidavit — Testimony before arbitrators not taken down — View of premises — Local knowledge. *Re Inglis & Owen Sound*, 3 O. W. R. 209.

Can the municipality discontinue expropriation proceedings? — *C. P. 215; C. C. 407.*]—A petition in expropriation is not an offer to buy, but the institution of a suit, and there is no necessity for the concurrence of the proprietor in the proceedings taken for the commencement and continuance of the suit. A municipal corporation therefore has an absolute right to discontinue its expropriation proceedings as long as the arbitrators' award has not been given, the award alone creating a right in favour of the proprietor. *Montreal* v. *Park Lafontaine*, 11 Que. P. R. 170.

Compensation — *Appointment of arbitrator — By-law — Formalities — City charter — Prohibition.*]—1. Under s. 796 of the Winnipeg charter, 1 & 2 Edw. VII. c. 77, the appointment by the city of an arbitrator to determine the compensation to be paid for land sought to be expropriated must be signed in the same manner as a by-law, that is, it must be under the corporate seal and signed by the mayor or acting mayor and the clerk or acting clerk, and it is not sufficient that a regularly signed by-law had been passed authorising the mayor to appoint a named person as arbitrator, and that the appointment had been signed by the mayor alone under the corporate seal.—2. The city charter contains no provision enabling the city to carry on arbitration proceedings to enforce the expropriation of land unless the amount claimed by the landowners does not exceed $1,000, and then only in the manner pointed out by s. 789.—Order made to prohibit the city and an arbitrator appointed by it from proceeding in the matter of a proposed arbitration to determine the compensation for certain lots sought to be expropriated for a market site. *Dewitt* v. *Winnipeg*, 4 W. L. R. 369, 16 Man. L. R. 398.

Compensation — *Arbitration — Notice to owner — Liability to true owner.*]—Under a statute empowering expropriation of lands, the duty devolved upon the defendant municipality to provide for the appraisement of the compensation. The defendant municipality did not give the owner of the lands notice to appear before the arbitrators, but treated the land as that of another person, and paid to that other person the amount awarded for the land taken:—*Held*, in an action for compensation, that the defendants could not set up the defence that the statutory remedy by arbitration was exclusive; under such a statute the necessity of giving notice to the owner of the land will be implied; and the defendant municipality remained liable to the true owner. *Thompson* v. *Sydney*, 40 N. S. R. 562.

Compensation — *Arbitration and award — Conclusiveness of award — Variation on appeal — Examination of evidence — Valuation of lands.*] — In a matter of expropriation at Montreal, under the provisions of 54 V. c. 78, s. 11, 1890, the commissioners' report has not the character of "*chose jugée*" any more than it had before the passing of that Act; and, on appeal from the decision of the commissioners to the Court of Review, the Court has a right, in order to understand the award, to refer to the evidence which accompanies it; but the Court will only change the amount of compensation awarded when it appears that no allowance has been made for part of the

claim, or in case of manifest error in arriving at the value of the property. The Court of Review has no right to take as a basis of its judgment, the opinions as to valuation given by the witnesses of the parties. In arriving at the value of lands and the damage sustained by reason of its expropriation, the revenue derived from the land ought to be taken into account as well as the sales which have been made in the neighbourhood. *Montreal* v. *Gauthier*, 26 Que. S. C. 351.

Compensation — *Increase on appeal — Interest.*]—Where, under the charter of the city of Montreal, a land-owner whose land has been expropriated has obtained from the Court of Revision, on appeal from an award of compensation, an increase of the amount fixed by such award, he may receive from the city corporation, the expropriating municipality, the amount of interest accrued upon the amount by which the award is increased from the time when the corporation took possession of the land down to the date of payment of the amount of the increase. *Grand Trunk Ry. Co.* v. *Montreal*, 18 Que. S. C. 534, 3 Que. P. R. 322.

Compensation — *Limitation of right—Construction of statutes.*]—By 63 V. c. 59, the city of St. John is empowered to take the lands, tenements, rights, property, and premises of persons or corporations for needed public civic works, and provision is made for compensation. By 1 Edw. VII. c. 55, the power of the city as to the right to expropriate for a water supply is extended, and the sections in 63 V. c. 59, providing for compensation, are made to apply. By 5 Edw. VII. c. 59, passed for the purpose of further carrying out the provisions of the Act or Acts of the legislature empowering the city to extend their water supply, the city are authorised to take by expropriation or purchase any land that may be needed for the purpose, but no provision is made for compensation, except in the case of certain riparian owners on the Mispec river, and no reference is made to the compensation sections in the other Acts:—*Held*, that persons other than those specially provided for in 5 Edw. VII. c. 59 are entitled to compensation, and for this purpose the provision in the other Acts as to assessing and paying damages might be read into 5 Edw. VII., that the city might expropriate either the land and vest the title or an easement to lay and maintain their pipes, but could not expropriate an easement to erect and maintain telegraph and telephone lines upon the land. *Chittick* v. *St. John*, 3 E. L. R. 475, 38 N. B. R. 249.

Compensation — *Value of lands and premises taken — Market value — Good will — Private way used in connection with business.*] — In addition to full and fair compensation for the value of lands and premises taken from the owner carrying on business there, he is entitled to compensation for the good will of such business.—The market price of lands taken ought to be regarded as the *prima facie* basis of valuation in awarding compensation for land expropriated. *Dodge* v. *Rex*, 38 S. C. R. 149, followed.—In this case there was a passage from a street in the rear of the premises taken where one of the defendants carried on a licensed business, by which customers who desired to visit the bar without attracting notice could do so:—*Held*, that such passage enhanced the value of the property for the purposes of a bar, and constituted an element of compensation. *R.* v. *Condon* (1909), 12 Ex. C. R. 275, 29 C. L. T. 714.

Compensation — *Value to be ascertained by justices of the peace and specially summoned jury—Jury not qualified to assess value without expert evidence—Acquiescence or waiver as to jurisdiction of Court.*]—By the Canadian Act, 14th and 15th V. c. 128, s. 66, the corporation of Montreal are authorised to purchase, acquire, or to take lands for the purpose of public improvements in that city, the value whereof, if disputed, is by s. 68, to be ascertained at a session held by the justices of the peace and determined by a jury specially summoned for that purpose.—*Held*, (reversing the judgment of the Court of Queen's Bench for Lower Canada), that the jury were not of themselves qualified to assess the value, without evidence of experts, and that a party claiming compensation for land taken by the corporation was entitled to produce witnesses as to the value; there being no express words in the Act, or necessary implication, to take away the right to have witnesses sworn and examined, and that the justices of the peace were wrong in refusing to take such evidence.—*Held*, further, that the justices being under the Act competent to swear a jury were competent to swear witnesses on the claimant's behalf. In order to constitute acquiescence, or waiver, it must be shewn that the party said or did something to give the Court a jurisdiction it did not possess. Mere respectful acquiescence, or submission to the ruling of a Court, will not amount to a waiver of a right to complain of an illegal decision. *Beaudry* v. *Montreal* (1858), C. R. 2, A. C. 342.

Compensation — *Vancouver Incorporation Act, 1900, s. 133—Award—Jurisdiction —Enforcement.*]—The right to compensation cannot be determined by arbitrators appointed under s. 133 of the Vancouver Incorporation Act, 1900, as their jurisdiction is limited to the finding of the amount of compensation. An award of such arbitrators cannot be enforced summarily under s. 13 of the Arbitration Act. *Re Northern Counties Investment Trust, Ltd., & Vancouver*, 22 C. L. T. 127, 8 B. C. R. 638.

Construction of sidewalk on private property — *Act of possession — Compensation.*] — The plaintiff owned a building which did not extend to the street line. The city having authorised the construction of a permanent sidewalk in the street, it was laid close to the plaintiff's house wall, occupying a small strip of his land. The plaintiff having sued the city for the value of this land:—*Held*, that the only act of possession being the construction of the sidewalk up to the wall of the plaintiff's house, and the placing of the sidewalk in this position not having been authorised by the city, which prayed *acte* of its willingness to surrender to the plaintiff possession of any property which might belong to him, his action to recover the value of the strip of land could not be maintained. *Burland* v. *Montreal*, 19 Que. S. C. 574.

Construction of subway—*Lands injuriously affected — Claim for compensation — Limitation of time for making — Winnipeg charter, ss. 774, 775—Commencement of year —Disagreement as to compensation before arbitration.*]—The defendants owned land in the city of Winnipeg within the area prescribed in a certain by-law of the city, and such as might be injuriously affected by the construction of a subway in the city so as to entitle them to proceed by arbitration to ascertain the damage, if any, which they had sustained, and to obtain compensation therefor from the plaintiffs. The by-law relating to the subway was passed on the 15th January, 1904, and in the month of May following the work of constructing the subway was begun, and was (as found) finished in November of the same year. Notices of claim were served by the defendants upon the plaintiffs in June and July, 1905. Section 774 of the Winnipeg charter provides that the council shall make compensation to the owners of land taken or injuriously affected, and that "any claim for such compensation, if not mutually agreed upon, shall be determined by arbitration." And s. 775 provides that every such claim shall be made within one year from the date when the real property was so entered upon, taken or used, or when the alleged damages were sustained or became known to the claimant, or, in case of a continuance of damages, "then within one year from the time when the cause of action arose or became known to the claimant:"—*Held*, that a different principle must apply where land is not taken but only injuriously affected; and the owner of land may make his claim to damages within one year from the completion of the works, when the damage actually sustained can with certainty be ascertained; and, therefore, the defendants' notices were given in time and entitled them to proceed by arbitration to have their compensation ascertained.—*Held*, also, that it is not intended by s. 774 of the plaintiffs' charter that there should be a disagreement as to compensation resulting from negotiations between the parties before arbitration can be resorted to.—*Saunby* v. *Water Commissioners of London*, [1906] A. C. 110, distinguished. *Winnipeg* v. *Toronto General Trusts Corp.* (1911), 16 W. L. R. 213, Man. L. R.

Costs of proceedings by claimant for compensation — *Inclusion in damages — Procedure — Taxation.*] — Although the charter of the city of Montreal, in dealing with municipal expropriation, makes no provision for the costs properly incurred by the person seeking compensation in establishing his claim, yet these form part of the damages suffered by him and ought to be included in the compensation awarded, but the commissioners ought to limit themselves to declaring in their report that the person to be compensated has incurred such costs and to filing a statement of them; they have no right to determine and tax the amount. The costs thus incurred are taxed according to the law and the ordinary practice, upon a bill prepared for the purpose, following the tariff established by the Judges of the Superior Court, as to the proceedings in expropriation, actually in course, and the amount of this bill ought to be added to the amount of the compensation. Consequently the only fees taxable against the party expropriating are those which are provided by the tariff. *Montreal* v. *Gauthier*, 26 Que. S. C. 361.

Highway — *Compensation — Costs.*]—Plaintiff claimed compensation for expropriation of highway in 1872. The records of the municipal council failed to shew that any compensation had ever been paid for the land:—*Held*, that the plaintiff could not recover, as his predecessor in title had acquiesced in the use of same for a road. *McLean* v. *Howland* (1909), 14 O. W. R. 509.

Above judgment affirmed by Court of Appeal (1910), 16 O. W. R. 608, 1 O. W. N. 1050.

Land for municipal purposes—*Adoption of a by-law and its effects—Transfer of the property in the expropriated land—Payment of the indemnity—Conflict of titles—Priority of registration.*]—Under the municipal code of c. 24, S. R. B. C., the adoption of a by-law ordering the expropriation of certain land for municipal purposes does not operate to transfer the property; this is only by the payment of the indemnity and the delivery of the receipt of the secretary-treasurer, that the legal title to it has developed on the municipal corporation: S. R. B. C. c. 24, s. 50, s-s. 9. In a contest of two parties claiming an immovable under different titles not of the same source the priority of registering the one adds nothing to its weight against the other. *Price* v. *Tremblay*, 18 Que. K. B. 375.

Lands for waterworks system — *Compensation — Arbitration and award — Appeal — Amount of award increased — Can. Mun. Act 1903, ss. 451, 462, 463, 464.*]—For the purpose of extending their waterworks system, the town of Owen Sound expropriated certain land belonging to the claimants. Being unable to agree as to the amount of compensation that should be paid the claimants, a reference was had before three arbitrators, who allowed $1,200 to one claimant and $25 each to the other two. On appeal, Britton, J., *held*, that upon the evidence the amount of $1,200 should be increased to $2,000, and that sum should be paid with interest at 5 per cent. from June 14th, 1909, the date of passing the by-law: that the award should be dealt with under s. 464 of the Mun. Act, 1903, as an award mentioned in s. 463 (1), relating to property to be entered upon, and used as mentioned in s. 451 (1) of that Act, and as an award not requiring adoption by the council. If it were an award not requiring an adoption by the council, then s. 462 (1) applied, and by s. 464, the Court should consider not only the legality of the award, but the merits as they appear from the proceedings so filed, and the Court could increase or diminish the amount awarded or otherwise modify the award as the justice of the case might seem to require. That justice required the increase mentioned, but in other respects the award should stand. That the corporation should pay the costs of appeal. *Herriman* v. *Owen Sound* (1910), 16 O. W. R. 98.

Lease of mud flats — *Covenant to pay for buildings and erections — Damages —*

Improvements.]—Where the corporation of the city of St. John expropriated land under lease from the corporation, consisting mostly of mud flats, to be used for manufacturing purposes only, and the lease contained a covenant to pay at the end of the term for "the buildings and erections that shall or may then be on the demised premises," piling fastened with stringers necessary to make it available for buildings may be a subject of damages for which the corporation would be bound to pay, on expropriation under 63 V. c. 59, and should not be excluded from consideration on an assessment of damages: *per* Barker, C.J., Hanington and Landry, JJ.; McLeod, J., dissenting. *Sleeth* v. *St. John, Gordon* v. *St. John*, 38 N. B. R. 542, 5 E. L. R. 391.

Lease of mud flats — *Covenant to pay for buildings and erections—Piling and filling in—Damages.*]—On expropriation under 63 V. c. 59 of lands under a lease, containing a covenant to pay at the end of the term for "any buildings or erections for manufacturing purposes" which should or might then be on the demised premises:—*Held*, that damages should be assessed for the value at the time of expropriation of all piling and filling in intended for and forming a necessary part of the foundation of such buildings: *per* Barker, C.J., Hanington, Landry, Gregory, and White, JJ.; McLeod, J., dissenting. *Sleeth* v. *St. John, Gordon* v. *St. John*, 39 N. B. R. 56, 6 E. L. R. 129.

Market site — Necessity for by-law — Edmonton charter, construction of. *City of Edmonton* v. *Macdonald* (Alta.), 7 W. L. R. 201.

Mistake — *Notice — Claim for compensation — Costs — Damages.*]—The plaintiff was the owner of land which would, according to the homologated plan of the city of Montreal, be crossed by a projected street. The defendants, intending to proceed with annual expropriations, gave public notice in the ordinary form designating the lots which were to be expropriated, among which was that of the plaintiff. This lot was not in a position to be expropriated, and it was by mistake that it was included, which the plaintiff must have known. Nevertheless, he appeared before the expropriation commissioners and made a claim, which was rejected by the commissioners on the ground that the annual expropriation related only to the widening of streets already opened, and not to the opening of new streets, and this decision was homologated by the Court. Afterwards the defendants were authorized by the Legislature to suspend the projected expropriations:—*Held*, that, under these circumstances, the plaintiff could not recover the costs which he had incurred in submitting his claim to the commissioners, nor could he compel the defendants to proceed with the expropriation; but the Court reserved to the plaintiff his right to proceed for damages, etc. *Gallagher* v. *Montreal*, 17 Que. S. C. 242.

Municipal charter — *Plan — Homologation—Resolution — Formalities.*]—When a municipal charter contains general provisions touching the expropriation of immovables and particularly provisions permitting a plan to be made of the municipality, shewing the streets and their alignment, and making it the duty of the corporation to give effect to such indications after homologation of the plan by the Court, such provisions are regarded as forming an exception to the former ones. Consequently, the municipality may, by a simple resolution, authorize payment for the lands indicated and treat with the owners by virtue of such resolution, without observing the formalities prescribed by the general provisions touching expropriation. *Gway* v. *Marsan*, 16 Que. K. B. 6.

Overholding tenant — *Right to compensation ex occupant—Elements of damage.*]—A tenant whose lease has terminated by effusion of time, and who, notwithstanding that an order decreeing expropriation has been made, and public notice has been given nearly a year before such expropriation, continues nevertheless in occupation of the lands as a simple occupant, day by day, on the sufferance purely of the owner, who, anticipating expropriation, did not wish to renew the lease, has only a precarious occupation of the land subject to be terminated from one day to another; consequently he cannot be considered an occupant within the meaning of Art. 1608, C. C., and is not entitled to compensation because the expropriation interrupted his occupation. Such an occupant can only recover damages for loss of profits from the time the order is made to the expiration of the lease, and, therefore, he has no right to the cost of moving, to the expense of transferring a hotel license, or to the damage resulting from deterioration of his chattels, these losses not being occasioned by the expropriation, but happening solely through the termination of an uncertain occupancy. *Montreal* v. *Poulin*, 26 Que. S. C. 367.

Property of street railway company designed for car-barn — *Action to restrain council from passing by-law — Declaratory judgment—Discretion — Appeal.*]—The Toronto Railway Company, having no powers of expropriation, acquired by purchase from the owners certain land in a residential locality, on which they proposed to erect car-barns, being a purpose authorized by the agreement with the city corporation, as validated by 53 V. c. 90 (O.), and submitted the plans to the city council for approval, whereupon a petition was presented to the board of control, by the residents of the locality, asking the intervention of the city council against such proposed use of the land, as well as against the laying of tracks on certain streets as a means of access to the barns, which was referred to the corporation's counsel for his opinion as to the city's powers. The city had at that time under consideration the acquisition of a specified block of land in the locality for park purposes, but, subsequently to the presentation of the petition, the parks and gardens committee recommended the expropriation of the company's land for such purpose, and under their instructions a by-law therefor was drafted by the city solicitor. On the matter coming before the council, the recommendation was struck out, and the question of procuring park lands referred back to the committee, and on the following day, but after the plaintiffs had commenced this action, the architect was instructed by the board not to deal with the plans pending the result of the pro-

posed expropriation proceedings. There was nothing to shew that the course pursued by the city was not actuated by good faith. In an action for a judgment declaratory of the company's right to so use the land:—*Held*, that, while there was undoubted power in the Court to grant declaratory judgments, it was a discretionary power; and that, in this case, the exercise of the discretion by the trial Judge, in refusing to grant such a judgment, should not, under the circumstances, be interfered with.—The right of a municipal corporation to exercise its expropriatory power discussed. *Toronto Ry. Co.* v. *Toronto*, 8 O. W. R. 78, 431, 13 O. L. R. 532.

Purchase of gas works — "*Works, plant, appliances, and property*" *of company—Arbitration—Franchise and good-will —Voluntary agreement—Ten per cent. addition.*]—By agreement between the city and the company, the former was to have the option of purchasing and acquiring "the works, plant, appliances, and property of the company used for light, heat, and power purposes," upon giving to the company notice as therein provided, at a price to be fixed by arbitration under the Municipal Act. The majority of the three arbitrators, in fixing the value of the works, plant, appliances, and property, included nothing for the earning power or franchise and rights of the company:—*Held*, that they were right, for by the fair interpretation of the agreement "property" must be limited by the preceding words, the rule of *ejusdem generis* applying. Held, also, that there being here no expropriation, but a voluntary agreement and submission, s. 99 of R. S. O. 1887, c. 164, as to adding ten per cent. to the amount ascertained by the arbitrators as the value, had no application. *Re Kingston and Kingston Light, Heat, and Power Co.*, 22 C. L. T. 181, 3 O. L. R. 637, 1 O. W. R. 194, 2 O. W. R. 55. 3 O. W. R. 769.

Reservation for highway — *Opening first front road — Indemnity — Award — Procès-verbal — Description of lands and owners—Formal defects — Quebec Municipal Code.*]—In proceedings for the opening of first front roads for which reservations have been made in the grants of land by the Crown, the provisions of the Quebec Municipal Code requiring a description of the lands appropriated for the highway and the owners thereof are imperative, and not merely matters of form, failure to comply with which may be cured by the provisions of Art. 16 of that Code; and failure to comply with these requirements nullifies the proceedings. —Judgment appealed from, 17 Que. K. B. 595, reversed; Davies and Idington, JJ., dissenting. *King's Asbestos Mines* v. *Municipality of South Thetford*, 41 S. C. R. 585.

Right to take land for purpose of sinking well — *Compensation — Notice to claimant—Form of — By-law—Failure to deposit plans—Condition precedent—Town of Vonda Act, 1908, s. 236.*]—*Held*, that the filing of plans was a condition precedent to expropriation of land for purpose of sinking a well by the town. *Re Vonda & Mantyka* (1909), 12 W. L. R. 222.

Sale of land to manufacturing concern — *Conveyance for unauthorised purposes—Injunction.*] — The land which the defendant municipal corporation now proposed to sell had been expropriated for "the extension and improvement of the city water system." The resolution of the council on which it was now acting simply stated that this land was no longer required for the "extension of the water system." Injunction granted restraining the sale. *Hubley* v. *Halifax*, 7 E. L. R. 369.

Statute homologating the plan of a city and fixing the street lines beyond which proprietors are forbidden to build, but which contains the following provisions: "Provided that the expropriation be asked for by the interested parties within 10 years from the date of the homologation of the said plan," must be interpreted to mean that, at the expiry of the time limit mentioned and after protesting the municipal corporation, every interested proprietor has the right to have the town ordered to proceed with the expropriation of the strip of land inside of the homologated line. *Maisonneuve* v. *Carpentier* (1911), 17 R. L. n. s. 216.

Statutory authority — *Manufacturing site—Survey—Location—Trespass.* — The corporation of the town of Sydney were empowered by statute to expropriate as much land as would be necessary to furnish a location for the works of the appellants, a plan shewing such location to be filed in the office for registry of deeds, and on the same being filed the title to the lands to vest in the town. Engineers of the company were employed by the town to survey the lands required for the site and to make a plan, which was filed as required by the statute, M., two years later, after the company had excavated a considerable part of the land, brought an action for trespass, claiming that it included five chains belonging to him, and at the trial the main contention was as to the boundary of his holding. He obtained a verdict, which was affirmed by the full Court: — *Held*, reversing the judgment, 36 N. S. Reps. 28, that the only question to be decided was whether or not the land claimed by him was a part of that indicated on the plan filed; that the sole duty of the engineers was to lay out the land which the town intended to expropriate; and whether it was M.'s land or not was immaterial, as the town could take it without regard to boundaries. *Dominion Iron and Steel Co.* v. *McLennan*, 24 C. L. T. 169, 34 S. C. R. 394.

Water supply — *Compensation to land owner—Arbitration and award—Principle of valuation.*]—The town took expropriation proceedings to acquire certain lands containing a spring of water for waterworks purposes. *Held*, that the basis adopted in arriving at the value of the land must not be a "realized possibility." The owner paid $2,700 for the lands. The northerly 50 acres, not wanted, are worth $5 per acre. With this as a guide the value was fixed at $2,500. *Re Fitzpatrick and New Liskeard*, 13 O. W. R. 806

Waterworks company — *Statutory powers—Crown — Pre-emptor — Ascertainment of lands—Compensation.*]—Lands expropriated by a waterworks company under statutory powers and taken over by the

defendant municipality, were claimed by the plaintiff:—*Held*, that the statutory powers of compulsory appropriation were not exerciseable against the Crown, but as soon as the pre-emptor obtained his records, these powers became applicable as against him to the lands comprised in the record. The evidence shewing that the areas sought to be appropriated were not set out or ascertained with any reasonable certainty, the plaintiff was entitled to compensation. *Carroll* v. *Vancouver*, 11 B. C. R. 493.

See APPEAL—ARBITRATION AND AWARD—COSTS—WAY.

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15. HIGHWAYS AND LANES.

Acquisition of land for highway — *Oral grant by owner—Acceptance — Evidence—Performance of conditions — Resolution of council.*]—The grant by a private person to a municipal corporation of the land necessary for the extension of a street may be made orally, and when it is made in consideration of conditions to be performed, the performance thereof is sufficient proof of the acceptance of the grant. Therefore, third persons have no status to contest the validity of the grant on the ground of absence of title or formal declaration of acceptance in the acts or records of the corporation. A resolution of the council delegating to a member thereof the duty of intervening and coming to an understanding with the grantor is a sufficient commencement of proof, if that is necessary. *Price* v. *Chicoutimi Pulp Co.*, 30 Que. S. C. 283.

Alteration in streets—*Closing of highways — Construction of subway—Property injuriously affected—Winnipeg Charter, s. 708 — Right to compensation — Detriment offset by advantage—Detriment in common with others—Absence of special damage.*]—In the city of Winnipeg a subway was constructed under the Canadian Pacific Railway tracks on Main street, and King and Princess streets were closed. By s.-s. (e), added to s. 708 of the Winnipeg charter by s. 15 of 3 & 4 Edw. VII. c. 64, the city corporation were authorised to close these streets and convey the closed portion to the railway company. They were also by the same section given power to determine what persons were injuriously affected by the exercise of these powers and entitled to compensation by reason thereof; "and no other persons . . . shall be so entitled unless such determination shall be amended on appeal to a Judge of the Court of King's Bench as hereinafter provided; and any advantage which the real estate, trade, or business of any person may derive from the exercise of such powers . . . beyond . . . . the increased value common to all real estate, trade, or business, in the city, shall be deducted from such compensation . . ." And s.-s. (e1) provided for an appeal to a Judge from the determination of the council:—*Held*, upon an appeal by the property-owner from the determination (by by-law) of the council that he was not entitled to compensation (*i.e.*, excluding his land from the compensation area) that the Judge must consider all the matters that would necessarily be weighed by the council when the by-law was before them—not only the injury, if any, sustained by the appellant by the closing of King and Princess streets, but also the benefit derived from the improvement of Main street by the construction of the subway.—And *held*, on the evidence, that the detriment to the appellant's property was more than offset by the advantage accrued to it:—*Held*, also, upon the evidence, that the appellant had suffered no damage which was not common to all those owners who had formally the right to use the closed streets; owing to the proximity of the closed streets to his property, his damage would be greater in degree, but not different in kind, from the more remote owners, and it would extend on a diminishing scale until it faded out entirely; it would be impossible to draw a line beyond which it could be said no damage was sustained.—*Held* therefore, that the appellant would have no right of action at common law, and his land was not "injuriously affected," within the meaning of the statute.—The *King* v. *McArthur*, 34 S. C. R. 570, followed. *Chamberlain* v. *West End & Crystal Palace Rw. Co.*, 2 B. & S. 617. *Metropolitan Board of Works* v. *McCarthy*, L. R. 7 H. L. 243, *Caledonian Rw. Co.* v. *Walker*, 7 App. Cas. 259, and *Re Tate & City of Toronto*, 10 O. L. R. 651, 6 O. W. R. 670, distinguished. *Re Shragge & City of Winnipeg* (1910), 15 W. L. R. 96.

Appeal from City Court — *Charlottetown Incorporation Act — General Trespass Act, 12 V. c. 16, s. 14 — Nuisance — Obstructing the continuations of the streets on the ice — Variance.*]—The appellant had been fined £1 in the City Court for placing obstructions near Pownal wharf on such part of the ice as formed a public street and highway. The fine was imposed under the provisions of a city by-law to prevent obstructions being placed on the continuations of streets which form public openings to the river, and which by-law was passed under a provision in the Act of Incorporation, empowering the corporation to pass by-laws "to abate and cause to be removed all public nuisances." The legality of the by-law being disputed respondent also relied on the General Trespass Act (12 V. c. 16, s. 14), which imposes a penalty of £5 on all persons doing "spoil or damage" to any public way, etc. The evidence shewed the obstruction in this case to be off the line of the street, and the question to be considered was whether the public had a way by prescription or otherwise on the ice over appellant's land in winter and of navigation in summer. The summons alleged that defendant placed an "obstruction on the public thoroughfare leading from Pownal street to Hillsborough river, the same being a public street of Charlottetown." The conviction was for having placed the obstruction "upon the ice of Hillsborough river within one hundred feet of Pownal wharf, and on such part of said ice as forms a public street of the city, and a public highway from the river into, to and along the continuation of Pownal street, etc., and did, thereby, greatly impede and obstruct the said public highway." Appellant contended that there was a material variance between the summons and conviction, and that the

latter must be quashed on that ground. He also contended that the City Court and this Court of Appeal had no jurisdiction to decide the matters in dispute:—*Held*, Hensley, J., that the question being one of public and private rights and of title, was for a jury to decide, and was not within the jurisdiction of magistrates under the Trespass Act, nor of the City Court under the Act of Incorporation.—That there was a material variance between the summons and conviction, and on that ground the conviction could not be supported. *Dinn* v. *R.*; *Carvell* v. *Charlottetown* (1871), 1 P. E. I. R. 361.

Bell Telephone Company — *Underground wires.*]—The plaintiffs, whose system of communication had been in operation in the town of Owen Sound for some years, changed their office, and in connection with the change wished to carry their wires to that office across the street in which it was situated underground in a conduit, instead of overhead by poles and the defendants refused to consent:—*Held*, on the evidence, that no danger of injury to the street or inconvenience to the public having been shewn, the defendants were not justified in fact in refusing their consent.—*Held*, also, that there was not justification in law for the refusal, s. 3 of the plaintiffs' Act of incorporation, 43 V. c. 67 (D.), not, as was contended by the defendants, empowering municipal councils to determine as they may see fit where and how the plaintiffs shall construct their lines. *Bell Telephone Co.* v. *Owen Sound*, 24 C. L. T. 320, 8 O. L. R. 74, 4 O. W. R. 69.

By-law closing lane and authorising transfer to private person—By-law passed in interest of transferee—Public interest—Saving of expense — Prejudice to applicant — Consent of land owner — Construction of City Ordinance. *Re Weir & Calgary* (Alta.), 7 W. L. R. 45.

By-law closing lane and opening new lane — Interests of private persons—Interests of municipality — Injury to other persons — Private lane — Exchange of lands — *Bona fides* of council. *Re Mills & Hamilton*, 9 O. W. R. 731.

By-law closing road — *Compensation for lands injuriously affected* — "*Advantage derived from contemplated work.*" — *Boundary.*]—Under s. 437 of the Consolidated Municipal Act, 1903, 3 Edw. VII. c. 19 (O.), every council shall make to the owners of real property taken by the corporation or injuriously affected by the exercise of its powers due compensation for any damages necessarily resulting from the latter "beyond any advantage which the claimant may derive from the contemplated work:"—*Held*, that this means the "contemplated work" of the corporation alone, and that a person injuriously affected by the closing of a road, part of a scheme for granting facilities to a lumber company, was entitled to compensation, without any diminution because the erection of the company's mills enhanced the value of his lands.—Under s. 629 no road established shall be closed whereby any person will be excluded from ingress or egress over such road, unless, in addition to compensation, some other convenient way is provided.—*Held*, that a road need not, in order to come within the above section, actually form a boundary of land, provided there is ingress or egress to and from such land over it. *In re Brown & Owen Sound*, 9 O. W. R. 727, 14 O. L. R. 627.

By-law closing street — Public interest — Discrimination — Substitution of convenient way — Compensation to land owner — Providing access to land — Construction of statute — Costs. *Re McLean & North Bay*, 7 O. W. R. 169.

By-law for raising money to construct sidewalks — Submission to electors —Failure to comply with s. 342 of Municipal Act — Appointment of scrutineers — Date of issue of debentures — Date of payment—Quashing by-law—Costs. *Re Kerr & Thornbury*, 8 O. W. R. 451.

By-laws — *Discretion — Supervision by Superior Court — Oppression.*]—Municipal by-laws dealing with roads and pavements are left to the discretionary power of municipal councils in the manner provided by the municipal code. The remedy of an action to annul a by-law founded upon the right of supervision by the Superior Court, by virtue of Art. 50, C. P. C., is not open except in case of abuse and injustice arising from bad faith and so serious as to be oppressive. *Pepin* v. *Massueville*, 15 Que. K. B. 261.

Closing highway — *Land injuriously affected — Compensation — Conveyance of land — Reservation of right.*]—The owner of land which, it is expected, will be depreciated in value by the contemplated closing of a street, may, in conveying it to a purchaser, reserve the right to collect and receive the compensation that may be thereafter awarded in respect of such depreciation, and afterwards his claim for such compensation cannot be answered by shewing that he has sold and conveyed the land. *Re Codville*, 5 W. L. R. 140, 16 Man. L. R. 426.

Closing highway — Private interests—Notice — Publication — Compensation. *Re Waterous & Brantford*, 2 O. W. R. 897.

Closing highway — *Property injuriously affected — Municipal Act, 1903, s. 437.*]—A property on the west side of a street running north and south was held to have been "injuriously affected" within the meaning of s. 437 of the Municipal Act, 1903, by the closing of a street running from the first street in an easterly direction opposite the property in question, and an award of compensation by the official arbitrator to the owner of the property was upheld, the principle of *Metropolitan Board of Works* v. *McCarthy*, L. R. 7 H. L. 243, being applied. *In re Tate & Toronto*, 10 O. L. R. 651, 6 O. W. R. 670.

Closing street — *By-law — Registered plan — Sale of road allowance — Approval of Lieutenant-Governor in Council — Promulgation.*]—When the owner of land has registered a plan of subdivision of it into lots and shewing a street, and has sold lots lying alongside and facing on the street, he is bound by the plan, and cannot, without

the consent of the purchasers, close up the street and retake the land composing it, and what he could not do himself the council of the municipality has no right to do for him by passing a by-law effecting that result; nor has such council a right under s. 667 and s.-s. (d) of s. 693 of R. S. M. 1902 c. 116, to sell roads stopped up by them, save original road allowances and public roads which have been duly dedicated as such, and over which the council has established its jurisdiction; and a by-law having such ends in view will be quashed, and is not validated by the approval of the Lieutenant-Governor in council pursuant to s.-s. (e) of s. 694 of the Municipal Act, nor by its promulgation under the provisions of ss. 425 and 426 of the Act. *In re Knudson & St. Boniface*, 15 Man. L. R. 317, 1 W. L. R. 281.

Closing street — Damage to property abutting — Deprivation of access — Other access—*Quantum* of damages. *Re Tate & Toronto*, 6 O. W. R. 670, 10 O. L. R. 651.

Construction of sidewalk — *Encroachment on abutting property—Straightening of street — Compensation—Petitory action — Prescription.*]—The respondents were owners of houses situated upon a street in Quebec. The lots sloped at this place, and the houses were originally constructed upon the alignment of the street, that is to say, they were not square except those of the respondents. The consequence was that the corner of the west side of their house upon the street was thirteen feet behind the neighbouring house to the west; as to the east corner, it was in line with the property to the east. So that there was between the alignment of the street and the front of the house a strip of land in the form of a triangle upon which had been built two flights of steps to give access to the houses. In 1896 the appellants, the city corporation, in order to enlarge the street and make it regular, had acquired the property of one C. adjoining on the west those of the respondents, had pulled down the house and built a new one in line with the houses of the respondents. The appellants constructed the sidewalk up to the new building, and at the same time made a sidewalk in front of the respondents' houses up to the houses, thus taking possession of the triangular strip, but without touching the flights of steps. The respondents claimed the value of the land which the appellants had so taken, and the latter pleaded that the land did not belong to the respondents, but was part of the street and had been so for more than 30 years:—*Held*, that in these circumstances the respondents could claim from the appellants the value of the land of which they had thus taken possession, and that without having recourse to a petitory action. *Quebec* v. *Caron*, 13 Que. K. B. 52.

Control of streets — *Railway crossing —Regulation requiring gates — Resolution of council — Injunction — Attorney-General —Parties — Assent of Governor-in-Council.*] —By the Act amending the Act of incorporation of the defendant company, they were given the right to lay their tracks across the streets of the plaintiffs provided that before doing so the consent of the town council should have first been obtained. On application by defendants to the town council for permission to cross one of the streets of the town, a resolution was passed granting the application "subject to such regulations as the town council may, from time to time, make to secure the safety either of persons or property." Subsequently, the town council passed a resolution requiring the company to forthwith erect and maintain two gates, of the latest approved pattern of railway gates, on and across the street on either side of the track. The defendants failed to comply with the regulations so made, and this action was brought to restrain them from running trains across the street until they should comply with the regulation:—*Held*, that the regulation was one within the powers of the town council to make. The town council having a special interest in the subject matter, the action could be brought in the name of the town, without joining the Attorney-General. The regulation in question, being made by virtue of a power given by a special Act, was not, in the absence of express words to that effect, a by-law of the town which required the assent of the Governor-in-Council before going into operation, such assent was required only in connection with the cases specially mentioned in the Act: Towns Incorporation Act, R. S. N. S. 1900 c. 71, ss. 265, 294. *Liverpool* v. *Liverpool, &c., Ry. Co.*, 35 N. S. R. 233.

County or local work—*Procès-verbal —Resolution of council — Notice—Status of local corporation.*]—A bridge which had been treated and considered as a county bridge, by virtue of old *procès-verbaux*, cannot be declared to be a local bridge, in spite of the fact that it is such by its situation, unless a resolution is adopted or a *procès-verbal* homologated to that effect; and a simple notice of taking into consideration the *procès-verbal* in which such a declaration is made, does not fulfil the requirements of the law. 2. A local corporation charged with maintaining a bridge in the condition required by the statute, by the *procès-verbal*, and the by-laws which govern it, if it has been declared to be a local bridge, has a sufficient interest to apply, to set aside the *procès-verbal* which makes the bridge a local bridge. *Corp. of St. Ignace du Coteau Landing* v. *Soulanges*, 25 Que. S. C. 133.

County road — *Board of delegates — Highway between counties — Proceedings — Jurisdiction.*]—In the absence of a declaration in pursuance of Arts. 758 and 759 of the Municipal Code, it is competent for the board of delegates to take all the proceedings in reference to a road, such as that of the Grande Ligne, situate between two local municipalities belonging to two different counties, such as those of St. Jean and Chambly. 2. The board of delegates is a municipal authority quite distinct from the county corporation, although it has *ex officio* for secretary the secretary of the corporation of one of the counties interested. *Arbec* v. *Lussier*, 21 Que. S. C. 204.

County road — *By-law declaring it local —Amendment — Notice — Restoration as county road — Maintenance — Land-owners.*]—A notice given by a municipal body to amend a by-law or to passing another relating to a public road, without in any way

mentioning the amendment or amendments to be made, or the nature of the by-law to be passed, is not sufficient, especially when those who complain of it are prejudiced. 2. By virtue of Art. 755, C. M., a road situated between two local municipalities is a county road and when, by virtue of Art. 758, C. M., the county council has declared it a local road under the direction of one of such municipalities, it has no jurisdiction afterwards to amend such by-law so as to declare it again to be a local road, but at the charges of the two municipalities separated by it; but it has the right to restore the road as a county road, and then, in accordance with Art. 758 (3), C. M., it may reapportion the work by specially indicating the property of the owners in each municipality liable for the maintenance of such road. *Corp. of St. André Avelin* v. *Corp. de Ripon*, 4 Que. Q. B. 167, followed. *Corp. du Canton de Nelson* v. *Mégantic*, 20 Que. S. C. 334.

County road — *Parish council—Ratepayers — Liability for work on road—Inspector of roads—County council — Board of delegates — Circuit — Court — Removal of action to Superior Court—Pleading.*]— A parish council (St. Joseph de Chambly) is incompetent, *ratione materiæ*, to have made and homologated a *procès-verbal* of a road situated between two counties (the Grande Ligne between the county of Chambly and that of St. Jean.) 2. Such incompetence is *d'ordre public*, having for its object the maintenance of the administrative hierarchy, and makes the *procès-verbal* (1867) absolutely void, and it may be invoked notwithstanding acquiescence at any time, even in 1895, by one of the ratepayers who is sued for contribution to the cost of fencing works undertaken by the parish pursuant to such *procès-verbal*, on the refusal of such ratepayer to do them himself. 3. It is for the inspector of roads, and not for the agrarian inspector, in all cases to cause the fencing works called for by such *procès-verbal* to be constructed, such works not being mitoyens; the incompetence of such officer is also *d'ordre public*. 4. The road in question according to the municipal statutes in force prior to the Municipal Code, came under the jurisdiction of the county council of Chambly, and then of the board of delegates of the counties of Chambly and St. Jean; such board alone can exercise such jurisdiction. 5. An action begun in the Circuit Court against a ratepayer for such contribution may be removed to the Superior Court. 6. The corporation ought to allege payment by it for these works in order to sustain an action against such ratepayer. *Parish of St. Joseph de Chambly* v. *Arbec*, 21 Que. S. C. 89.

Dangerous machine in street — *Use by independent contractors — Precautions—Injury to passer-by—Liability of corporation and contractors.*] — In a public and busy street of a city a horse became frightened by a steam roller engaged in repairing an intersecting street, and, swerving suddenly upon the plaintiff, who was passing on a bicycle, injured him. The roller was the property of the city corporation, and was being used by paving contractors under a provision in the contract. The work was being done for the corporation, and it necessitated the use of the roller. It was shewn that the roller was a machine likely to frighten horses of ordinary courage and steadiness; that of this the city corporation's servants were aware; and that proper precautions were not taken on the occasion in question to warn persons of the approach of the roller to the street on which the horse was passing:—*Held*, that the place where the work was to be done and the means by and the manner in which it was to be performed made it incumbent on the city corporation, if they had been doing the work otherwise than through a contractor, to see that proper precautions were taken to guard against danger to the public from the use of the roller; and the corporation could not rid themselves of this obligation by intrusting the work to a contractor. *Penny* v. *Wimbleton Urban District Council*, [1898] 2 Que. B. 212, [1899] 2 Que. B. 72, followed:—*Held*, also that the contractors were bound equally with the corporation to take notice that the roller was likely to cause danger to the public, and their failure to take proper precautions occasioned the accident. *Kirk* v. *Toronto*, 25 C. L. T. 29, 8 O. L. R. 730, 4 O. W. R. 496.

Establishment of highway — *Assessing lands not benefited—By-law—Action to set aside—Appeal to county council — Petition to quash.*]—*Held*, that the defendants, a municipal corporation, could not subject the lands of the plaintiff, which had a road in front of them at a distance of less than 30 arpents, to a contribution, in proportion to their area, to the expense of opening up and maintaining a road which was of no use to such lands and was projected only for the benefit of other lands; and a by-law passed by the defendants for this purpose, thereby causing a grave injustice to the plaintiff, was set aside in an action brought in the ordinary way in the Superior Court. 2. The fact that the plaintiff had first appealed to the county council, who had confirmed the by-law, did not deprive him of his right of action. 3. The remedy given by the Municipal Code by way of petition to quash did not exclude the proceeding by action. *Therriault* v. *Parish of St. Alexandre*, 20 Que. S. C. 45.

Expropriation of land for highway —*Procès-verbal — Ultra vires—Pleading.*] — Where an action is brought by a municipal corporation to compel the defendant to convey land for a road, the defendant cannot plead that the *procès-verbal* of the municipal inspector is void and *ultra vires*, and has been annulled by the Court; that the county council has not been consulted on the subject of the opening of the road; and that the defendant has sued the corporation for possession; such allegations will be struck out on demurrer. *Corp. of the Parish of Ste. June* v. *Malo*, 5 Que. P. R. 217.

Expropriation of land for road — *Valuation — Compensation.*]—A municipal corporation cannot expropriate land for a public road without first having a valuation made. The formalities required for expropriation ought always to be followed even if the owner has no right to compensation. *Laramie* v. *Hincks*, 27 Que. S. C. 27.

Extension of streets — *Municipal works — Delay — Injury to individuals.*]— Municipal corporations, in deciding upon the extension of streets and municipal works generally into new districts, and acting in good faith, are not responsible for damages caused to individuals by delay in resolving upon such works, especially where such delay was occasioned by due regard to economy and prudent administration. *Rochon* v. *Montreal*, 22 Que. S. C. 42.

Homologation of street line — *Damages—Exercise of right—City of Montreal—Demurrer—C. P. 191, 67 V. c. 38, 440, 447.*]—Whoever exercises a right commits no fault, and real damages which, in fact, may exist and which are suffered by a third party cannot be recovered by a suit-at-law, as they are damages without lesion of a right.—Thus, an action of damages directed against Montreal by a proprietor who has built along a newly homologated street line and who complains that his neighbours are building several feet in advance of himself (inasmuch as they are building along the former street line) will be dismissed on inscription in law. *Pepin* v. *Montreal* (1910), 11 Que. P. R. 368.

Laying gas pipes under — Permission of council—Resolution—By-law. *Bowerman* v. *Amherstburg*, 1 O. W. R. 16.

Liability of abutting land-owner for maintenance — *Resolution of council —Expense of cleaning ditch — Charge on land — Sale of land to realize.*]—When an owner who is under an obligation to maintain a public road fills up the ditch which forms part of it, the municipal council may by resolution order the inspector of roads to summon him to clean the ditch within 48 hours, and in default of his obeying the summons to do the work at his expense.—A municipal corporation incurs no responsibility for damages by reason of such a resolution and its being put into execution, nor by the fact that the cost of the work, $16.61, is added to the municipal taxes due by the owner in the minute which the secretary-treasurer of the municipality transmits to the secretary-treasurer of the county pursuant to Art. 373 of the Municipal Code, followed by notices of sale of the whole of the property affected by virtue of Arts. 998-1001 of the Municipal Code. *Lagacé* v. *St. Joseph de Bordeaux*, 28 Que. S. C. 319.

Liability to repair highway — *Road-bed washed away by natural stream — Construction of new roadbed — Diversion of stream — Depreciation in value of property abutting on highway — Delay in repairing bridge.*] — A swift natural stream ran through the defendants' town. The stream changed its course but owing to no fault of the defendants, and in so changing its course carried away a portion of the street on which the plaintiff had land situated:—*Held*, the municipality was not bound to replace the portion of the street so carried away under their statutory duty to repair highways. Nor could the plaintiff recover for damages to his property. *Cummings* v. *Dundas*, 6 O. W. R. 168, 10 O. R. R. 300.

Maintenance of road — *Mandamus.*]— When a municipal corporation has caused a road to be opened, it is obliged to keep it in repair, no matter of what importance the amount of taxes raised on the adjoining property may be; and this obligation may be enforced by means of a *mandamus*. *Goulette* v. *Sherbrooke*, 25 Que. S. C. 387.

Non-repair — *Penalty — Informer — Action—Affidavit.*]—By virtue of Art. 1046, C. M., any adult person may in his private name claim the penalty imposed by Art. 793, C. M. 2. The affidavit required by Art. 5716, R. S. Que., is not necessary in such a case. *Tourigny* v. *Corp. of St. Paul de Chester*, 5 Que. P. R. 199.

Opening highway — *Procès-verbal — Particulars of route — Persons affected — Right of attack — Municipal council — Homologation — Amendment—County or local road.*]—A *procès-verbal* which provides for the opening of a road, satisfies the law if it sets out where the road is to be opened and that it is to have ditches and trenches everywhere necessary, even if it does not indicate precisely the places where they are to be made nor their width and depth. 2. If the *procès-verbal* of a road states that it will pass through a place where a cheese factory stands, or any other place which it cannot pass through without the consent of the owner, or if it provides that fences shall be at the expense of persons who cannot be forced to make them, such owner or such person illegally charged with the fences, may attack the *procès-verbal* upon that ground. 3. In a *procès-verbal* numbers and dates may be indicated by figures. 4. A municipal council called together to adopt a *procès-verbal* may amend it by adding particulars, the absence of which would have made it void. 5. A road which extends through more than one municipality, is not a county road; it is only a local road of each one of the municipalities in which a part of it is situated. *Mondoux* v. *Yamaska*, 22 Que. S. C. 148.

Opening highway — *Procès-verbal — Petition to quash — Service—Time for presentation.*]—When a petition to quash a *procès-verbal* has been served within thirty days following its adoption, it need not necessarily be presented to the Court at the next term. *St. Aubin* v. *Parsh of St. Jerome*, 5 Que. P. R. 317.

Opening highway — *Report of superintendent — Notice — Parties interested — Adoption by council.*]—The report of a special superintendent upon the opening of a road will not be set aside, in spite of the want of a new special notice of the day upon which he is to visit the locality in question, if the interested parties are present, and submit to him all their grounds for or against the report. 2. A *procès-verbal* adopted by the council will not be set aside because it is adopted at a general sitting of the council and without notice that it was to come up, if all the parties interested were present and stated their grounds for and against. *Paquet* v. *Durham*, 22 Que. S. C. 233, 5 Que. P. R. 229.

Opening of road—*Procès-verbal—Lapse by non-execution — New procès-verbal — Statute—Retroactivity — Defect in procès-verbal — Amendment — Council.*]—The ex-

istence of an old *procès-verbal* for the opening of a front road, which has never been executed, is no obstacle to a new *procès-verbal* for the opening of a front road covering the same ground to a depth of 30 arpents. The statute 60 V. c. 27, s. 7 (Que.), which declares *procès-verbaux* void for default of execution after 5 years, applies to those made before as well as those made after its passing.—The neglect to prescribe in a *procès-verbal* the part of the work to be done by each person called upon to contribute, is not a cause of nullity, but constitutes at most a defect which the council may remedy by way of amendment. *Couture* v. *Megantic*, 31 Que. S. C. 541.

Opening road — *Procès-verbal — By-law amended to charge plaintiff's lands — Notice—Sufficiency—Application to quash.*] —Neither the plaintiff nor his lands were charged in any way with the expense of opening and maintaining a road created by a confirmed *procès-verbal*. The municipal council cannot by by-law amend such *procès-verbal* in such a way as to subject the plaintiff or his lands to such charges unless in the first place public notice has been given stating clearly that by the proposed by-law the plaintiff or his lands might be rendered liable to contribute to such expense. A notice addressed "to whom it may concern," stating that the "municipal council of the parish of St. Alexandre, at a session which will be held Tuesday, October 13th next, at 8 a.m., will consider a by-law to amend the *procès-verbal* of . . . with respect to arranging as to the cost of the roads authorized and the owners benefited," was held insufficient as regarded the plaintiff, who was not hitherto a party concerned in the *procès-verbal* nor interested in these roads nor benefited by them. As a result the plaintiff would be entitled, in an action in the Superior Court, to have this by-law declared void so far as he was concerned, in view of the fact that he had not had an opportunity of being heard before the council, and of shewing that he ought not to be subjected to these charges. *Bouchard* v *Corp. of the Parish of St. Alexandre*, 25 Que. S. C. 415.

Petition for opening of road—*Discretion of township council — Appeal to county council — Special meeting of council — Notice — Resolution — Minutes.*] — A township council has a discretionary power to grant or refuse a petition for the opening of a road, and however unjust its decision may appear, if the formalities required by law have been observed, the Superior Court will not interfere to set aside the decision; the remedy being by appeal to the county council. 2. Notices of a special meeting of a municipal council orally given by the secretary-treasurer are sufficient. 3. Resolutions of municipal councils are valid, although they are not entered in the minute book of the meetings of the council nor in the *procès-verbal* of the meeting at which they were adopted. *Martin* v. *Corp. of Windsor*, 24 Que. S. C. 40.

Procès-verbal for construction of road — Distinction between *procès-verbal* and by-law under Quebec Municipal Code. *Grégoire* v. *Deronce*, 4 E. L. R. 74.

Raising level of — Injury to adjoining land — Backing water on—Culvert—Inappreciable injury. *Turner* v. *York*, 1 O. W. R. 723.

Repair of road — *By-law — Charge on land-owner — Excessive share of cost—Action to quash—Prescription.*]—A municipal by-law which imposes upon a land-owner the cost of maintaining and repair of the road in front of his land to an extent greater by half than the average cost of work done upon the road to the owners of lands of the same value, is illegal and oppressive, and the owner so affected has a remedy by action before the Superior Court to have it quashed.—The 30 days' prescription of Art. 708, M. C., has no application to such an action. *Rousain* v. *Corp. of Parish of Ste. Dorothée*, 31 Que. S. C. 520.

Report of special superintendent—*Invalidity—Oath administered without jurisdiction.*]—The report prepared by a special superintendent as to a new road petitioned for, is void, where the officer (a justice of the peace for a neighbouring district) who has administered the oath to the superintendent, had not jurisdiction in the place where the oath was administered. *Pinsonault* v. *Laprairie*, 20 Que. S. C. 525.

Road work — *Charge on lands — Servitude—Interest—Decision of council—Powers of Court.*] — Municipal councils have no power to create servitudes on lands; they can only give effect to those already created by law. 2. Those lands can only be charged with servitude of road work which have an interest in such work. 3. The interest required by law is not the personal interest of the owner of the lands, but that arising from the situation of the lands. 4. Article 795, M. C., does not give to municipal councils the power arbitrarily to charge land with road work irrespective of any legal interest arising from the situation of the lands. 5. The Superior Court has the right to interfere with decisions of municipal councils, whenever any question of legality is involved therein. *Therriault* v. *Corp. of Nôtre-Dame du Lac*, 24 Que. S. C. 217.

Road work done on owner's default not a tax — *When collectible as such — Sale for taxes—Prescriptions.*] — The cost of road work done at the expense of an owner in default under Arts. 397 *et seq.*, C. M., is assimilated to a tax and collectable as such only when it has been ascertained by a judgment rendered in a suit brought under these articles. The abstract furnished by the secretary-treasurer of a local municipality to the secretary-treasurer of the county, by virtue of Art. 373, C. M., and the notice given and published by the secretary-treasurer of the county, by virtue of Arts. 998 and 999, C. M., ought to contain, on pain of being void, the amounts of the taxes affecting the lands mentioned in it. A sale made under Arts. 1000 and 1001, C. M., of land mentioned in such extract and notice, as for a sum exceeding that actually owing for taxes is void. The prescription of two years provided for in article 1015, C. M., applies only to sales which are voidable, and not to those which are effected with absolute illegality. *Dent* v. *Labelle, Gagnon* v. *Lochaber*, 27 Que. S. C. 171.

Sidewalk — *Accident — Relief over.*]— The corporation of the city of Montreal, being sued for damages for injuries sustained by reason of a fall upon one of its sidewalks, have the right to bring in *en garantie* the owner or occupant of the land in front of which the sidewalk is. *Montreal* v. *Sisters of Congregation of Notre-Dame de Montreal*, 3 Q. P. R. 475.

Sidewalk — Alteration in grade—Injury to adjoining land — Absence of by-law — Remedy — Arbitration — Sale of land after injury — Right of vendor to compensation. *Re Dunn & Stratford*, 5 O. W. R. 65

Sidewalks — *By-law authorising issue of debentures to pay for work—Time specified for completion of work—Width of sidewalks specified — Construction of sidewalks after time expired and of less width—Injunction—Damage to property—Remedy by arbitration under Municipal Act.*]—A municipal corporation passed a by-law and it was approved by the electors. The by-law provided for construction of sidewalks five feet wide along certain streets and to raise money by way of debentures to pay for the same. The city engineer was placed in charge of matters of grade, etc. The work was to have been completed in 1904. In 1905, objection being raised as to the validity of the by-law the council passed two other by-laws which were not submitted to the people. They adopted the city engineer's plans and reduced the sidewalk to only four feet:—*Held*, these two by-laws were *ultra vires* as the council had not the power to extend the time allowed in the first by-law for the construction of the walks, nor to vary the width and purpose of them. Injunction granted to restrain the money being raised on debentures. *Cleary* v. *Town of Windsor*, 6 O. W. R. 192, 10 O. L. R. 333.

Streets, property of corporation in— *Vancouver Incorporation Act, 1900, s. 218 —"Vest," meaning of — Injunction—Construction of drain — Irreparable injury.*]— Section 218 of the Vancouver Incorporation Act, 1900, provides, in part, that every public street . . . in the city shall be vested in the city (subject to any right in the soil which the individuals who laid out such road, street, bridge or highway may have reserved). In an action for an injunction to restrain the corporation from digging and blasting for the construction of a drain in a street, within the corporate limits, the plaintiffs submitted that a proper construction of the word "vest" as used in s. 218, did not authorise the corporation to dig to an excessive depth:—*Held*, adopting the ruling in *Roche* v. *Ryan*, 22 O. R. 107, that the word "vest" does not import a vesting of the surface merely, but is wide enough to include the freehold as well.—*Held*, on the evidence, however, that it had not been shewn by the plaintiffs that substantial or irreparable injury would be sustained by them through the construction of the drain. *Cotton* v. *Vancouver*, 12 B. C. R. 497.

Toll roads expropriation — *Costs of arbitration—Toll Roads Expropriation Act, 1901.*]—A county which, upon the petition of the ratepayers affected, presented through the medium of two interested townships, and proceeding in accordance with the provisions of the Toll Roads Expropriation Act, 1901, initiates and takes part in an arbitration to fix the value of a toll road, cannot recover from the township the costs incurred by it. *United Counties of Northumberland & Durham* v. *Hamilton & Haldimand*, 10 O. L. R. 680, 6 O. W. R. 814.

Winter road — *Location of — Art. 840, C. M.*]—In laying out winter roads at some distance from the summer roads, a municipality is only exercising the right conferred on it by Art. 840, C. M., and, therefore, an owner of property abutting on a summer road cannot be heard to complain of the location chosen by the municipality for the winter road. *Pesant* v. *St. Leonard de Port Maurice*, 7 Que. P. R. 229.

Work — *Initiative — Ratepayers—Petition — Board of delegates — Summoning.*]—When it is a question of adopting a by-law or causing work upon a road or bridge to be executed, conformably to the provisions of the statutes or *procès-verbaux*, municipal corporations may take the initiative in the measures necessary to obtain such a result, without waiting for the ratepayers to put them in a position to act. 2. But when it is a question of changing or modifying the obligations or charges which the statute or by-laws impose upon the ratepayers the corporations exercise judicial functions, and have not then the same initiative, and must wait until the ratepayers complain and establish their grievances; and if the latter do not succeed in their demand, the corporations may condemn them to pay the expenses which they have occasioned. 3. Even if the board of delegates has acted so illegally as to render its proceedings void, the county corporations which it represents are responsible for the consequences of its error and its illegality, and must be held responsible for expenses incurred by its secretary. 4. The board of delegates may be summoned in several ways, but not necessarily by writing. *Lord* v. *Maskinonge*, 13 Que. Q. B. 20.

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16. Licensing and Regulating Powers.

Assize of bread — *Prescribing weight of loaf — Reasonableness of by-law — Specific weight—Shrinkage—Statute — Incorporation of town as city—Continuance of powers under Municipal Ordinance.*] — The powers granted by the legislature to municipal corporations to make by-laws with regard to the assize of bread authorise the making of by-laws regulating the standard of quantity or measurement of bread.—2. A by-law providing that no person should sell or dispose of any loaf of any size or weight but two or four pounds is not unreasonable as prohibiting the sale of a loaf weighing more than the standard, because it is evident that the evil which the legislature intended to remedy is the sale of bread under weight, and not bread weighing more than the standard, and the enactment should be so construed.—The by-law in question was passed by the council of the town of Regina in 1891. By an Ordinance of 1903, the town was incorporated under the name of the city of Regina:—*Held*, that the powers conferred on the town by the Municipal Ordinance and the by-law passed

pursuant thereto, continued in force. *Rex* v. *Williamson*, *Rex* v. *Feihne*, 7 W. L. R. 51; *Harwood* v. *Williamson*, *Harwood* v. *Feihne*, 1 Sask. L. R. 66.

Automatic slot machine — *By-law—Ultra vires — Powers given by statute — Motion to quash — Time limit — Absolutely void by-law.*] — A municipal by-law which makes the possession and use of an automatic slot machine subject to the obtaining of a license in consideration of a money payment, cannot be validly passed under a statute which gives the municipality the power to impose such an obligation upon the exercise of a trade, industry, or any kind of business. Such a by-law is, therefore, *ultra vires* and void.—A municipal by-law which imposes a burden without following the mode of imposition provided in the statute by virtue of which it is passed, is void.—The prescription of three months for motions to quash by-laws, provided by Art. 304 of the charter of the city of Montreal, applies only to cases of relative nullity and not to cases of absolute nullity, or to cases in which it might be said that the by-law was void and had no existence. *Bell Telephone Co.* v. *Montreal*, 50 Que. S. C. 157.

Barristers and solicitors — *By-law—Interpretation — Description of class of persons taxed — Amendment — Mistake.*] — The effect of reprinting a municipal by-law was to alter the position of the last word in the first line of a section. The same word occurred five times in the section. An amendment was subsequently passed, intending the insertion of another word before the word so changed in position:—*Held*, that the amendment should be placed and read in the position only to which it could sensibly relate.—A by-law provided for the taking out of a license by every person using or following "any of the professions particularly described and mentioned in schedule A." The profession of barrister or solicitor was not mentioned, but clause 27 of the by-law contained an ominous provision that "every person following within the municipality any profession . . . not hereinafter enumerated" should take out a license.—*Held*, Clement, J., dissenting, that this provision took in the professions of barrister and solicitor without any more definite description. *Victoria* v. *Belyea*, 5 W. L. R. 101, 428, 13 B. C. R. 5.

Billiard licenses—*Regulation of by by-law—Prohibitive license fee—Object of municipal council.*]—Motion to quash a township by-law, passed under Con. Mun. Act (1903), s. 583 (4), (5), for the licensing and regulating the keeping of billiard tables for hire and fixing the annual license fee at $100 per table.—Middleton, J., *held*, that B. N. A. Act, s. 92 (9) gave provincial legislatures power to grant such licenses in order to raise revenue for provincial, local or municipal purposes: That the province had delegated to municipalities its full power to regulate such licenses, therefore, the matter was within the jurisdiction of the council: That there was no evidence of anything fraudulent or malicious on the part of the members of the council, in passing the by-law, or that it was passed for the purpose of putting the applicant out of business, therefore, the Court should not inquire into the motive which influenced their action: That the by-law was not in its nature prohibitive, even though the result might be that no one would undertake to establish a billiard room in the township. There might be no reasonable demand for such a place, and the fact that, even, in the absence of any license or regulation, until recently there was no such resort, indicated that this was the case. Motion dismissed with costs. *Pigeon* v. *Recorders Court & Montreal* (1890), 17 S. C. R. 495, 501, 502, followed. *Re Foster & Raleigh* (1910), 16 O. W. R. 1012, 22 O. L. R. 26, 2 O. W. N. 65.

Divisional Court affirmed above judgment, 18 O. W. R. 195, 22 O. L. R. 342, 2 O. W. N. 306.

Bread — By-law regulating sale of — Penalty for infringement — Validity of by-law. *Iberville* v. *Labelle*, 4 E. L. R. 76.

Bread — *By-law regulating weight of — Intra vires — Constitutional law — Conviction — Evidence — Mens rea.*]—*Held*, that under s. 583, s.-ss. 10 and 11, and s. 583, s.-s. 1, of the Consolidated Municipal Act, 1903, 3 Edw. VII. c. 19 (O.), a city has power to pass a by-law "to provide for the weight and sale of bread," and imposing a penalty for selling loaves of light weight: and that the same is not *ultra vires as* creating a criminal offence, or otherwise:—*Held*, also, that no evidence of *mens rea* was necessary to conviction, the word "wilfully" not being used in the statute or by-law. *Rex* v. *Chisholm*, 9 O. W. R. 914, 14 O. L. R. 178.

By-law licensing hawkers and pedlars — *Prohibitory effect — Conviction — Amendment of — Motion to quash—Repeal of amending by-law.*]—The defendant was convicted of an infraction of a by-law passed by a town council, under s.-s. 14 of s. 583 of the Mun. Act, 1903, 3 Edw. VII. c. 19 (O.), relating to hawkers and pedlars, etc., the violation charged against the defendant being "by going from place to place with an animal bearing or drawing or otherwise carrying goods, wares, or merchandise, for sale, without a license therefor," but not stating that he did so as a hawker, etc., nor did the conviction negative the exceptions in the proviso to s.-s. 14 of s. 583 that the sale was to a retail trader, or of goods manufactured in this province by the defendant or his employer: as the evidence shewed that the defendant was not within the proviso, the conviction was amended by supplying these defects, and a motion to quash by reason of the omissions was dismissed.—The conviction was also objected to on the ground that the by-law, though professedly passed for licensing and regulating, was in reality passed at the instance of the retail merchants of the town, who had the license fees made so high as to be in fact prohibitive:—*Held*, that, as the Court were not trying the defendant, or hearing an appeal from conviction, and this not being a motion to quash the by-law, and there being evidence, though slight, upon which the magistrate might find against there being any such prohibition, a motion to quash the conviction on this ground was also dismissed.—Section 376 of the by-law fixed the license fees at $20, $5, and $4, contingent respectively on the use of a horse or cart by the hawker, etc., or his travelling on foot with or without a push cart, etc. This by-

law was amended by by-law 779, which struck out the words 20, 5, and 4, and substituted therefor 75, 50, and 50. This last-named by-law was repealed by by-law 821, and the first-named by-law amended by striking out the words 20, 5, and 4, and substituting therefor 75, 50, and 50. Then by by-law 855 this last-named by-law was amended, but not in so far as regarded the last-named amendment, and in other respects was confirmed. It was objected that no penalty was provided in the by-law 821, which repealed by-law 779, as it did not in its terms restore to s. 376 the words 20, 5, and 4, but merely directed the substitution of the words 75, 50, and 50 for such words as if they had been restored:—*Held*, that the objection must be overruled, for the rule under s.-s. 46 of s. 8 of the Interpretation Act, R. S. O. 1897 c. 1, which restricts the effect of repeal of a repealing Act, has no application to by-laws, and, therefore, the repeal of by-law 779 restored s. 374 to its original condition, and by by-law 821 the purpose intended was effected. *Rex* v. *Laforge*, 12 O. L. R. 308, 8 O. W. R. 104, 551.

By-law licensing professional men — *Barrister — Payment of fee to municipality — "Practising," what constitutes—Penalty.*] The profession of a barrister is included in the term "profession" in clause 26 of s. 171 of the Municipal Clauses Act, as amended in 1902, c. 52, and s. 173, as amended in 1903, c. 42, imposing the payment of a license fee upon every person following a profession within a municipality.—*Semble*, one appearance in the town where the barrister has his office, in Court as counsel for a client, is sufficient to constitute an offence under the statute, when the license fee has not been paid, although, following *Apothecaries Co.* v. *Jones*, [1893] 1 Q. B. 89, acting in several instances would constitute only one offence, in respect of which only one penalty could be imposed.—It is not necessary that the tax-imposing by-law should fix a penalty; s. 175 of the statute does that, and provides the manner in which it may be recovered. *Victoria* v. *Belyea*, 12 B. C. R. 112.

By-law limiting number of tavern licenses prescribing accommodation — *"License year" — Liquor License Act — Objections to procedure — Validity of by-law.*]—A by-law passed by the council of a town before the 1st March, 1905, limiting the number of tavern licenses, prescribing the accommodation to be possessed by taverns, and fixing the amount of license duties, was held not to be invalid because it omitted the words "beginning on the first day of May," after the words "license year," in prescribing the number of taverns licenses for the "ensuing license year." In prescribing the accommodation for taverns the by-law did not limit its provisions to the ensuing license year, but was so general that it might apply to all future years:—*Held*, that the scope of the by-law being limited on its face to the license year 1905-1906, the general words of the clause dealing with accommodation were limited to that year. Sections 29 and 29 of the Liquor License Act, R. S. O. 1897 c. 245, considered.—Objections to the procedure of the council in relation to the passing of the by-law were overruled, the by-law being valid on its face, none of the objections having been raised by any member of the council, and the matters objected to being matters of internal regulation. *Re Caldwell & Galt*, 10 O. L. R. 618, 6 O. W. R. 340.

By-law regulating auctioneers — License fees — Discrimination between residents and non-residents — Invalidity of by-law — Quashing conviction. *Rex* v. *Pope* (N.W.T.), 4 W. L. R. 278.

By-law regulating sale of coal — *Market by-law — Weighing — Municipal Act.*]—The provision in s. 580, s.-s. 9, of the Consolidated Municipal Act, 1903, 3 Edw. VII. c. 19, whereby municipalities are empowered to pass by-laws "for regulating, measuring, or weighing (as the case may be) of lime, shingles, laths, cordwood, coal, and other fuel," must be read as limited to such articles as are marketed or exposed for sale within the limits of the municipality. It cannot have been intended by the legislature that where such articles have been the subject of a complete contract of sale made beyond the limits of the municipality, and the only act done within it is the delivery, there should be the right to impose what is practically a tax upon the vendor of the articles. *Rex* v. *Woolatt*, 11 O. L. R. 544, 7 O. W. R. 727.

Cigarettes—*License for sale—Excessive fee—By-law ultra vires:—Held*, that a by-law of a municipal corporation imposing a license fee of $200 on the sale of cigarettes in stores and shops, purporting to be passed under s. 583, s.-ss. 28, 29, of the Consolidated Municipal Act, 3 Edw. VII. c. 19 (O.), was *ultra vires*, was in effect prohibitive, and not merely regulative, the evidence shewing that it exceeded the annual profits which any shop in the municipality could make on the sale of cigarettes. *In re Talbot & Peterborough*, 12 O. L. R. 358, 8 O. W. R. 274.

Company — *License fee — City charter —Construction — Ejusdem generis rule — Foreign company — "Doing business in Halifax."*]—By s. 313 of the city charter (54 V. c. 58), as amended by 60 V. c. 44, "every insurance company or association, accident and guarantee company, established in the city of Halifax, or having any branch office or agency therein, shall . . . pay an annual license fee as hereinafter mentioned. . . . Every other company, corporation, association, or agency doing business in the city of Halifax (banks, insurance companies, or associations, etc., excepted) shall . . . pay an annual license fee of one hundred dollars:"—*Held*, that the words "every other company" in the last clause were not subject to the operation of the *ejusdem generis* rule, but applied to any company doing business in the city. Judgment appealed from reversed on this point.—A carriage company agreed with a dealer in Halifax to supply him with their goods, and gave him the sole right to sell the same in a territory named, on commission, all moneys and securities given on any sale to be the property of the company, and goods not sold within a certain time to be returned. The goods were supplied and the dealer assessed for the same as his personal property. — *Held*, Davies and Maclennan, JJ., dissenting, that the company were not "doing business in the city of Halifax," within the meaning of s. 313 of the

charter, and not liable for the license fee of $100 thereunder. Judgment of the Court below, 39 N. S. R. 403, 1 E. L. R. 58, affirmed on other grounds. *Halifax* v. *McLaughlin Carriage Co.*, 27 C. L. T. 659, 39 S. C. R. 174.

Eating houses — *By-law regulating — Validity — Compulsory closing — Sunday.*] —A city corporation by by-law enacted that no eating-house within the municipality should be open nor anything sold therein between 1 a.m. and 6 a.m., and also that on Sunday no such eating-house should be open nor anything sold therein after 7 p.m.: — *Held*, that the by-law was a good and valid by-law, as "regulating" eating-houses, within the authority given by the Municipal Act. *In re Campbell & Stratford*, 9 O. W. R. 115, 345, 14 O. L. R. 184.

License for bowling alley — *By-law — Forfeiture of license—Conviction of servant of licensee for illegal sale of intoxicating liquor on bowling alley premises—Declaration of invalidity of by-law—Electricity supplied by municipal corporation—Servant of licensee tapping main and abstracting electricity — Proof of quantity taken.*]—Action for value of electricity abstracted by defendant. Counterclaim that by-law forfeiting bowling alley license be declared invalid. Claim for damages abandoned as no proceedings taken to quash by-law. Counterclaim allowed. Defendant's husband, the manager of the business, had been convicted of various offences, including theft of electricity and perjury. The defendant, not the plaintiff, should call the husband as a witness. Judgment for plaintiffs for amount of electricity abstracted at selling price, not cost price per unit. *Sudbury* v. *Bidgood*, 13 O. W. R. 1904.

License law of Quebec — *Claim to set aside a resolution of a municipal council.*]— There is power to set aside a resolution of a municipal council, in the matter of licenses, even in cases not provided for in s. 22 of the license law. *Desparois* v. *St. Paul* (1909), 10 Que. P. R. 393.

Municipal licenses — By the Edmonton Charter, title XXXII., s. 3, s-s. 4, it is provided: "No person who is assessed in respect of any business or special franchise shall be assessed in respect of the income derived therefrom, and no person who is assessed in respect of any business or special franchise, or of any income derived therefrom, shall be liable to pay a license fee in respect to the same business or special franchise:"—*Held*, that the word "license," as used in the Edmonton Charter, refers to a license issued by the municipal corporation, and has no reference to any license issued by any other authority. *York* v. *Edmonton* (1909), 2 Alt. L. R. 38.

Municipal licenses.] — The provisions of the charter of the town of Edmonton (N. W. T. Ord. 1904, c. 19), title xxxii, s. 3 (4), exempting any person assessed in respect of any business from payment of "a license fee in respect of the same business" does not apply to fees exigible upon licenses issued by the Provincial Government under the Liquor License Ordinance, Con. Ord. N. W. Terr., c. 89. *York* v. *Edmonton* (1909), 2 Alta. L. R. 38, 10 W. L. R. 405, affirmed, 42 S. C. R. 363, reversing 10 W. L. R. 270.

Pool rooms — *By-law requiring closing on Sunday — Intra vires — Provincial legislatures — Objection to by-law as unreasonable, oppressive, or discriminating.*] — A municipal by-law, passed under the powers conferred by s-s. (*a*) of s. 640 of the Municipal Act, R. S. M. 1902 c. 116, and providing that all licensed pool rooms and billiard rooms shall be closed from 8.30 p.m. of every Saturday until 7 a.m. of the following Monday, and from 10 p.m. of every other day until 6 a.m. of the next day, is not *ultra vires* of the municipal council, on the ground that it may have been intended as a means of enforcing Sabbath observance to that extent. Such provision is within the power of regulating and governing pool and billiard rooms conferred along with the licensing power.—A provision in such a by-law requiring the screens or other devices for obscuring the view from the outside into the pool rooms to be removed during the prohibited hours is not unreasonable or oppressive, and should not be held invalid as discriminating between one class of the people and other classes. *Re Fisher & Carman*, 16 Man. L. R. 560.

Restaurant license transfer — *Abandonment of property—Rights of curator when transferee of license—Transfer made within the delays and according to the provisions of the Quebec License Law.*]—A restaurant license held by an insolvent, remains in force for 30 days after abandonment of his estate during which time it may be transferred by the provisional guardian or assignee. Demand for such transfer should be made according to requirements of Arts. 11, 12, 36 and 37 of Quebec License Law—In present case, abandonment of property was made on 7th March, 1908, demand for a transfer was filed by curator on 1st April, 1908, and such demand was confirmed by Commissioners on 15th April, and transfer was effected on 28th April in accordance with provisions of the law. If follows that the license was transferred within the delays and according to required formalities. Moreover, the certificate for renewal of license applied for by assignee was granted by Commissioners on 15th April, 1908, and the license was taken out and paid for on 19th June, 1908, and therefore the license in question never ceased to exist. Under circumstances, Commissioners could not consider such license as cancelled and could not, on 28th August, 1908, issue such license to another party under pretext of preserving the number of licenses allowed in Montreal. *Gariepy* v. *Choquet & Turgeon* (1908), 16 Que. R. de J. 314.

Sale of meat — *By-law — Requirement that animals be killed at public abattoir—Restraint of trade—Validity — Statute confirming—Powers of provincial legislature.*]— A municipal by-law which prohibits the sale of the flesh of animals killed elsewhere than at the public abattoir, except in the case of farmers, who are excepted, is not bad as exceeding the power of the municipal council, and does not violate freedom of trade; and a statute of the provincial legislature ratifying it is constitutional. *Paul* v. *Sorel*, 34 Que. S. C. 70.

Shops — By-law providing for early closing — Powers of council — Offence—Selling goods — Conviction. *Rex* v. *Doll* (N.W.P.), 6 W. L. R. 512.

Shops — *Ontario Shops Regulation Act — Early closing by-law — Motion to quash— Right to shew that petitioner not of specified class — Month in which by-law was to be passed — Time — Directory enactment — Right of withdrawal before final passing — Delegation to clerk of duty of council.*]—On a motion to quash an early closing by-law, passed under the Ontario Shops Regulation Act, R. S. O. 1897 c. 257, it may be shewn that persons who signed the petition as presumedly of the trade or business whose shops the by-law was designed to close, were not, as a matter of fact, of such trade or business.—In this case, where the by-law was for the early closing of grocers' shops, it was proved, on the motion to quash, that a number of the names in the petition were not of the requisite class, and that, after striking off the names of such persons, there was not the three-fourths majority required by the Act:—*Held*, that the by-law must be quashed.—*Semble*, that the time specified under the Act for the final passing of the by-law — namely, one month after the presentation of the petition—is merely directory.—*Semble*, also, that under this Act petitioners have the right of withdrawal before the final passing of the by-law. *Gibson* v. *North Easthope*, 21 A. R. 504, 24 S. C. R. 707, distinguished. —This decision affirmed upon the ground that the council had failed to comply with the provisions of the Ontario Shops Regulation Act, R. S. O. 1897 c. 257; having, contrary to its requirements, delegated to the clerk the duty of ascertaining whether the petition for the by-law was properly signed. *Re Halladay & Ottawa*, 10 O. W. R. 46, 612, 14 O. L. R. 458, 15 O. L. R. 65.

Shops — Regulation of retail shops — Early closing by-law — Powers of city council — Provincial statute — *Intra vires* — Trade and commerce — Delegation of discretion as to hours and penalty — Unreasonable by-law — Excessive penalty — "Legal holiday" — Movable dates — Authority outside by-law — Conformity of penalty clause with powers given — Prior by-law — Implied repeal — Discrimination. *Re Brown & Calgary* (N.W.P.), 5 W. L. R. 576.

Taverns — *By-law — Music — Exception.*]—The by-law of the city of Montreal, No. 36, s. 8, forbidding instrumental or vocal music in establishments where intoxicating liquors are sold, does not apply to the company called "*le Stadium*," of which the petitioner was the agent and servant. *Thouin* v. *Weir*, 8 Que. P. R. 367.

Trades licenses — *By-law — Registration under s. 86 of Municipal Clauses Act— Copy — Seal — Conviction — License — Period — Computation.*]—A municipal by-law providing for the imposition of a license "for every six months" was passed and registered on the 18th September, and the time limited for the expiration of the first license thereunder was fixed for the 15th of the ensuing January. There was no provision made for the period of time between the passage of the by-law and the 15th January: —*Held*, that a conviction of the defendant company for carrying on business on or about the 4th December intervening, without having taken out a license under the by-law, was bad, in that s. 1 of the by-law could apply only to a six months' license, for which a six months' fee had been paid.—*Held*, further, that it was sufficient that the copy of the by-law deposited for registration had impressed upon it the seal of the municipality, and that it was not necessary to affix the seal to the certificate of the municipal clerk authenticating the by-law. *Fernie* v. *Crow's Nest Pass Electric Light and Power Co.*, 13 B. C. R. 12.

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17 Local Improvements.

Apportionment of cost — *Railway companies — Court of Revision — Appeal to County Court Judge by municipality—Prohibition.*]—By s. 41 of R. S. O. 1897 c. 226 and s. 75 of R. S. O. 1897 c. 224, an appeal lies to the County Court Judge not only from a decision of the Court of Revision, but also from the refusal to decide an appeal; and by s. 6 of 62 V. (2) c. 27, the appeal in such case may be at the instance of the municipal corporation or of the assessment commissioner or assistant assessment commissioner. After a petition had been presented to a city council for the construction, as a local improvement, of certain bridges over the tracks of certain railways where they crossed one of the streets, and asking that a proportionate part of the cost should be imposed on the railways and on the city generally, and after lengthened procedure in which the validity of by-laws passed for the carrying out of the said work were questioned, a by-law was passed purporting to be made in pursuance of a petition of ratepayers under s. 664 of the Municipal Act, whereby the matter of the assessment for the cost of the said work was referred to the city engineer, under which the city engineer made his report, and a reference thereof was then made to the Court of Revision, whereupon that Court determined that such assessment was invalid and refused either to confirm it or to make any assessments under it: — *Held*, that the County Court Judge could properly entertain an appeal from the decision of the Court of Revision at the instance of the city and the assistant assessment commissioner; and an application for prohibition was therefore refused. Decision of Meredith, J., 3 O. W. R. 170, affirmed. *In re Hunter & Toronto, In re Dundas Street Bridges*, 24 C. L. T. 336, 8 O. L. R. 52, 3 O. W. R. 660.

Assessment — *By-law — Alteration by resolution of council — Extension of time for payment — Interest — "Cost."*]—A municipal by-law is not an agreement, but a law binding upon all persons to whom it applies, whether they care to be bound by it or not; and a resolution can no more alter a by-law than a statute.—The council of the plaintiffs passed by-laws for the prolongation of a street, and assessed the adjacent property with the whole cost:—*Held*, that the "cost" would properly include the purchase of the land required for the prolongation.—*Held*, also, that the council had no power by resolution to alter the time fixed by the by-laws for payment. *Victoria* v. *Meston*, 11 B. C. R. 341, 2 W. L. R. 384.

By-law — *Personal service of notice — Waiver — Court of Revision.*]—It is a fatal

objection to the validity of a municipal by-law authorising a work as a local improvement, that notice of the intention of the council to undertake the work was not given to the owners of the properties benefited thereby, by personal service, etc., as provided by s. 669 (1a) of the Municipal Act, 1903.—*Semble*, that an owner might waive such notice, but *held*, that in this case there was no conduct amounting to waiver.—*Semble*, also, that while the direction of the statute (s. 64 of the Assessment Act, R. S. O. 1897 c. 224), that the members of the Court of Revision are to be sworn, should not be ignored, it does not follow that neglect or failure to take the oath renders their acts void. Order of Boyd, C., 7 O. L. R. 149, 24 C. L. T. 129, 3 O. W. R. 233, reversed. *In re McCrea & Brussels*, 24 C. L. T. 346, 8 O. L. R. 156, 3 O. W. R. 868.

By-law for asphalting a street — *By-law quashed — Ont. Municipal Act, s. 671.*] — The notice given to a property owner under above section omitted to mention the time over which was spread the cost of certain local improvements. On this ground by-law quashed *pro tanto*. *Re Hodgins & Toronto*, 14 O. W. R. 642, 1 O. W. N. 31.

By-laws — Extension of street—Expropriation — Petition against — Status as petitioner of owner of land expropriated — Withdrawal of petitioner — Internal regulations of council — Discretion as to quashing by-laws — Substantial compliance with statute — Expropriation of land not shewn on plan — Non-assessment of property benefited Report of assessor — Finality in absence of fraud — Cost of sidewalks. *Re Cameron & Victoria* (B.C.), 2 W. L. R. 387.

Destruction of sidewalks—*Statutory obligation to keep in repair.*]—Where a city by-law has been duly passed for the widening of a street as a local improvement, the city corporation are bound to proceed with the work, notwithstanding that it involves the destruction of sidewalks which the corporation are by statute obliged to keep in repair. *Todd* v. *Victoria* (1910), 15 W. L. R. 502, B. C. R. .

Expropriation — *Assessment —Rating for benefit — Trivial objections.*]—Where a statute for the widening of a street directs that part of the cost shall be paid by the owners of property bordering on the street, the apportionment of the tax should be made upon a consideration of the enhancement in value accruing to such properties respectively, and the rate levied in proportion to the special benefit each portion has derived from the local improvement. When an assessment roll covering over half a million dollars has been duly confirmed without objection on the part of a ratepayer that his property has been too highly assessed by a comparatively trivial amount, he cannot be permitted afterwards to urge that objection before the Courts upon an application to have the assessment roll set aside. Judgment in 9 Que. Q. B. 142, reversed; and that in 15 Que. S. C. 43, restored. Gwynne, J., dissenting. *Montreal* v. *Belanger*, 21 C. L. T. 4, 30 S. C. R. 574.

Expropriation for widening street—*Action for indemnity — Assessment of damages — Evidence.*]—Where the city of Montreal, under the provision of 52 V. c. 79, s. 213, took possession of land, for street widening, in October, 1895, under agreement with the owner, the fact that the price to be paid remained subject to being fixed by commissioners to be appointed under the statute was not inconsistent with the validity of the cession of the land so effected, and, notwithstanding the subsequent amendment of the statute in December of that year, by 59 V. c. 49, s. 17, the city were bound, within a reasonable time, to apply to the Court for the appointment of commissioners to fix the amount of the indemnity to be paid, and having failed to do so, the owner had a right of action to recover indemnity for his land so taken. *Hogan* v. *Montreal*, 31 S. C. R. 1, distinguished. The assessment of damages by taking the average of estimates of the witnesses examined is wrong in principle. *Grand Trunk Rw. Co.* v. *Coupal*, 28 S. C. R. 531, followed. *Fairman* v. *Montreal*, 21 C. L. T. 330, 31 S. C. R. 210.

Frontage system — *Mode of assessment —Court of Revision — County Court Judge —Prohibition.*]—When a sewer is being constructed by a municipal corporation under the local improvement system, and land not fronting on the street in question is benefited, as well as land fronting thereon, the proper method of assessment is to determine what proportion of the cost the land fronting on the street shall bear, and what proportion the land not so fronting shall bear, and to assess the proportion payable by each class according to the total frontage of that class, and not according to the benefit received by the lots in that class *inter se*. Judgment of a Divisional Court, 30 O. R. 158, *ante* 31, affirmed: Burton, C.J.O., dissenting. But, *held*, also, reversing that judgment, Osler and Moss, JJ.A., dissenting, that after the County Court Judge had, on appeal by an owner, taken a contrary view and altered the assessment, it was too late to obtain an order for prohibition. *In re Robertson & Chatham*, 19 C. L. T. 380, 26 A. R. 554.

Money for improving streets and sewers—Motion to quash refused by Meredith, C.J.C.P.—Appeal to Divisional Court—Consent of municipal council to have by-law quashed—No power so to do — Beyond its legal powers — Appeal struck off the list. *Great North-West Central Rw. Co.* v. *Charlebois*, [1899] A. C. 124, followed. *Re Angus & Widdifield* (1911), 18 O. W. R. 913, 2 O. W. N. 940.

Pavement — *Liability to repair.*] — A city corporation having, by by-law, adopted the local improvement system, a pavement was constructed as a local improvement in 1891, composed of cedar blocks. The by-law for levying the assessments stated that ten years was the "lifetime" of the pavement:—*Held*, that what the legislature contemplated by ss. 664-666 of the Municipal Act, R. S. O. c. 223, was that the initial cost of the construction of the local work or improvement should be borne by the owners of the property benefited by it, but that they should not be responsible for the keeping of it in repair, that duty being cast upon the municipality generally, and that when it should become

necessary to reconstruct the work or improvement, the cost of doing so should be defrayed by the owners of the property benefited by the work of reconstruction. This duty to repair is not to be confounded with the general duty to repair, which is one towards the public. This duty ends when it becomes necessary to reconstruct the work or improvement, and whenever it is worn out and not worth repairing, no order for repair can be made under the amendment to s. 666 contained in s. 41 of 62 V., sess. 2, c. 26. *In re Medland & Toronto*, 20 C. L. T. 12, 31 O. R. 243.

Pavements — *Agreement — Grant of land for street — By-laws — Charge on lands — Notice — Cost of work.*] — An agreement by which a ratepayer grants the land for a street to a municipal corporation, upon condition of the corporation opening the street, does not include the obligation to lay pavements thereon.—When municipal by-laws make the construction of pavements a charge upon the property abutting on the street, and provide that in case of default the municipality may do the work, after notice to the defaulters, and recover the cost from them, the omission of the notice described is not a ground of defence to an action, unless the sum claimed exceeds that which the doing of the work would have cost the owner sued. *Corp. of Three Rivers* v. *Dumoulin*, 31 Que. S. C. 75.

Payment out of general funds — *Illegality — Liability of councillors—Trustees—Breach of trust — Excuse — Relieving statute.*]—By a special Act of the legislature of Ontario incorporating a town it was provided that all expenditure in the municipality for improvements and services for which special provisions were made in ss. 612 and 624 of the Consolidated Municipal Act, 1883, should be by special assessment on the property benefited and not exempt by law from taxation; and the construction of sidewalks upon the local improvement plan was one of the matters provided for by s. 612. In an action by a ratepayer, on behalf of all ratepayers other than the defendants, against the members of the council who sanctioned the payment out of the general funds of the town for work done in reconstructing a sidewalk, and against the corporation of the town, the claim was that the individual defendants might be ordered to pay to the corporation the moneys expended in the construction of the sidewalk, and that the defendants might be enjoined from paying any further moneys in respect thereof:—*Held*, that the members of the council who were sued, having acted in good faith and under the *bona fide* belief that they were doing their duty as trustees for the body of ratepayers in paying out of the general funds of the municipality for what was practically a new sidewalk, even if they had misconstrued the meaning of the statutes, which was by no means clear, at all events acted honestly and reasonably and were entitled to be excused for the alleged breach of trust.—*Semble*, that 62 V. (2) c. 15, s. 1, applied to these defendants; but, if it did not, they should not be more hardly dealt with than ordinary trustees, and should be treated as within its equity. *King* v. *Matthews*, 23 C. L. T. 109, 5 O. L. R. 228, 2 O. W. R. 18.

Petition for — *Majority of petitioners —Exempt property — Value — Land — Buildings.*]—A petition for local improvements is sufficiently signed under s. 668 of the Municipal Act when signed by six out of nine owners to be benefited, who appear on the assessment roll, notwithstanding that the city within which the improvement is to be made also appears as an owner of property on the roll in respect to property which is exempt from taxation; and the value of the buildings as well as the land is properly taken into consideration in ascertaining the requisite one-half in value. *Macdonell* v. *Toronto*, 22 C. L. T. 294, 4 O. L. R. 315, 1 O. W. R. 433, 494.

Purchase of electric light plant — Compulsory expropriation. *Iroquois Electric Light Co.* v. *Iroquois*, 1 O. W. R. 306.

Sidewalk — Assessment for — Action to restrain — Estoppel — Appeal to Court of Revision and County Court Judge — Irregularities — Costs. *Canada Co.* v. *Mitchell*, 2 O. W. R. 732.

Statutory powers — *Expropriation—Assessment — Arbitration and award—Appeal — Grounds of objection.*]—When a statute for improvements in a city provides that the cost of the necessary expropriations shall be borne, one-half by the city, and the other by a class of proprietors, and awarded and assessed by a board of arbitrators, with a right for such proprietors to appeal from the award, the assessment should be proceeded with, notwithstanding appeals, inasmuch as, if they fail the assessment will be good, and, if they are allowed, a second assessment can be made to meet any increase of the awards. —2. Proceedings in expropriation under a statute, when otherwise regular and in conformity with its provisions, cannot be attacked for reasons which might have been urged against the passing of the statute, but which do not affect its validity. *Guy* v. *Montreal*, 14 Que. K. B. 401.

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18. Local Option By-law. *See* Elections —Intoxicating Liquors.

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19. Markets.

Auctioneer.] — Neither under s. 580, nor under s. 583 (2), of the Municipal Act, R. S. O. c. 223, can a municipal corporation prohibit an auctioneer from carrying on his business in the public markets of the city in respect of any commodities which may properly be sold there. Judgment of a Divisional Court, 30 O. R. 7, 18 C. L. T. 401, affirmed. *Hollander* v. *Ottawa*, 20 C. L. T. 296, 27 A. R. 335.

By-law — Powers of council — Permitting part of market to be used for exhibitions and meetings—1 Wm. IV. c. 10—User of market square — Dedication — Parties — Attorney-General. *Godden* v. *Toronto*, 12 O. W. R. 708.

By-law — *Tolls — Private sale.*] — The leased butchers' stalls in the city market of the city of St. John are not part of the

market, within the meaning of the regulations making all articles sold or exposed for sale therein liable to pay toll, and a sale of vegetables, in such a stall, to be subsequently delivered at the stall to the lessee thereof, is not an offence against a by-law requiring all persons carrying articles for sale into the market to report to the deputy clerk of the market and pay toll, and forbidding all persons from selling or offering for sale any article without having a stand assigned, and at any place except at the stand so assigned. *Rex* v. *Manchester*, 38 N. B. R. 424. 4 E. L. R. 538.

Confiscation of meat — *Damages — Powers of inspector.*]—The plaintiff, a farmer, offered meat for sale in a market, which was confiscated by an inspector of meat. The plaintiff brought this action against the municipality which employed the inspector, to recover the value of the meat and damages:—*Held*, that the authority of the inspector was incontestable, and, even if he were wrong in his judgment, the vendor could not resist him there and then; but the power of the inspector was administrative, not judicial; and, as it appeared upon the evidence in this case that the meat seized was good, the plaintiff was entitled to damages. *Blouin* v. *Quebec*, 16 Que. S. C. 303.

Negligence — *Injury to cattle.*] — A city corporation, having lawfully established a public cattle market under the Municipal Act, and fixed the fees to be paid by persons using it, are not liable to a person who has paid the usual market fee for the safe-keeping of animals placed by him in a pen in such market.—*Semble*, also, that no negligence on the part of the caretaker of the market was shewn, the injury to the cattle having been apparently wilfully done by some unknown person. *Gillies* v. *Hodgson*, 20 C. L. T. 336.

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20. Meetings of Councils.

Adjourned special meeting—*Notice of meeting—Sufficiency of notice—Invalidity of proceedings — Oral proof of mistake—Minutes of meeting of municipal council.*] — Proof by witnesses, without notes in writing of the mistakes, that the date of a meeting of a municipal council, inserted in the minutes, is wrong, is illegal and no notice should be taken of it. The proceedings of a local council at an adjourned special meeting whose minutes do not assert that notice of it had been given to all the members, setting forth the subjects to be dealt with, are void. They are not within the provisions of Art. 16 C. M., the absence of prejudice, this case being in the exception to the section dealing with indispensable formalities. *Desjardins* v. *D'Hébertville*, 1909, 36 Que. S. C. 295.

Adjournment for want of quorum—*Notice to absent councillors.*] — When a regular session of a municipal council is adjourned, for want of a quorum to a subsequent day, the notice of the adjournment to the absent councillors required under Art. 139, M. C., may be given verbally, and, although service of such notice must be established at the resumed session, a mention in the minutes that this was done is not essential to the validity of the proceedings. Hence, a resolution passed at such a resumed session, although the minutes contain no reference to the notice given after adjournment to the absent councillors, if no substantial injustice is shewn to result therefrom, will not, in view of Art. 16, M. C., be declared null and void. *Hudon* v. *Roy dit Desjardins*, 19 Que. K. B. 68.

Minutes — *Amending or setting aside existing minutes — Powers of municipalities in this respect — Powers of county councils to place certain roads under the charge of local councils.*] — A municipal corporation which keeps and records its minutes alone has the power to make and record another to amend it. Hence, a county council has not the power to make and record a minute modifying or striking out another made and recorded by the members of the county council of that and the neighbouring county for the construction and maintenance of roads partly in the one and partly in the other. A meeting of the commissioners of two counties may declare in a resolution that a minute that one of the works that are thereby ordered shall be made by a municipality local in its situation and shall remain at its charge. *Sénécal* v. *Beauharnois*, 1909, 36 Que. S. C. 337.

Minutes—*Signature of presiding officer.*] —One who presides at a meeting of a municipal council should, without delay, sign minutes which correctly record the proceedings, whether these proceedings be regular or not. *Macdonald* v. *Chevrier*, 7 Que. P. R. 160.

Notice — *Time — Resolution — Statute —Finance committee.*]—A delay of at least 24 hours between the day on which the notice is given of the holding of a special session of the council of a town corporation, and that fixed for such session, is necessary, and all resolutions adopted, in the absence of one councillor, at a session irregularly called are void. 2. The statute governing the city of Sherbrooke, providing that all resolutions concerning expenditure beyond the amount of credits voted, must first be submitted to the finance committee, must be observed on penalty of nullity. *Farwell* v. *Sherbrooke*, 25 Que. S. C. 203.

Procedure — *Local option by-law — Second reading without formal motion — Approval by vote of ratepayers — Motion to quash — Discretion — Delay.*]—A local option by-law was introduced in a town council on the 5th October, 1903, and a motion that it be read a first time was carried, after discussion, on a division of eight to two. On the 17th November a motion that the second reading should be deferred till January was lost on a division of three to seven. The council then went into committee of the whole, and reported the by-law, which was then "read and passed as having had its second reading," but without any motion that it be read a second time. The by-law was then submitted to the electors, as provided by the Liquor License Act and the Municipal Act, and was approved by a vote of 869 to 679. On the 11th January, 1904, the by-law was, on motion read a third time in the council, and, also on motion, adopted as final. On the 23rd April, 1904, a motion to quash the

by-law, on the ground that there was no motion for a second reading, was launched. The procedure by-law of the council contained a provision that in proceedings of the council the law of parliament should be followed in cases not provided for. The procedure followed in this case was, however, the usual procedure of the council:—*Held*, that the matter was one of internal regulation, of which the mayor was the judge, subject to the appellate jurisdiction of the council; that, even if there was an irregularity, a by-law passed pursuant to a statute and adopted by vote of the people should not be quashed by reason thereof; and further, that as a matter of discretion, and in view of the delay in moving, the motion should be refused. *In re Kelly & Toronto Junction*, 24 C. L. T. 352, 8 O. L. R. 162, 3 O. W. R. 765.

Procedure at — *Passing by-law — Suspending rule of order — Notice.*]—It is not necessary that a thirty days' notice should be given to permit the council of the city of Montreal to suspend the rule which forbids more than one reading of a by-law at the same sitting, such suspension, with the consent of three-fourths of the members of the council, being authorised by the orders and by-laws of the city. *Société des Ecoles Gratuites* v. *Montreal*, 19 Que. S. C. 148.

Resignation of member — Sufficiency of resolution accepting — Filling vacancy under statute. *London Street Ry. Co.* v. *London*, 2 O. W. R. 44.

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21. NEGLIGENCE.

See NEGLIGENCE.

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22. NUISANCE.

Factories — *By-law — Injunction — Penalty.*]—A municipal corporation has a right to prevent factories or mechanisms moved by steam being erected within its limits, to pass by-laws to that effect, and to exercise, in order to have such by-laws observed, all the remedies known to the law, and particularly injunction.—2. A municipal corporation is not bound to impose a penalty for contravention of such by-laws. *St. Agathe des Monts* v. *Reid*, 6 Que. P. R. 3.

Street nuisance — *Neglect to enforce by-law—Injury to person—Liability—Nonfeasance.*]—The passing by a municipal corporation, under the powers conferred by the Municipal Act, of a by-law prohibiting the setting off of fire-works, fire-crackers, etc., on the public streets, does not cast any duty on the municipality to see to its enforcement. An action to recover damages from a corporation on account of injuries sustained by the plaintiff by reason of the setting off of fire-works, in alleged contravention of a by-law, will not lie. *Brown* v. *Hamilton*, 22 C. L. T. 324, 4 O. L. R. 249.

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23. OFFICERS, SERVANTS AND OTHERS.

Alderman—*Disqualification to hold office —Municipal Act (1903), ss. 80, 219, 220, 232—Rule 598—Position of relator—Jurisdiction of Master—Objecting to irregularities, etc.—Powers of amendment—Intention immaterial—Mistake in law.*]—Appeal by one Homan from a judgment of M.-in-C. upon a motion in the nature of a *quo warranto*, under s. 220 of Con. Mun. Act (1903), holding that Homan, who was the respondent upon the motion, and who at the municipal elections in January last had been elected an alderman for the city of Niagara Falls, had since his election forfeited his seat and was disqualified from acting as such alderman, and had usurped and continued to usurp the said office. — Teetzel, J., *held*, that an alderman was disqualified from holding office by having an interest in a municipal contract. Judgment of M. in C., 19 O. W. R. 427, 2 O. W. N. 1221, affirmed. *Rex ex rel. Slater* v. *Homan* (1911), 19 O. W. R. 613, 2 O. W. N. 1334.

Aldermen of city — *Illegal acts—Ratepayer—Right of action—Damages—Notice of action—Qui tam action.*]—Ratepayers and proprietors of the city of Hull are qualified to take action against any of the aldermen who by their votes have illegally spent the city's money, to force them personally to refund the same to the city. Aldermen of the city of Hull are persons fulfilling a public function or duty; the present action was an action in damages, and the defendants were entitled to one month's notice under Art. 88, C. C. P. The present action was not a "*qui tam* or popular action." *Trudel* v. *Thibault*, 26 Que. S. C. 542.

Alderman's qualification — *Montreal —Changes on real estate existing at time of nomination or at any time during six months previous.*]—Under s. 29 of the Charter of Montreal, upon a petition to annul election of alderman, if it is established that respondent, at time of his nomination, or at any time during 6 months immediately previous thereto, did not own real estate in Montreal, of value of $2,000, after deduction of charges imposed thereon, such election shall be annulled with costs against respondent. *Levy* v. *Lamarche* (Que.) (1903), 16 R. de J. 330.

Appointment and dismissal of municipal councillors by the Lieutenant-Governor — *Notice of appointment and dismissal.*] — A municipal councillor, appointed by the Lieutenant-Governor, by virtue of Art. 327 M. C., and afterwards dismissed, by virtue of Art. 329 M. C., remains in office and is eligible to form part of the quorum at a meeting of the council as long as his dismissal has not been made known to him according to the provisions of Art. 328 M. C. Hence, an election of a councillor, made at a meeting of the council at which there was a quorum only by including the councillor present whose appointment has been cancelled and who was informed of the cancellation of his appointment by a telegram from the Provincial Secretary, but who had not been notified of it according to the form prescribed by law, is valid. *Laterreur* v. *Blais* (1909), 37 Que. S. C. 412.

Board of delegates — *Procès-verbal respecting a bridge — Amendments — 2 Edw. VII. c. 46—M. C. 760.*]—A board of delegates which declares that a bridge, till then

under control of two counties, shall be for the future a local bridge and under the exclusive direction of the local municipality within which it is situated, cannot at same time proceed to enumerate the ratepayers of such local municipality who will be responsible for the maintenance of such bridge; it should restrict itself to making such declaration. — Under provisions of article 760 M. C., as amended by 2 Edw. VII. c. 46, from date of such declaration by board of delegates the work to be performed upon such bridge is at sole charge of local municipality in control of bridge, and that municipality has exclusive right to adopt by-laws or resolutions respecting the work to be performed thereon. *Dagenais* v. *Two Mountains* (Que. 1910), 16 R. de J. 393.

Board of delegates — *Rights and liabilities of — Entity — Action against.*]— Although the board of delegates is created a responsible entity, and recognised by the law, it is not a body corporate and politic capable of suing and being sued, any more than is the council of a county or municipality; and the members of such a board form in reality a council created for two or more counties for the purposes specified by the law, and as such the delegates sitting for the counties which they represent cannot be sued in a court of justice. *St. Stanislas de Kostka* v. *Bureau of Deputies of the Counties of Huntingdon & Beauharnois*, 7 Que. P. R. 256.

Board of police commissioners — *Resolution—Cab-stand — Designation — Delegation—Police administration.*]—The commissioners of police of the city of Montreal may establish by resolution a cab-stand in the neighbourhood of a hotel for the use of its guests, and may also in the same way order that this stand shall be occupied only by cab-men designated by the proprietor of the hotel. Such resolutions do not import a usurpation of the legislative power conferred upon the city council, but simply acts of police administration. *Samson* v. *Montreal*, 14 Que. K. B. 461.

Commissioner of City Court — *Salary —Reduction—Consent—Public policy.*]—An arrangement entered into by the plaintiff, the Commissioner of the City Court of Moncton, an officer appointed by the Lieutenant-Governor in council, with the city council of the city of Moncton, to accept a reduction of his salary, which arrangement had been assented to by both parties and acted upon for a period of five years, is binding and can not be repudiated on the ground that it is void as against public policy. *Kay* v. *Moncton*, 36 N. B. R. 377.

Commissioner of City Court — *Salary —Statutory liability — Pleading.*]—The declaration alleged that under 53 V. c. 69, a Court for the trial of civil causes was established in the city of M.; that a commissioner of the said Court was to be appointed by the Governor in council; that the salary of the said commissioner was to be fixed by the city of M. and paid out of their funds; that pursuant to the Act the plaintiff was appointed commissioner, and his salary was fixed by the city council at $600 per annum; that he had performed the duties of the office and was entitled to be paid the salary, but the defendants had refused to pay:—*Held*, on demurrer, that the declaration was good, as it alleged a statutory liability to pay the plaintiff out of the city funds. *Kay* v. *Moncton*, 36 N. B. R. 292.

Contempt of Court by county council —*Disobedience to mandatory order—Requiring county to erect house of refuge—Motion for attachment or committal of councillors— Undertaking—Costs.*]—Motion for an order for attachment against certain county councillors for contempt in not obeying a mandatory order by which it was directed that the corporation do proceed forthwith and complete without delay the erection of a House of Refuge for said county pursuant to the statute or for an order committing the said councillors to the common gaol for their said contempt. Upon argument this was amended by asking "for such further or other order against the said councillors individually or the said corporation as may be deemed proper in the premises."—Middleton, J., *held*, that upon the faith of an undertaking given by council that the erection of the House of Refuge would be pushed to completion without delay, no further order was now needed except as to costs. Costs allowed against the county. No order as to costs against individual defendants. Application to have his full costs against county. Above order without prejudice to any subsequent motion that may be made by reason of any failure to comply with original order or this undertaking. *Re Bolton & Wentworth* (1911), 18 O. W. R. 795, 2 O. W. N. 827. O. L. R.

Councillor — *Disqualification—Contract with corporation—Vacating seat—Elections.*] —A municipal councillor who, in a case of urgency, has supplied to employees of the corporation timber and joists and money for the purpose of repairing municipal bridges, under the direction and control and at the sole charge of the corporation, who makes and files his claim, amounting to $19.38, with the council, who approve of it and order it to be paid at a session presided over by such councillor as mayor, and who receives payment, but does not make any profit, and between whom and the council there was no prevenient contract, does not thereby vacate his office.—2. In any event, supposing that Art. 205, C. M., would be applicable, the only result would be a simple incapacity to act as councillor; such incapacity would not have any retroactive effect upon the election of the defendant; it would cease with the facts which gave rise to it, and would come to an end with the payment of the account, before the issue of the writ of *quo warranto* and before any notice could be given pursuant to the terms of Art. 207, or any resolution adopted by virtue of Art. 208; and the result would be, therefore, that there was never any vacancy in the office, according to Art. 337; and that such councillor does not come within the provisions of Art. 205, C. M., and Art. 987, C. P. C. *Houle* v. *Brodeur*, 18 Que. S. C. 440.

Councillor — *Disqualification — Public crier—M. C. 205.*]—A person employed as public crier by a municipal council for 3 years in succession at an annual salary of $9, and re-appointed for a 4th year without

any mention being made of his remuneration, who discharges the duties of the office during that year without claiming any salary, does not come within provisions of Art. 205 M. C., therefore he is qualified to be a municipal councillor. *Allard* v. *Gratou* (1905), 17 R. L. n. s. 46.

Councillors — *Qualification — Ratepayer — Poll taxpayer — Procedure for removal — Quo warranto — Assessment.*] — A poll taxpayer is not a ratepayer within the meaning of the Assessment Act, R. S. N. S. 1900 c. 73, and consequently is not qualified to be elected or serve as a town councillor under the Towns Incorporation Act, c. 71, s. 26 (3).—Where a person not properly qualified has been elected, and continues to act as a councillor, the proper procedure for his removal is an information in the nature of a *quo warranto*. It is no answer to such an application that the respondent has actually paid rates on property occupied by him, but that the property was erroneously assessed in the name of another. *In re Mack*, 1 E. L. R. 222, 39 N. S. R. 394.

Councillors — *Salaries.*] — Municipal councillors cannot vote salaries to themselves, unless expressly authorised by statute. *Amherst* v. *Read, Amherst* v. *Fillmore*, 40 N. S. R. 154.

County officers — *Office accommodation — Discretion — Mandamus.*] — The Courts should not interfere by mandamus with the reasonable exercise by a county council of its discretion in selecting the place in the county at which an office shall be provided for the County Crown Attorney and clerk of the peace.—Judgment of the Court of Appeal, 19 O. L. R. 659, affirmed. *Rodd* v. *Essex* (1910), 44 S. C. R. 137, 31 C. L. T. 255.

Decisions of municipal officers—*Review by Court.*]—The Court is not competent to reverse the decisions of municipal officers upon questions of fact, save in the case of fraud or manifest abuse. *Pepin* v. *Pepin*, 14 Que. K. B. 371.

Declaration of vagrancy—*Resolution of council—Grounds — Mandamus.*] — Art. 208 of the Municipal Code, which provides that if the disqualification of a person holding a municipal office is *notorious or sufficiently established*, the council may by resolution declare the office of such person vacant, does not justify the proceeding of a municipal council in declaring the seat of a councillor vacant when the person unseated has made sworn declaration of his property qualification, and when the grounds of disqualification alleged are doubtful, and depend upon the interpretation to be given to articles of the Municipal Code. And a writ of *mandamus* lies, in such case, to order the council to restore the ejected member to his privileges as councillors. *Pelletier* v. *Lorimer*, 17 Que. S. C. 509.

Dismissal of constable — *Report of committee — Recommendation—Adoption by council — Ambiguity — Interpretation of report—Action for salary. Ward* v. *Toronto*, 12 O. W. R. 134.

Disqualification—*Contract.*]—The only contracts which, according to Art. 4215, R. S. Q., render the contractor incapable of sitting in the council of a town, are those which establish permanent relations between the contractor and the town corporation.—2. The fact that a man has sold to a town corporation a quarry and plant does not render him incapable of being a member of the council of such town. *Leonard* v. *Martel*, 4 Que. P. R. 320.

Disqualification — *Contract — Professional services—Resolution—Creditor—Election of councillor—Agent—Corrupt practice —Personation.*]—Art. 4215, R. S. Q., renders ineligible for municipal officers only those who receive from the municipality remuneration for services which they render to it by virtue of a contract, express or implied, effecting between them and it a connection for a certain period, and not professional men who, without being bound in advance by any contract, render professional services to the municipality for which they receive only the remuneration fixed by the tariff of their profession.—2. A resolution of a municipal council to the effect that a certain person shall be for the future the advocate or the notary of the corporation, even if it is communicated to the person whom it concerns, and acted under for several years, is only an instruction to the officers of the corporation to address themselves to such person when they need the professional services which he can render, and does not constitute a contract which renders him incapable of being elected a member of the council.—3. The fact that a person is a creditor of a corporation does not render him ineligible to be elected a member of the council.—4. An agent of a candidate for a municipal office in whose presence an act of personation is committed without his endeavouring to hinder it is not guilty of a corrupt practice, and the election of a candidate cannot be affected. *Chaussé* v. *Olivier*, 21 Que. S. C. 387.

Disqualification—*Contract for performance of work—Solicitor employed by officer of town.*] — Under the provisions of the Towns Incorporation Act, R. S. N. S, c. 71, ss. 54 and 56, no person is qualified to be elected, or to hold office as mayor or councillor who, "directly or indirectly, by himself or with any other person, as a partner or otherwise, enters into, or is directly or indirectly interested in any contract, express or implied, for the supply of any goods, or materials, or for the performance of any work or labour to or for the town." Among the officials appointed by the town of W. was an inspector for the purpose of enforcing and carrying out the provisions of the Canada Temperance Act. The inspector received as salary one-half the net proceeds of fines imposed, after paying expenses, and was authorised by resolution of the town council to engage his own solicitor, whose fees were not to exceed a fixed amount in each case. The defendant, who was elected mayor of the town, had been previously engaged by the inspector for the purpose of prosecuting cases under the Act, and at the time of his election there was due him a small sum for services rendered as such prosecutor, which was passed by the council, and paid after the election:—*Held*, that the defendant

was a person directly or indirectly interested in a contract for the performance of work for the town, within the meaning of the Act, and was therefore disqualified from holding office. *Rex ex rel. McDonald* v. *Robertson*, 35 N. S. R. 348.

Disqualification—*Diversion of sinking fund.*]—The provisions of s. 418 of the Consolidated Municipal Act, 3 Edw. VII. c. 19, do not apply to debentures payable in annual instalments, there being in such a case no "sinking fund" to be provided. *Regina ex rel. Cavanagh* v. *Smith*, 26 O. R. 632, distinguished. *Rex ex rel. Seymour* v. *Plant*, 24 C. L. T. 235, 7 O. L. R. 467, 3 O. W. R. 550.

Disqualification—*Insurance agent—Interest in contract.*]—A municipal councillor who represents an insurance company, and is paid by a commission on the premiums, is not disqualified from holding office by the fact that the company he represents insures through him property belonging to the corporation. Art. 4215, R. S. Q., which says that whosoever has, directly or indirectly, by himself or his partner, any contract or "interest in any contract with the corporation," cannot be appointed a member of the council or act as such, does not cover the case of an agent paid by commissions on premiums paid under a contract between the insurance company and the corporation. *Pinder* v. *Evans*, 23 Que. S. C. 229.

Disqualification — *Interest in "contract"—Judgment.*]—The object of the legislature in passing s. 80 of the Consolidated Municipal Act, 1903, 3 Edw. VII. c. 19 (O.), was to prevent any one being elected to a municipal council whose personal interests might clash with those of the municipality; and the word "contract" used therein must be construed in its widest sense; and a member of a municipal council against whom the corporation held an unsatisfied judgment for costs was unseated as being disqualified under that section. *Rex ex rel. McNamara* v. *Heffernan*, 24 C. L. T. 233, 7 O. L. R. 289, 3 O. W. R. 431.

Disqualification—*Interest in contract—Solicitor for prosecutor appointed by town.*]—The Towns Incorporation Act, R. S. N. S. c. 71, s. 54, disqualifies for the office of mayor "any person who directly or indirectly, by himself or by or with any other person as co-partner or otherwise, enters into or is directly or indirectly interested in any contract, express or implied, for the supply of any goods or materials or for the performance of any work or labour to or for the town." R. S. N. S. c. 100, s. 181, enacts that the town shall annually appoint an inspector to enforce and carry out the provisions of the Canada Temperance Act, and authorises the town to pay out of its funds the expenses of enforcing the Act. On the 19th December, 1900, W. was appointed prosecutor under the Canada Temperance Act, and his salary was by resolution fixed at one-half the net proceeds of the fines, after deducting expenses. It was also resolved that the prosecutor should engage his own solicitor, whose fees were not to exceed $5 for any one case. The defendant, a solicitor, acted for W. in four cases before his election as mayor, and his fees were paid on the 6th March, 1901. On the 8th February, 1901, the defendant was elected mayor, and thereafter he acted gratuitously for W. in a number of cases:—*Held*, that the direct relation of agency was constituted between the town and the defendant, and that the defendant could recover directly from the town his fees: *Tilson* v. *Warwick Gas Light Co.*, 4 B. & C. 962.—*Held*, also, that the defendant had a direct interest in the contract with W. *Rex* v. *Robertson*, 22 C. L. T. 240.

Disqualification — *Proceeding against municipality.*]—At a municipal election the respondent C. was elected mayor, and the other respondents were elected councillors, of a town, and subsequently took the declaration of office, and sat as members of the municipal council. The relator complained that at the time of such election, each one of the respondents had "a claim, action, or proceeding" against the municipality. The respondents were members of "The Good Citizen's League" of the town, and they subscribed money to pay the expenses of a summary proceeding taken at the instance of the league to quash a by-law of the town. The respondents were not the applicants in the application to quash the by-law:—*Held*, that the proceeding to quash the by-law was a proceeding against the municipality, within the meaning of s. 80 (1) of the Municipal Act, R. S. O. c. 223; and, upon the evidence and findings of the County Court Judge, that it was a proceeding taken by the respondents "through another." Something more than membership in the organisation was necessary to render the members answerable for expenditures or acts done in the name of the association; but their assent to and participation in the proceedings were shewn by the evidence. *Rex ex rel. Davis* v. *Campbell*, 22 C. L. T. 118.

Disqualification — *Vote on by-law — Pecuniary interest — Liquor license.*] — A member of a municipal council is disqualified from voting in the council upon any subject in which he has a personal or pecuniary interest, distinct from that which he has as a ratepayer in common with other ratepayers. A by-law to reduce the number of liquor licenses in a municipality was quashed because carried by the casting vote of the reeve, who was mortgagee of one of the properties likely to be affected by it. *In re L'Abbé & Corp. of Blind River*, 24 C. L. T. 126, 7 O. L. R. 230, 3 O. W. R. 162.

Disqualification of mayor and town councillors—*"Current expenditure"—Nature of loans—Borrowing by outgoing council—Affidavits—Costs.*]—A mayor and five councillors of a town, having voted for borrowing money to meet the current expenditure for 1903 in excess of the amount authorised by s. 435 of the Consolidated Municipal Act, 1903, and having had proceedings taken against them by a relator to unseat them, disclaimed, and a new election was held, at which the mayor and four of the old councillors, together with another, were elected by acclamation. The same relator then took further proceedings against the mayor and four old councillors, on the same grounds, to have them unseated again: — *Held*, in answer to the contention that sums expended for school purposes and debentures and other

special charges were not "current expenditure," that the by-laws recited that the loans were to meet "current expenditure;" and that there was no power to borrow for any other purpose without a vote of the duly qualified ratepayers; that the sums borrowed were in the estimates and were part of the current expenditure for 1903; and similar charges were in the regular levy for 1902 and formed part of the sum on which the 80 per cent. was calculated:—*Held*, also, that a sum of $5,000 borrowed under a by-law passed in January, 1903, by the outgoing council of 1902, should be taken into account:—*Held*, also, that the personal motives of the relator had no bearing on the motion or any part of it; and affidavits and counter-affidavits as to his motives were not read; and the mayor and four councillors were unseated and ordered to pay the costs. *Rex ex rel. Moore* v. *Hemill*, 24 C. L. T. 271, 7 O. L. R. 600, 3 O. W. R. 642.

Disqualifying mayor or councillors —*Contracts with municipality.*]—The sale for cash to a municipal corporation of the right to quarry and remove from his land the stone required for road building purposes is not such a contract as will have the effect of disqualifying the seller from acting as a municipal councillor or mayor, under the provisions of Art. 205 M. C. Such a contract comes within the exceptions mentioned in the third paragraph of said article. *Gauthier* v. *Macdonald* (1910), 38 Que. S. C. 439.

Duration of office—*Tirage au sort — Remedy — Mandamus — Quo warranto.*]—Where municipal councillors are named by the Lieutenant-Governor, without determining the duration of their term of office, the council should, at one of its sittings, draw lots to decide which one of them should retire from office.—Art. 280, C. M., which authorises the drawing of lots, is applicable in this case.—The legal remedy for a councillor so named, who has been deprived of his office, is *mandamus* and not *quo warranto*. *Gosselin* v. *Corp. of St. Jean*, 16 Que. S. C. 449.

Election — *Powers of old council.*]—A resolution passed by a municipal council composed of six members, two of whom have just been replaced by the election of new councillors is void. *Laroche* v. *Corp. de Ste. Emilie de Lothinière*, 17 Que. S. C. 352.

Election officer—*Negligence—Depriving elector of vote—Liability.*]—An action will lie where one is deprived of his right to vote at a municipal election by the negligence of another. A municipal corporation is answerable for the negligent performance of his duties by one of its officers, who is appointed and removable by it, even where the duties, the negligent performance of which gave rise to the action, were imposed by the legislature and not by the corporation: Hannington, J., dissenting. *Crawford* v. *City of St. John*, 34 N. B. R. 560.

Employment of city engineer—Resolution—Absence of by-law and contract under seal — Dismissal — Notice—Length of—Calgary city charter—"Officer"—"Official" — Salary. *Speakman* v. *Calgary*, 9 W. L. R. 204.

Engineer to supervise municipal works—*Breach of contract of hire—Refusal to give communications of plans and specifications.*]—An engineer hired by a municipal corporation to supervise the construction of sewers and waterworks, in consideration of a percentage to be levied on the cost thereof, does not violate his agreement by refusing to give communication of the plans and specifications prepared by himself. The service upon him of a notice of dismissal gives rise in his favour to an action in damages. *Addie* v. *Thetford Mines* (1910), 39 Que. S. C. 412.

Illegal payments to—*Recovery back.*]—A municipal corporation were held entitled to recover from councillors moneys illegally paid to them for services on a resolution of the council. *Town of Amherst* v. *Read. Town of Amherst* v. *Fillmore*, 23 C. L. T. 139.

Injunction—*City of Montreal—Enquiry into conduct of employees—Their membership in Masonic lodges—C. P. 357.*]—The fact that its employees are members of any kind of literary, religious, scientific or political organisations cannot justify a municipal corporation in dismissing or admonishing its employees and officials.—An interim writ of injunction will be granted to prevent a civic committee from proceeding with an enquiry and making a report upon an accusation which could in no way be of any useful effect either respecting matters within the powers of such corporation or respecting the administration of the affairs of the municipality. *Fortier* v. *Guerin* (1910), 12 Que. P. R. 108.

Inspector of works — *Authority of.*]—A special inspector duly appointed to superintend the construction of a ditch or watercourse ordered by by-law of a municipality to be made of a specified depth and width and at a specified place, has full power to cause the work to be carried out, without a special authorisation of the council. *Leroux* v. *St. Mark*, 7 Que. P. R. 225.

Interest in matter before council—*Shareholders in company—Bonus—By-law—Invalidity.*]—Article 4301, R. S. Q. declares that councillors who have a personal interest in a question before the council are incompetent to take part in the deliberations of the council upon that question. No matter how small that interest may be, and whether an individual or collective interest, such as the interest which a councillor may have in a joint stock company of which he is a shareholder, if it exists, it is direct, immediate, and therefore sufficient according to the terms of the article, which does not make the distinction found in Art. 4215, which relates only to candidates for municipal offices.—2. Therefore a councillor who is a shareholder in a company, cannot take part in a vote of the council granting a bonus to this company, and, if the majority is composed of councillors so interested, the by-law passed by their aid for such purpose will be quashed. *Town of Victoriaville* v. *Dubuc*, 13 Que. K. B. 109.

Liability for acts of police officer — *Respondeat superior — Ratification — False imprisonment.*] — A municipal corporation

can not be made to answer in damages for the unlawful acts of one of its police officers while attempting to perform a public duty.—The plaintiff, who was temporarily in the town of C., collecting subscriptions for a newspaper published in the city of S., was arrested by a police officer of the town for a breach of one of its by-laws, which required all persons, who were not ratepayers of the town or non-residents of the county of N., to pay a license fee before engaging in any calling, occupation, or employment in the town. The arrest was made by the officer without any warrant, and the plaintiff was only released upon his paying to the town treasurer the fee demanded, which was retained. In an action for false imprisonment against the town corporation for the alleged unlawful arrest by the police officer:—*Held*, following *McCleave* v. *Moncton*, 35 N. B. R. 296, 32 S. C. R. 106, that, assuming the arrest to have been unlawful, the doctrine of *respondeat superior* did not apply, and the corporation were not liable.—*Held*, further, that the fact that the police officer, in making the arrest, was endeavouring to enforce a by-law of the town made for revenue purposes only was not sufficient to take this case out of the rule laid down in the McCleave case; and that the payment of the license fee to the town treasurer, and its retention by him, in the absence of any evidence of knowledge on the part of the town of the circumstances surrounding such payment and retention, was no proof of any intention on the part of the town to ratify the acts of the police officer. *Woodforde* v. *Chatham*, 37 N. B. R. 21.

Liability for acts of treasurer — Power to pledge credit—Advertising tax sale. *Canadian Bank of Commerce* v. *Toronto Junction*, 1 O. W. R. 74, 3 O. L. R. 309.

Mayor—*Disqualification—Employment as solicitor — Quo warranto.*]—The defendant was, before his election as mayor of a town, solicitor for the prosecutor appointed by the town to enforce the provisions of the Canada Temperance Act, the prosecutor receiving as salary from the town one-half of the fines collected, after deducting the expenses. His right to the office was attacked on the ground that he was disqualified under R. S. N. S. c. 71, s. 54 (e). The affidavits were in conflict as to whether the defendant had received any payment out of the funds of the town after his election as mayor, but it was conceded that he had acted for the prosecutor, having been retained by him:—*Held*, that on a motion for an information in the nature of a *quo warranto*, the Court could not determine the disputed questions of fact, and leave to exhibit the information should be granted, as there appeared to be something to be investigated. The Court had some doubt as to whether the seat ought not first to be declared vacant by the council. *Rex* v. *Robertson*, 21 C. L. T. 413.

Mayor — *Disqualification of — Election of illiterate councillor as—Removal after 30 days allowed for contesting—Quo warranto.*]—A municipal councillor who could neither read nor write was elected mayor. The 30 days within which to contest his election before the Circuit Court had expired, and it had not been contested. The mayor, although he could not read or write, took the oath of office, and, after the 30 days had expired, he acted and continued to act as mayor:—*Held*, that any person interested could, by the *quo warranto* proceedings provided in Arts. 987 *et seq.*, C. P., depose this councillor from the mayoralty and prevent his continuing to act as mayor. *Bedard* v. *Venet*, 25 Que. S. C. 537.

Mayor — *Public works — Contract — Interest — Nullity — Public order.*]—C. C. 989, 990, 1047; M. C. 205; 58 Vict. (Que.) ch. 42.—It is a maxim of public order that a municipal officer, such as the mayor, cannot have any personal interest in a contract respecting public works, nor can he reap any benefit from a contract with the corporation of which he forms part.—A promissory note given by a contractor to a mayor for his share of the profits to be made from a contract for public works executed for the corporation is null and void as being against public order. *Lapointe* v. *Messier* (1910), 16 R. L., n. s. 443.

Mayor — *Qualification — Value of the expression "established by the valuation role."*]—In the provisions of a law which provides certain qualifications for the office of mayor by requiring the ownership of immovable property of the value of six hundred dollars, the words "such qualification to be established by the valuation roll," refer only to the value of the property which creates the qualification. Consequently, a person who is proprietor of an immovable, entered upon the valuation roll for the required amount, although his name does not appear as proprietor upon the roll, is eligible. *Desjardins* v. *Lechere*, 37 Que. S. C. 368.

Mayor — Refusal to sign by-law and contract—*Mandamus*—Stay to enable ratepayer to bring action—Demand and refusal—Other remedy. *Re Kennedy & Boles*, 6 O. W. R. 856.

Mayor — *Signature of deed — Resolution of council.*]—A mayor, although authorised by resolution of municipal council to sign a deed, believing resolution to be illegal or inimical to the interests of municipality, may refuse to comply with the resolution, and a writ of *mandamus* to oblige him to do so will be dismissed. *Mun. Homes & Invest. Co.* v. *Legare* (1910), 16 Que. R. L., n. s. 353.

Members of municipal councils must be able to read and write. Art. 335 M. C. *Page* v. *Genois* (1909), 38 Que. S. C. 1.

Members of municipal councils, who cannot read and write, may be ousted from office by way of *quo warranto* proceedings. *Page* v. *Genois* (1909), 38 Que. S. C. 1.—Above remedy is founded on common law and can be exercised at same time as the contestation of an election. *Ib.* Such office holder pleaded that he has occupied the office for over a year without objection. No acquiescence can cure the illegality. *Ib.*

Money payment to—*By-law—Violation of procedure by-law — Discretion.*] — The Court, in the exercise of its discretion, refused, under the circumstances of the case (Street, J., dissenting), to restrain a muni-

cipal corporation from acting upon a by-law for the payment of money to the mayor as remuneration for services, the money not being provided for on the face of the estimates, and the by-law being passed by the council in the face of the protest of the minority and in contravention of the procedure by-law of the council, by being taken up by the council before being submitted to a committee of the whole. *Heffernan* v. *Town of Walkerton*, 23 C. L. T. 222, 6 O. L. R. 79, 2 O. W. R. 17, 434.

Ouster — *Resolution of council—Pleading.*]—In an action by a municipal councillor asking that he be replaced in possession of his office, of which he was deprived by a resolution of the council, there is no incompatibility in claiming that the resolution shall be set aside as well as that the council shall be ordered to replace him in the office. *Bédard* v. *Village of Delorimier*, 17 Que. S. C. 141.

Park commissioner — *Action against—Parties — Attorney-General — Ratepayers.*]—Ratepayers who are affected thereby only to the same extent as all other ratepayers in the city cannot bring an action against the park commissioners of the city to set aside resolutions as to the management of a city park; such an action must be brought by the Attorney-General. *Hope* v. *Hamilton Park Commissioners*, 21 C. L. T. 230, 1 O. L. R. 477.

Payment for services—*Recovery back.*]—A municipal council which has knowingly and voluntarily paid a councillor the value of his services as inspector of roads has no right to recover back from him the sum paid. *Corp. of New Rockland* v. *Torrance*, 21 Que. S. C. 165.

Powers conferred by statute on municipal bodies — *How exercised—Seizure of things authorised by law under special circumstances — How and by whom it may be effected—Exercise of statutory powers by the Provincial Board of Health.*] — *Held*, (1) When power is conferred by statute on a municipal corporation to establish a board for a certain purpose, and "to define and regulate the duties, powers and attributions of its officers," a board so created cannot proceed to act or carry out its purpose, until the duties, etc., of its officers have been defined. (2) Likewise, when power is given by statute to a municipal corporation to provide for and regulate the inspection of food products, and to define the duties, powers and attributions of the inspectors appointed for that purpose, a by-law to regulate such inspection is inoperative, if it does not further define the duties, etc., of the inspectors. (3) When a by-law to create a board, as mentioned above, provides that "any member or officer of the board" may seize and confiscate certain things under certain circumstances, and such a seizure can only be made by such a member or officer, and is null and void if made by any one else, even under orders or instructions of the board. In like manner and under pain of the same nullity, none but an executive officer of the Municipal Sanitary Authority, or any other officer appointed by it for that purpose, is competent to make the inspection and seizure provided for in section 3913, R. S. Q., 1909. (4) A letter signed by a person as "Food Inspector" addressed to the holder or depositary of food products, and giving him notice that such goods are under seizure, is not a seizure such as contemplated either in the by-law or in the section of the R. S. Q. above cited. (5) In the use of the power conferred upon the Provincial Board of Health by section 3875, R. S. Q., 1909, "to compel municipal councils to exercise and enforce such of their powers as the urgency of the case demands," it should deal directly with such councils. Therefore, a notice by it, for such a purpose, addressed to "La Corporation de la Cité de Montreal" but delivered to the board of commissioners of that city, is irregular and void. *Layton* v. *Montreal*, 39 Que. S. C. 520.

Appeal to Court of King's Bench now pending.

Presence at meetings — *Mandamus—Penalty—Nonfeasance—Discretion of Court.*]—A municipal councillor is a person occupying an office in a corporation, within the meaning of Art. 992, C. P.—2. One of the duties attached to such office is that of being present at the sittings of the council.—3. A councillor who, while he retains his office, conspires with others not to be present at the sittings of the council in order to prevent a quorum being present, and thereby to prevent the council from exercising rights or powers or functions which it is obliged to exercise within a certain time, is held to be a person occupying an office in a corporation who omits and neglects to perform a duty attached to such office, and, according to the terms of Art. 992, he may be ordered by *mandamus* to be present at the sittings of the council.—4. The fact that a penalty is given for the non-fulfilment of such duty does not prevent the issue of the *mandamus*. *Semble*, that a municipal councillor is one of the persons aimed at by Art. 50, C. P., subject to the rights of surveillance and direction under the orders and control of the Superior Court and its Judges. *Semble*, that, without a by-law therefor passed by the council, there is no penalty upon a councillor who is not present at the sittings of the council. *Semble*, that there is nonfeasance of office on the part of a councillor who conspires for the purpose aforesaid. *Semble*, that the writ of *mandamus* is a matter largely in the discretion of the Court or Judge. *Legacé* v. *Olivier*, 21 Que. S. C. 285.

Pro-mayor of village — *County council.*] — A pro-mayor of a local municipal council has no right to sit in the county council. *Paré* v. *County of Shefford*, 24 Que. S. C. 50.

Public offices — *Local Master* — "*Stationery and furniture*"—*Law books—County council.*]—The officer of a local Master in Chancery is an office within s. 506 of the Municipal Act, 3 Edw. VII. c. 19 (O.), which enacts that the county council shall provide proper offices (together with fuel, light, stationery, and furniture), for all officers connected with the High Court of Justice. The words "stationery and furniture" do not extend to law and text books. *Re Local Offices of High Court*, 12 O. L. R. 16, 7 O. W. R. 316.

Quo warranto — *Councillor legally incapacitated from filling office — M. C. 203, 346, 348—C. P. 987.*]—Proceedings in the nature of *quo warranto* are permissible against a municipal councillor who is incapacitated under the provisions of Article 203 of the Municipal Code, even when such incapacity existed at the time of his election. The special jurisdiction given to the Circuit Court and the District Magistrate's Court *quoad* contestations of the "appointment" of municipal councillors made by the electors does not include cases against those who are incapacitated by law from "filling" municipal offices. In such cases, the Superior Court has jurisdiction. *Leggo* v. *Jewell* (1910), 17 R. de J. 244.

Quo warranto — *Municipal councillor —Revocation by the provincial secretary— Telegram—C. P. 987; M. C. 328.*]—(Reversing Rachon, J.)—A municipal councillor appointed by the Lieutenant-Governor in Council has the right to act even after he has received a telegram from the provincial secretary informing him that his commission has been revoked. Such revocation only takes effect after the receipt of the official letter of the provincial secretary and after notice giving effect to it by the secretary-treasurer of the municipality in virtue of Art. 328 M. C. *Latercrcur* v. *Blais*, 11 Que. P. R. 163.

Quo warranto — *Public officer — Discharge of his duties — His disqualification should be declared by law—Remedy under strict law—Controller of the city of Montreal —Costs—C. P. 549, 987, 9 Edw. VII. c. 82, s. 1.*]—A writ of *quo warranto* is a remedy of strict law; it cannot be extended over the whole jurisdiction of the Superior Court in a suit under the common law. A writ of *quo warranto* can only issue when a person unlawfully holds or exercises a public office; consequently, it is essential that the office holder against whom the proceedings have been directed be declared by law to be disqualified and his office thereby vacant. Proceedings by *quo warranto* cannot be taken against a public officer to have him obliged to faithfully and efficiently discharge the duties which the law has imposed upon him. The statute 9 Edw. VII. c. 82, s. 1, which provides that the controllers of the city of Montreal shall devote all their time to the fulfilment of their duties, contains no sanction to enforce its provisions. A writ of *quo warranto* which for that reason prays for the disqualification of one of the controllers, will be dismissed, with costs. *St. Martin* v. *Lachapelle* (1910), 12 Que. P. R. 106.

Quo warranto will issue against a person who illegally exercises a public office, but not if he simply unfaithfully or dishonestly discharges his duties. When certain allegations of the petition for *quo warranto* may open the way for the proof of circumstances which the plaintiff intends to make for the purpose of establishing that the defendant really held an illegal contract with the public body of which he is a member, they will not be struck out upon an inscription in law. *Martineau* v. *Dansereau* (1910), 12 Que. P. R. 199.

Railway embankment — Damages to adjacent property—Water—Liability of corporation. *Slinn* v. *Ottawa*, 1 O. W. R. 269.

Recorder — *Removal of — Grounds for —Powers of council—Statutes—Appointment —Seal.*] — The relator, who held the office of recorder of the town of T. during good behaviour, was removed from his office by the town council, and the defendant was appointed in his place and stead. An information in the nature of a *quo warranto* was filed to determine the right to the office. The grounds of dismissal were: 1st, non-attendance at meetings of the council; 2nd, refusal to prepare an Act for submission to the legislature unless paid therefor; and, 3rd, procuring alterations of this Act, after it had been prepared by another solicitor, whereby certain changes were made in the salary attached to the office of recorder and in the tenure of office. By the Act of incorporation numerous powers were given to the town council, but no power was given specifically in relation to the amotion of officers, and all the powers of the corporation generally were not vested in the council. The town council was given power to make by-laws, but only in relation to subjects specifically mentioned, and not including the amotion of officers:—*Held*, that, under all the circumstances, it could not be inferred that the power of amotion was given to the council by the charter and Acts of incorporation, but the same remained in the corporation at large as one of its incidents and could be exercised only by the corporation itself and not by any separate portion of it such as the town council.—*Held*, that, as the town council had no power to amove the relator from the office of recorder, the office was not vacant at the time of the appointment of defendant.—*Held*, that the appointment of the relator was not bad for not having been made under seal, such a method of appointment being unnecessary. — *Held*, that, if an appointment under seal were necessary, the objection was removed by Acts of 1889 c. 4, s. 30, by which appointments made by the councils under the Act of 1888 were declared to be valid and effectual.—*Semble*, that if the town council had the power to amotion it was properly exercised and for good cause. McDonald, C.J., dissented. *Regina ex rel. Lawrence* v. *Patterson*, 33 N. S. R. 425.

Resignation of mayor of town—*Subsequent withdrawal—Resolution of council accepting withdrawal—Ultra vires—Motion to quash—Status of applicant—Elector — Evidence—Onus — Affidavit — Information and belief—Incorporation of town—Proof of —Costs—Scale of—Act respecting Alameda, s. 232.*]—Motion to quash a resolution of defendant council. No evidence filed for defendants. Applicant's affidavit stated he was an elector:—*Held*, that applicant not put to strict proof until the fact is denied. The mayor sent in his resignation which he subsequently withdrew. A resolution purporting to reinstate him is *ultra vires*. Motion to quash allowed with costs on highest scale of District Court. *Re Heaslip & Alameda*, 11 W. L. R. 718.

Responsibility for acts of police officer — *Negligence — "Lock-up"—Lack of proper heating — Duties of constable — Caretaker — Governmental capacity — Trial — Jury — Findings.*] — A municipality which maintains a "lock-up" is not liable in relation to prisoners who complain of negli-

gence on the part of those in charge thereof, as, for example, in this case, of causing illness through lack of proper heating. In maintaining such a "lock-up," a municipality is not exercising its corporate powers for the benefit of the inhabitants in their local and particular interests, but is performing a public service intrusted to it in the interests of general government. A constable in charge of such a "lock-up," though appointed by the municipality, is not to be regarded as the servant or agent of the corporation, but as a public official, for whose acts or decisions civil responsibility does not attach to the municipality.—*Per* Mabee, J.:—In this case the negligence complained of was that of one who, though a constable, was acting entirely as servant of the corporation, employed in taking care of the municipal buildings, of which the "lock-up" was a part, and the defendants were therefore liable.—An answer of a jury to a question submitted may be rejected as insensible or at unreasonable variance with the other answers. *Nettleton* v. *Prescott*, 16 O. L. R. 538, 11 O. W. R. 539.

Road inspector—*Doing work contrary to orders and by-laws of the municipality and without notice.*]—When a road inspector, without taking into consideration municipal orders and by-laws and without previous notice, has work done which resembles road making more than road repairing, the Court will allow but the cost of road repairing and will dismiss the action for the surplus and with costs when, as in the present case, a tender was made by the defendant of the amount granted by the judgment. *Rouleau* v. *Lacoursiere* (1910), 16 R. de J. 529.

Secretary-treasurer — *Illegal assessment—Execution for — Imprisonment.*]—A municipal corporation is liable to respond in damages for the act of its secretary-treasurer in sending to a collecting justice the name of the plaintiff as having made default in the payment of a rate, which had been illegally imposed upon him, at the same time instructing the justice to enforce payment of the same, which the justice did by issuing an execution against the plaintiff, under which, for want of goods and chattels whereon to levy, he was lodged in prison. *Mellon* v. *King's County*, 35 N. B. R. 153.

Superintendent — *Negligence — Personal injuries — Drains and sewers.*]—The Act incorporating the town of St. Louis, Quebec, giving power to the council to regulate the connection of private drains with the sewers, "owners or occupants being bound to make and establish connection at their own cost, under the superintendence of an officer appointed by the corporation":—*Held*, that the municipality cannot be made liable for damages caused through the acts of a person permitted by the council to make such connections, as he is neither an employee of the corporation nor under its control. Judgment in 11 Que. K. B. 117 affirmed. *Dallas* v. *St. Louis*, 22 C. L. T. 194, 32 S. C. R. 120.

Tax collector — *Appointment.*]—Municipal legislative powers are to be exercised by by-law, by Mun. Act 3 Edw. VII. (O.), c. 19, s. 352, but that section does not relate to the performance of a statutory duty such as the appointment of a tax collector. This may be done by resolution. *Foster* v. *Reno* (1910), 17 O. W. R. 707, 2 O. W. N. 351, 22 O. L. R. 413.

Tax collector — *Tenure of office — Removal—Notice—Tax sale—Commission—By-law.*]—Under s. 47 of the Municipal Clauses Act a municipal officer holds office "during the pleasure of the mayor or council," and so may be removed at any time without notice or cause shewn therefor. A tax sale by-law provided that the collector should be entitled to a commission on all arrears of taxes collected:—*Held*, that where lands were bid in by the municipality because the amount offered at the sale was less than the arrears of taxes and costs owing on the lands, the collector was not entitled to a commission on the price of lands so bid in. *North Vancouver* v. *Keens*, 24 C. L. T. 197, 10 B. C. R. 276.

Treasurer — *Tax sale — Power of treasurer to pledge credit of corporation.*] — A treasurer of a town has no authority to bind the municipal corporation by a contract to pay the cost of advertising his list of lands for sale for arrears of taxes. Under the Assessment Act, R. S. O. 1897, c. 224, s. 224, he is only *persona designata* to act on behalf of the municipality, and the municipality has no authority to interfere with him in the performance of his defined duties. A creditor in respect to the publication of such advertisements must look to him personally. *Warwick* v. *County of Simcoe*, 36 C. L. J. 461, approved of and followed. *Canadian Bank of Commerce* v. *Town of Toronto Junction*, 22 C. L. T. 97, 3 O. L. R. 309, 1 O. W. R. 74.

Vacant alderman's seat — *Refusal to discharge duties — Mayor's prerogatives — Arts. 58, 58a and 59 of the Cities' and Towns' Act of 1903, 8 Edw. VII. c. 62, sec. 1.* —The resignation of an alderman, when it is not accepted by the council, is without effect.—Consequently, an alderman's seat is vacant only when it is so declared by the council. The council alone, and not the mayor, has the right to take action upon any such resignation.—The mayor cannot order a new election to fill a vacancy in the council by virtue of the Cities and Towns' Act, 1903, until such vacancy has been declared by the council. *Lumbarver* v. *Corp. of Shawinigan Falls* (1910), 16 R. de J. 423.

Valuators — *Appointment—Re-appointment — Duplication.*]—By Art. 373 of the charter of the city of Montreal, the city council appoints, in the month of December of every year, 8 valuators, who remain in office until their successors are appointed. In this case the plaintiff, appointed valuator on the 7th January, 1901, received notice on the 27th February, 1902, that his services were no longer required:—*Held*, that, in the circumstances, he could not maintain that his services had been engaged for the year 1902, nor that there had been a tacit renewal of the engagement. *Hamilton* v. *City of Montreal*, 24 Que. S. C. 535.

Warden resigning his position as councillor — *Presentation of petition to warden — Liquor License Act.*]—M. was elected councillor for the parish of St. L. in October, 1907, and was appointed warden of the county in January, 1908. On Sep-

tember 29, 1908, he resigned his position of councillor, but afterwards and before December 29, 1908, was elected councillor by a newly-created parish in the same county, and in January, 1909, was re-appointed warden. *Held*, M.'s resignation as councillor operated as a resignation of his position of warden, as the warden must be a councillor under the Municipalities Act, C. S. 1903, c. 165, and therefore presenting a petition to him on December 29, 1908, would not be sufficient under the provisions of the Liquor License Act, C. S. 1903, c. 22, s. 21, amended 7 Edw. VII. c. 46. *Ex p. Stavert* (1909), 39 N. B. R. 239.

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24. Police Officers.

Corruption — *Inquiry — Jurisdiction to order — Quashing resolutions—Ratepayer—Promise of immunity.*]—The board of police commissioners of the city of M. resolved to call a special session of the board to interrogate under oath all the members of the police force appointed or promoted by the board as to the circumstances which had led to their appointment or promotion, in order to satisfy the public and to demonstrate the falsity of the allegations of newspapers which alleged that every appointment or promotion was due to the influence of money. The city council ratified this resolution of the board, and adopted a resolution instructing the board to give an assurance of full protection to the officers and constables who should be interrogated, so as to get at the whole truth: —*Held*, that, as no matter had been submitted to the council, nor any representations made to the council concerning matters within its jurisdiction, the board and the council had no power to order the inquiry.—2. That the resolution assuring immunity to those who should admit criminal acts done to secure their appointment or promotion was void. —3. That the plaintiff, as a municipal elector and ratepayer, was entitled to have these resolutions quashed, and the defendants restrained from putting them into execution. *Martin* v. *City of Montreal*, 18 Que. S. C. 30.

Liability for acts of.] — A police officer is not the agent of a municipal corporation.—2. A municipal corporation is not responsible for the acts of its police officers, unless it has authorised or adopted such acts. *Tremblay* v. *City of Quebec*, 23 Que. S. C. 266.

Liability for false arrest — *Hours of duty.*]—The corporation of the city of Sherbrooke were held responsible for the damages caused by an arrest made without reasonable or probable cause by a policeman in the employ of and wearing the uniform provided by the city. The fact that, at the time the arrest was made, the policeman had been relieved and was off duty, is no defence to the action. *Rousseau* v. *Town of Levis*, 14 Que. L. R. 376, and *Corp. of Quebec* v. *Oliver*, 15 Que. L. R. 319, distinguished. *Bourget* v. *City of Sherbrooke*, 27 Que. S. C. 78.

Liability for unlawful acts of — *Ratification.*]—The defendants, a city corporation, were held not liable for the act of a police officer who unlawfully broke and entered the premises of the plaintiff and carried away therefrom certain intoxicating liquors there kept for sale by the plaintiff contrary to the provisions of the Canada Temperance Act, although the officer had been specially appointed to see that the Act was enforced. When the servant of a municipal corporation does an act in which the corporation have no peculiar interest, and for which they derive no benefit in their corporate capacity, but which is done in pursuance of some statute for the general welfare of the inhabitants of the community, the servant cannot be regarded as the agent of the corporation for whose wrongful acts they would be liable, and the doctrine of *respondeat superior* does not apply. The defendants could not make themselves liable for the acts of the officer unless they ratified and adopted them with a full knowledge of their illegality. *McClearc* v. *Moncton*, 35 N. B. R. 296.

Negligence — *Principal and agent.*]—A police officer is not the agent of the municipal corporation which appoints him to the position, and, if he is negligent in performing his duty as a guardian of the public peace, the corporation is not responsible. *McClearc* v. *Moncton*, 22 C. L. T. 199, 32 S. C. R. 106.

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25. Powers of Councils.

Alteration of boundaries of local municipalities — *Misdescription—Petition —Notice—Waiver—Arbitration and Award —Motion to quash by-law—Application by minor municipality.*] — Under s. 18 of the Municipal Act, c. Edw. VII. c. 19, when an application is made to a county council to detach a portion of one municipality and annex it to another, the county council is not confined in its powers to the boundaries of the lands mentioned in the application, but may detach any lands it may deem proper from the one municipality and attach them to the other, subject, in case of the dissent of the municipality the area of which is reduced, to the award in the 2nd sub-section mentioned. It would, therefore, be no objection to a by-law of a county council detaching two parcels of land from one municipality and adding them to another, that the petition for the by-law described only one of the parcels and asked to have that parcel detached, for the council, being once set in motion, may, in the exercise of its discretion, detach all, or less, or more, than the territory described. The municipalities affected, however, have a right to require that there shall be a real exercise of discretion before the power is acted upon, it being judicial in its nature. The by-law of the county council was bad when passed because it altered the limits of the village of Southampton without intending to alter them to the extent actually affected, and without considering the expediency of so altering them; and the objection was not waived by the act of the Southampton Council in passing a by-law appointing their arbitrator, because they were misled by the untrue recitals in the county council's by-law that the petitioners covered the whole of the lands detached. They should not be held to have waived an objection going to the root of the by-law, of which they were not aware; in the face of the recital, they were not obliged to verify it before act-

ing as they did. Notice of the application should have been given to the Southampton council before the county council acted upon the petitions. It seems to be the intention of s. 18 of the Municipal Act of 1903, that the by-law of the county council should provide for the reference of boundaries to the arbitrators only where the municipality from which territory is detached opposes it, and notice to that municipality is necessary for the purpose of ascertaining whether it opposes or agrees to the proposed alteration of its boundaries. That objection, however, was apparent on the face of the county by-law in the present case, and was, therefore, waived by the appointment of an arbitrator. It was objected that this was not a case in which one municipality could apply to quash the by-law of another, but it is manifestly within s. 378a of the Municipal Act. Appeal allowed and by-law quashed with costs. Order of MacMahon, J., 24 C. L. T. 353, 3 O. W. R. 729, 8 O. L. R. 106, *reversed*. *In re Village of Southampton and County of Bruce*, 4 O. W. R. 341, 25 C. L. T. 12, 8 O. L. R. 664.

Appeal from decision of local council.] — A county council, sitting in appeal from the decisions of local councils, has neither the privileges nor the powers which municipal councils exercise as the executive of municipal corporations; it only fulfils quasi-judicial functions, by virtue of the powers which the legislature has delegated to it, to adjudicate upon appeals from the decisions of local corporations; and for such purpose a county council is a tribunal which in no way warrants the validity of its decisions; and for its decisions or judgments the county council is not responsible. *Young* v. *Township of Hereford*, 19 Que. S. C. 120.

Appeal from decision of local council — *Jurisdiction* — *Irregularity* — *Contradictory decision.*]—A local council had adopted a *procès-verbal* ordering the opening of a road. In his report to the council the superintendent had stated the date of appointment as the 13th instead of the 12th June. An appeal was taken to the county council to quash this *procès-verbal* on the merits. The petition in appeal gave the true date of the appointment of the superintendent, and did not invoke the clerical error. Before the county council the appellants demanded a declaration of want of jurisdiction by reason of the error in the report and *procès-verbal*, and the council decided that it had no jurisdiction, and at the same time quashed the *procès-verbal*:—*Held*, that this contradictory decision was illegal; that the informality in the date was of no consequence, and besides had not been invoked before the local council, nor by the petition in appeal; that the county council could not, by relying upon such an informality, refuse to take cognizance of the merits of the *procès-verbal* and at the same time quash it, so long as it was regular on its face; and the decision of the county council was a denial of justice to the respondents. *Ricard* v. *Lemyre*, 19 Que. S. C. 172.

Appeal from decision of local council — *Way* — *Maintenance and opening*— *Powers of special superintendent*—*Municipal by-law*—*Petition*—*Discretion of council* —*Powers of Superior Court*—*Quashing.*]—1. By virtue of Art. 794, C. M., if the special superintendent is of opinion that a petition for certain works should be refused, he should report accordingly; but if, on the contrary, he is of opinion that this petition is well founded in demanding certain works, it would be proper to make a *procès-verbal* to that effect.—2. It is not necessary that the works demanded should be mentioned in the prayer of the petition; it is sufficient, to give the county council authority to act, that they should be mentioned in the body of the petition as things suggested to the council upon which the council should exercise its discretion.—3. The Superior Court, by virtue of powers, which are conferred upon it by Art. 2329, R. S. Q., may take cognizance of the proceedings of municipal councils, whatever they may be, and quash them: and it may exercise these same powers in the case of a decision of a county council sitting in appeal, in spite of Art. 1061, C. M., which denies the right of appeal in such a case. Judgment in 17 Que. S. C. 131 corrected. *Piché* v. *Portneuf*, 17 Que. S. C. 589.

Corporate powers—*General power to do a thing followed by provisions for carrying it out*—*By-law to do the thing without applying the means prescribed in the statute*—*By-law to buy property, when in the nature of a by-law to borrow.*]—When a statute confers powers in general terms, in one section, and provides, in several sections following, special means of exercising them, such means must be adopted and no other. Thus, the "Cities' and Towns' Act," in the R. S. Q. 1909, under the two headings "Water Supply," and "Lighting," empowers councils to make by-laws for the establishment, etc., of waterworks (s. 5645), for the lighting of the municipality by light furnished under contract by any company, firm, or person (s. 5666), and for the establishment, etc., of a system of lighting of its own (s. 5667), and both as to water and light supply, has several sections setting forth how the wags and means are to be secured. Under this Act, a by-law to purchase immovable property "for the purpose of an aqueduct and for the establishment of a system of electric lighting," for a price of $40,750, of which $25,000 to be paid to an hypothecary creditor, and the balance to the vendor, by instalments represented by the notes of the corporation, and which does not provide for the levying of these sums in the manner prescribed as aforesaid, is null and void.—A by-law for the purchase of property hypothecated to a third party for a debt due by the seller, and which the corporation undertakes to pay out of the price of the sale, is in the nature of a by-law to borrow money, and, therefore, subject to the formalities prescribed in sections 5776 and following, R. S. Q. 1909. *Shawinigan Water & Power Co.* v. *Shawinigan Falls* (1910), 19 Que. K. B. 546.

Discretion — *Interference by Superior Court.*]—In the absence of fraud, or of an undue invasion of private rights, or of wilful infliction of a palpable and manifest wrong, the Superior Court will not use its reforming and revisory power to interfere with municipal corporations in matters left by law to their discretion. *Mercier* v. *Bellechasse*, 31 Que. S. C. 247.

Judicial powers — *Passing on sufficiency of councillor's declaration of qualifica-*

tion—Requisition for evidence of truth of declaration—Resolution declaring office vacant —Ultra vires — Remedy — Mandamus.]—Municipal councils exercise only the powers conferred upon them by statute, the interpretation of which in this respect must be strict and rigorous. Especially they cannot, in their deliberations, make decrees of a judicial character; for example, they cannot adjudge the nullity of a document signed and deposited by a councillor in conformity with a provision of the Municipal Code. Therefore, where a councillor, called upon by virtue of Art. 283 of the Municipal Code to make the declaration of qualification therein provided for, deposits it within the time prescribed, a resolution of the council declaring his seat vacant because he has not also deposited his title deeds in support of his declaration, is illegal and void.—**2.** The remedy of *mandamus* to restore him to his office is open to a municipal councillor against the corporation whose council has illegally declared his seat vacant. *Riendeau* v. *Bassin de Chambly*, 34 Que. S. C. 136, 9 Que. P. R. 279.

Manufacture and supply of gas — *Explosion — Injury to private property — Dangerous substance — Negligence — Evidence — Findings of jury.*]—A municipal corporation invested with statutory powers to develop or manufacture a dangerous substance—*e.g.*, inflammable gas—is not liable in the same way as an individual, without proof of negligence, for damages occasioned by the escape or explosion of such substance. —*Fletcher* v. *Rylands*, L. R. 1 Ex. 265, L. R. 3 H. L. 330, distinguished.—Powers and liabilities of a municipality in boring for, storing, and supplying natural gas, incidentally discussed.—Where there is evidence reasonably sufficient to support the verdict of a jury, the appellate Court will not set it aside as perverse or against the weight of evidence. *Purnal* v. *Medicine Hat*, 7 W. L. R. 437, 1 Alta. L. R. 209.

Nuisance — *Declaration by by-law — Building regulations — Stables — Ultra vires.*]—A by-law of the town of St. Boniface provided that no stable should be built and maintained at less than twenty feet from any house without permission of the owner of such house, and declared all stables built and in use at the date of the passing of the by-law which did not conform to that standard to be nuisances, and as such subject to abatement—*Held*, that the municipality had no statutory power to define what constitutes a nuisance, and its attempt to do so was *ultra vires*.—2. Section 631 (*a*), giving power to pass by-laws "for preventing and abating public nuisances," gives no power to pass such a by-law, as the matters declared by it to be nuisances are not shewn to be public nuisances, and the council, in enacting it, did not deal with them as such. *Re Dupuis*, 7 W. L. R. 629, 17 Man. L. R. 416.

Petition against liquor license — *Power to strike off names—Action in Superior Court—Jurisdiction.*]—An action in the Superior Court is not available for the purpose of reviewing decisions of municipal councils in matters which are within their administrative competence. Such decisions can only be reversed or varied in the manner provided in the Municipal Code. The power of superintendence and review is exercised by the Superior Court only in cases of illegality or abuse of power. There is no illegality or abuse of power in the decision of a municipal council to strike off the petition in opposition to the grant of three licenses the names of those who had previously signed a petition for the grant.—Judgment in 30 Que. S. C. 19, affirmed. *Brunelle* v. *Princeville*, 17 Que. K. B. 99.

Powers and liabilities — *Statutes, application and construction—New municipalities—Assignment of rights and liabilities of corporations abolished — By-laws — Formalities — Approval by Governor-General — Evidence — Onus — Assignment of recourse.*]—Where a county municipality took stock and became a shareholder in a railway company under a by-law that provided for effecting a loan to pay for the stock, under 16 V. cc. 138 and 213, and ceased to exist by operation of 18 V. c. C., and its property, debts, contracts, liabilities, powers, and duties were vested in and laid upon a new county municipality created by the same statute, with a proviso that the new municipality should have a recourse to recover "from any other county within the limits of which any part of the municipality ceasing to exist was situate, a share of any sum paid in discharge of any such a debt proportionate to the population of such part of such municipality as compared with the whole population thereof," this proviso does not apply to moneys paid by the new municipality on account of the shares held by it in consequence of the subscription made by the old municipality as stated above. Hence, the township of Brome and the east part of Farnham forming part of the county of Shefford until the 1st July, 1855, and having from that date, under 18 V. c. C., become part of the county of Brome, the latter did not become liable to the new county of Shefford created by the same statute on that date, for any proportion of moneys paid by it in carrying out a subscription of the former county of Shefford for stock in a railway company, made by a by-law of the 22nd September, 1853.—A by-law passed under 16 V. c. 213, which did not provide for a special rate to meet interest and a sinking fund, was, nevertheless, valid if approved by the Governor-General, under 18 V. c. 13, s.s. 5 and 6, and was no longer open to attack on the ground of the omission and informalities in question.— Credit given by the government in the accounts of the Receiver-General to a county for a sum as due to it under 22 V. c. 47, s. 21, and c. 15, s. 5, is not of itself evidence that it was retained in discharge of a *debt* under the proviso above cited of 18 V. c. C., s. 37, s.s. 5. The onus of proof that the credit and entry thereof is connected with such a debt is on the party alleging it.—The recourse given by the proviso is against the county in which the part of the county ceasing to exist is situate, and not against the township or local municipalities forming such part. An assignment of the recourse purporting to be against the township or local municipalities is, therefore, void under the statute, and gives no right of action against the county in which they lie. *Auger* v. *Brome*, 30 Que. S. C. 446.

Powers of councils — *Right to censure member—Municipal Code—Illegal resolution—Damages.*]—An appeal from a decision of the local council of the defendants having been taken to the county council, and no session to consider this appeal having been called by the mayor, secretary-treasurer, or councillors, and the appeal in question having been allowed by the county council when the mayor or the local council concerned was present, the local council at a subsequent meeting passed the following resolution: "That the mayor deserves the censure of the council for having neglected to call a meeting of council so that the council should have an opportunity to resist the appeal;"—*Held*, reversing the judgment of the Superior Court, 26 Que. S. C. 447, that municipal councils have no rights or prerogatives other than those conferred on them by the Municipal Code; and there being nothing in the said Code giving municipal councils the right to pass judgment on their members, they cannot arrogate to themselves the right to do so; and, in this case, a vote of censure of the mayor consequently illegal, ought to be rescinded, and for this purpose the judgment of the Court declaring the resolution illegal should be inserted in the minute books of the council in the margin where the said resolution appears. Furthermore the corporation are liable for the act of their council and may be adjudged to pay exemplary damages. *Vallières* v. *Parish of St. Henri of Lauzon*, 14 Que. K. B. 16.

Powers of county councils to erect certain public buildings — *Power to levy taxes upon local municipalities — Local municipal councils having the powers of county councils—Nullity of municipal by-laws in the absence of notices—Burden of proof.*]—By conferring upon the councils of certain local municipalities the powers of county councils (1081 M. C.), the law did not detach such local municipalities from the counties of which they formed part in virtue of the statutes governing the territorial division of the province. Hence, they remain subject to the by-laws of such county councils touching the cost of erecting, etc., court houses, registry offices, etc.—It is for the party pleading who attacks a by-law on the ground that no notice was given of the meeting of the council at which it was adopted to establish, in addition to any prejudice suffered, that the notice was actually wanted. *Ile aux Coudres* v. *Charlevoix* (1910), 19 Que. K. B. 362.

Sale of personal property acquired under statute — *Discretion — Bona fides —Conversion — Injunction.*]—The plaintiffs, a town corporation, were authorised by statute (Acts of 1903 c. 114), to borrow money for the purpose of improving and extending the water system of the town, and, among other things, for laying a new 12-inch main. After the money had been borrowed, the pipe purchased, and a considerable portion of the work completed, it became necessary to suspend work, and the chairman of the water committee, acting upon the opinion of the town engineer, and in good faith, negotiated a sale of the balance of the pipe remaining on hand at the same price per ton that it originally cost, less expense of truckage. A resolution confirming the sale was submitted to the town council, and, on the refusal of the mayor to put it, was put by the chairman of the committee and declared carried. In an action against the members of the committee for conversion:—*Held*, that the sale, in the circumstances stated, was within the powers of the town council.—*Held*, also, that where the council, in the exercise of its discretion, thinks it more advantageous to dispose of property, in such circumstances, than to retain it until it can be used, the Court will not interfere with the exercise of the discretion, and, *a fortiori*, such act cannot be made the subject of an action for conversion.—*Held*, also, that the power to sell was incident to the power to purchase, and was not cut down by s. 35 of the Towns Incorporation Act.—*Semble*, that any attempt upon the part of a town council to exercise the power referred to in bad faith would be a proper subject for injunction. *New Glasgow* v. *Brown*, 41 N. S. R. 542. Reversed by the Supreme Court of Canada, 39 S. C. R. 586. (See Digest for 1907).

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26. Public Buildings.

Registry office — *Powers of county council — Acquiescence.*]—A county corporation, although bound by law to provide, and keep constantly in perfect repair, a suitable and ample metal safe or fire-proof vault in the registry office of the county, has no authority to bind the city or town municipalities within the county for the cost of a building, part of which is to be used as a registry office and part as a hall for the meeting of the county council, and also for the sittings of the district magistrate's Court. If it be desired to erect a building for such purposes, the cost of the different parts should be established by the tenders received for the construction, or by other sufficient evidence, —in which case the municipalities would be liable for the cost of the part absolutely required for the registry office and fire-proof vault or safe.—2. The fact that individual members of a city corporation within the county were aware of the construction of a building for the joint purpose of a registry office and hall for meetings, and did not object thereto, does not bind the corporation, —a municipal corporation being only bound by the corporate action of its council. *Richelieu* v. *Sorel*, 8 Que. Q. B. 526.

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27. Public Health.

Board of health — *Appointment of member — Disqualification — Contract with corporation—Quo warranto.*]—A person having a contract with a town corporation for the lighting of the town by electricity may be appointed a member of the board of health of the town, and exercise the functions thereof. Therefore, a demand in the nature of a *quo warranto* to remove him from the office, by reason of his contract, should be refused. *Dufresne* v. *Rivard*, 29 Que. S. C. 385.

Exercise of right — *Quarantine of house—Damage to owner—Liability.*] — The plaintiff had leased his house, situated in the city of Montreal, upon a lease to begin on the 1st May, 1901. In the month of April one of the persons who lived in the house

contracted smallpox, and the municipal authorities, after removing him, put the house in quarantine, preventing all access to it, and kept it so until the 14th May. The plaintiff's tenant, therefore, was not able to take possession, and the plaintiff was obliged to cancel the lease. He now claimed damages from the city corporation for the loss of his rent:—*Held*, that, although the municipal authorities had acted in the exercise of a right and even of a duty, the corporation must pay the plaintiff for the injuries which he had suffered. *Dalbec* v. *Montreal*, 22 Que. S. C. 23

Expenses of local board — *Order for payment by county council—Jurisdiction.*]—A Judge of the Supreme Court has no jurisdiction under s. 73 of the Public Health Act (C. S. N. B. 1903 c. 53) to order a county council to pay an amount assessed for the expenses of a local board under s. 72 of the Act, on the application of the chairman, without the authority of the board; *per* Hanington and McLeod, JJ.; Tuck, C.J. dissenting. *Ex p. York, Re Local Board of Health of York*, 37 N. B. R. 546, 2 E. L. R. 364.

Health Act, R. S. B. C. 1897 c. 91—*Isolation of infected premises by medical health officer—Liability of corporation for expenses.*]—Where a medical health officer (appointed by a city council), acting in pursuance of a provincial statute, places a quarantine on a building and its inmates within the limits of a city municipality, the latter cannot be held liable for the cost of provisioning and heating the building during the period of isolation. *Taylor* v. *Revelstoke*, 7 W. L. R. 39, 13 B. C. R. 211.

Liability for expenses incurred by local board of health.]—A medical practitioner, employed by the local board of health of the city of Moncton to attend to cases of smallpox, cannot recover for his services in an action against the city. The Public Health Act, 1898, imposes upon the cities or municipalities wherein local boards of health are established, no liability, which can be enforced by action, for the expenses or contracts of such boards. *Cruise* v. *Moncton*, 35 N. B. R. 249.

Local boards of health — *Action — Parties — Corporations.*] — Local boards of health constituted under ss. 48 and 49 of the Public Health Act, R. S. O. 1897 c. 248, are not corporations, and cannot be sued by any corporate name: Britton, J., dissenting. *Sellars* v. *Dutton*, 24 C. L. T. 311, 7 O. L. R. 646, 3 O. W. R. 664.

Sanitary by-law — *Conviction — Summons—Reference to wrong action of by-law.*] —A city by-law making the owner of a house responsible for the unsanitary condition of a yard leased by him, is *intra vires*.—2. A conviction will not be quashed because the summons refers to a provision of a statute or by-law which is not the one applicable to the case. *Beauchamp* v. *Weir*, 7 Que. P. R. 174.

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28. Public Libraries.

Aid by municipality — *Grant for site —Validity of by-law—Assent of electors.*]—A mechanics' institute having been converted into a library, and a board of management organised under R. S. O. 1897 c. 232, part II., a grant of a sum of money for the purchase of a site was made by by-law of the corporation of the town in which the library was situate, without the assent of the electors to either the appointment of the library board or the grant:—*Held*, that the power to grant aid to free libraries is absolutely in the hands of the local municipality under the general provisions of the Municipal Act, and that the by-law was invalid notwithstanding s. 18 of R. S. O. 1897 c. 232, which may have its full and legitimate scope by being applied to the raising of ways and means by means of the requisitionary powers intrusted to particular free library boards under ss. 14 and 17 of the Act. *Hunt* v. *Palmerston*, 23 C. L. T. 66, 5 O. L. R. 76, 1 O. W. R. 791.

Gift — *Breach of contract — Injunction —Ratepayer — Attorney-General.*] — A. C. made an offer to the defendants that "if the city will pledge itself by resolution of council to support a free library . . . and provide a suitable site," he would furnish $75,000 to erect free library building. The defendants obtained legislation enabling them to give the guarantee, and afterwards the council passed a resolution accepting the offer and giving the guarantee, which resolution was communicated to A. C., and the receipt thereof acknowledged by him. At a later meeting of the city council a resolution was passed to rescind all previous resolutions in relation to the matter:—*Held*, that there was a binding contract between the defendants and A. C., and the Court would interfere by injunction, at the suit of the Attorney-General, upon the relation of a ratepayer, to restrain a breach of the contract. The passing of the statute gave a vested interest to every citizen. *Attorney-General* v. *Halifax*, 23 C. L. T. 24.

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29. Sewers.

Agreement for construction — *Action for rectification of cancellation of written instrument—Evidence.*]—Action to rectify a written contract:—*Held*, that there being no fraud or misrepresentation, there is nothing in the evidence to satisfy the Court beyond reasonable doubt that there has been any mistake. Action dismissed. *Morrison* v. *Summerside*, 8 E. L. R. 77.

By-law authorising construction of sewer — Two-thirds vote in city council—Property interest of alderman—Disqualification—Injunction. *Elliott* v. *St. Catharines*, 12 O. W. R. 633.

By-law authorising construction of sewer — *Vote in city council — Property interest of member — Disqualification.*]—A member of a city council is not disqualified from voting upon a proposed by-law to construct a sewer on a certain street within the municipality, merely because he owns property fronting on the street, which gives him a large interest in the proposed drainage. The principle that a member of a council is not disqualified merely because he possesses an interest in common with the other ratepayers applies as well where, a local im-

provement by-law being in question, the community of interest is only with the ratepayers of a section of the municipality, as where all the ratepayers will be affected by the proposed by-law. *Re McLean & Township of Ops*, 45 U. C. R. 325, discussed and followed.—Judgment of Anglin, J., 12 O. W. R. 653, reversed. *Elliott* v. *St. Catharines*, 18 O. L. R. 57, 13 O. W. R. 89.

Communication of disease—*Evidence—Inference—Nonsuit.*] — Although the defendants were guilty of a nuisance in conducting sewage and depositing it or allowing it to be deposited at the outlet of that sewer on the shore of the Toronto harbour, there was no evidence from which a jury might fairly and reasonably infer that the plaintiff's family, who lived in a house built upon cribs near such outlet, were infected with the germs of diphtheria by reason of such sewage, and therefore the case should have been withdrawn from the jury. *Connacher* v. *Toronto*, 21 C. L. T. 172.

Construction — *Depth* — *Abutting lands.*] — A municipal corporation when it constructs a system of sewers in a public highway is not bound to place them lower than at the depth required for the general convenience of the lands abutting on the highway; and when any of such lands are in an exceptional position so that at certain points their level is lower than that of the sewer, it is for the owners of these lands to put their property in a position to benefit by the sewer, the corporation not being bound to provide for exceptional cases. *Roberts* v. *Montreal*, 16 Que. S. C. 342.

Defective sewer — *Duty to repair* — *Notice—Misfeasance.*]—If a city corporation fail to repair a leak in one of their public sewers, after notice of defect, they are guilty of a misfeasance, and are liable for damages by reason of water finding its way from the leak into the cellar of an adjoining property. —*Curless* v. *Grand Falls*, 37 N. B. R. 227, followed. *McKay* v. *St. John*, 38 N. B. R. 393, 4 E. L. R. 529.

Discharge into navigable waters — *Special damage.*] — The defendants' sewer emptied into navigable water, in which the plaintiff's vessel was lawfully moored for the winter. The defendants, although notified of similar previous occurrences, allowed a factory to send hot water down the sewer, which melted the ice on one side of the vessel, causing damage:—*Held*, that the defendants were liable, as the plaintiffs were lawfully using the waters, and the discharge of the hot water was a public nuisance which caused special damage to the plaintiff. *Matthews* v. *Hamilton*, 6 O. L. R. 198.

Establishment in part of town—*By-law—Validity—Borrowing money—Statutory powers.*] — A municipal corporation authorised by charter to perform works of public utility (in this case to establish a system of sewers) may proceed to perform the whole work at one time, or in parts, and in such subdivisions of their territory as they judge to be suitable, the mode followed being left to their discretion. A by-law of the town of Levis establishing a system of sewers in the town, except in one of its quarters, is therefore valid.—2. A special power of borrowing may be exercised according to the statute when confers it, notwithstanding a provision in the charter which forbids borrowing for general purposes beyond a prescribed sum or in proportion to the value of the taxable property of the town. *Juneau* v. *Levis*, 14 Que. K. B. 104.

Extending into adjoining municipality — *Injunction to restrain.*]—A municipal corporation, unless specially authorised by statute, has no right to construct sewers or other works across or under the public streets of another municipality, without having obtained the consent of such municipality, or a right of way; and may be restrained by injunction from proceeding with such works, where the same will cause great or irreparable damage to the other municipality. *Ahuntsic* v. *Montreal*, 26 Que. S. C. 291.

Extending into adjoining municipality — *Terms and conditions—Award—Municipal Act.*]—Arbitrators made an award, purporting to be under s. 555 of the Municipal Act, 3 Edw. VII. c. 19 (O.), permitting an extension of a sewer from one municipality into another, but no by-law had ever been passed by the former defining the lands to be taken or affected, or the route of the sewer, and there were, moreover, no terms or conditions imposed upon the former by the award:—*Held*, affirming the decision of Teetzel, J., 24 C. L. T. 89, 7 O. L. R. 3 O. W. R. 145, that the award was bad and should be set aside; Moss, C.J.O., and Maclennan, J.A., dissenting. *In re Berlin & Waterloo*, 24 C. L. T. 333, 3 O. W. R. 903; *S. C., sub nom. Waterloo* v. *Berlin*, 8 O. L. R. 335.

Flooding plaintiff's property—Negligence—Independent contractor—Collateral or casual work done without authority—Nonliability of corporation — Damages — Costs. *Borst* v. *Toronto*, 11 O. W. R. 738, 12 O. W. R. 261.

Insufficiency — Backing up water into cellar of house — Liability of corporation. *Faulkner* v. *Ottawa*, 8 O. W. R. 126.

Insufficiency — Injury to property — Liability—Costs. *Gallagher* v. *Toronto*, 9 O. W. R. 310, 696.

Insufficiency — *Overflow* — *Injury to private property — Liability — Vis major.*]—Owing to a heavy rain the water from the defendants' street drain backed through the plaintiffs' drain and injured a large quantity of goods stored in the basement of his store. There was no question of *vis major*. Judgment for plaintiff. *Woodward* v. *Vancouver* (1909), 12 W. L. R. 156.

Liability for flooding private premises — Sufficiency of culvert — Negligence —Extraordinary rainfall. *Cardston Drug & Book Co.* v. *Cardston* (N.W.T.), 3 W. L. R. 64.

Neglect to repair — *Notice* — *Misfeasance.*]—A municipal corporation failing, after notice, to repair a sewer laid under statutory authority, thereby causing damage to a person connected therewith for sewerage purposes, are guilty of misfeasance and liable in

an action for damages. *Lirette* v. *Moncton*, 36 N. B. R. 475, distinguished. *Curlcas* v. *Grand Falls*, 37 N. B. R. 227.

Negligence — *Insufficiency — Damage caused by back flow — Compulsory user of sewer — Statutory authority.*]—In 1894 the plaintiff built a house on R. street, in the city of M., and, pursuant to city by-law, connected the same with the sewer system provided by the city in the exercise of their statutory duties. Several times the tidewater backed up into the plaintiff's and other cellars on the same street, and, in 1901, the corporation, with a view, if possible, of preventing damage in future by back flowage, continued the sewer on R. street southwardly to the P. river, the outlet being still below high water mark. The new sewer was constructed according to plans prepared by the city engineer and approved of by the city council, and with the same device at the outlet to prevent back flowage, as in other sewers in the city, and similar in principle and mode of operation to those used in other places where sewers discharge into tidal rivers. The new sewer did not prevent back flowage, and the action was brought for loss and damage occasioned thereby:—*Held*, that the city, having the statutory authority to construct the sewer, and having built it after plans made by a competent engineer and adopted by the council, were not guilty of actionable negligence on account of the insufficiency of the sewer to answer its purpose, and a person thereby injured has no remedy by action at law; and it makes no difference in this particular whether the use of the sewer is voluntary or under compulsion. *Lirette* v. *Moncton*, 36 N. B. R. 475.

Overflow — Flooding premises of householder — Construction of sewer — Insufficiency — Heavy rainfall — Responsibility of municipality — Damages. *Roberts* v. *Port Arthur*, 10 O. W. R. 1111, 11 O. W. R. 642.

Permit to enter — *Frontage and entry fees—Non-payment—Mandamus.*]—The city of M. by their Act of incorporation were authorised to levy on the owners of lots frontage fees for sewers, and to collect them as ordinary city taxes; the Act also gave authority to make by-laws to regulate the way and manner of entering the sewers, and to prevent the entry of any sewer, unless the entry and frontage fees were first paid. A by-law was made providing that no person should enter any public sewer until all entry and frontage fees were paid. E., the owner of a lot by purchase from the sheriff under an execution by the city of M. for general city taxes (not frontage fees), on which frontage fees had been rated against a former owner and not paid, applied for a *mandamus* to compel the city to grant him a permit to enter a sewer without payment of the frontage fees:—*Held*, refusing the *mandamus*, that the city could not be compelled to issue the permit until the fees were paid, even though they had lost the right to enforce payment against the owner of the lot. *Ex p. Edgett*, 36 N. B. R. 224.

Sufficiency — *Negligence — Capacity of sewer—Vis major.*]—F. brought an action against the corporation of a city claiming damages for the flooding of his premises by water backed up from the sewer with which his drain pipe was connected:—*Held*, Idington and Duff, JJ., dissenting, that as according to the evidence the sewer was capable of carrying off a fall of 1½ inches of water per hour, which was considered as meeting the requirements of good engineering and was the standard adopted by all the cities of Canada and the Northern States, the city corporation was not liable.—*Held*, also, that a fall of rain at the rate of 3 inches per hour for 9 minutes was one which could not reasonably be expected, and for which the city corporation were not obliged to provide. Judgment in 10 O. W. R. 807 affirmed. *Faulkner* v. *Ottawa*, 41 S. C. R. 190.

Surface water — Sewers — Flooding cellar — Negligence — Construction of sidewalk — Liability — Act of God — Extraordinary rainfall. *James* v. *Bridgeburg*, 9 O. W. R. 189.

Vancouver Incorporation Act—*Entry on land—Compensation — Condition precedent.*]—Before entering on land for the purpose of putting a sewer through it, the city of Vancouver must, under their Act of incorporation, compensate the owner of the land through which it is proposed to lay the sewer. *Arnold* v. *Vancouver*, 10 B. C. R. 198.

Water supply — *Contract between city corporation and owners of land in adjacent township for use of city sewer—Annexation of part of township to city—Proclamation by Lieutenant-Governor — Class action—Plaintiff suing in representative capacity.*]—Action by plaintiff township and three landowners therein for a declaration as to their rights in respect of water supply and sewers. There was an agreement under seal between the township and defendants respecting annexation on terms as to a part of the township, and the Lieutenant-Governor issued a proclamation annexing said part to Hamilton.—*Held*, that the agreement was *ultra vires* as an agreement. The proclamation is effectual and has the effect of a statute. A class action should so appear in the style of cause. One of the plaintiffs had, without permission of defendants, connected his drain with defendant's sewer. This he had no right to do. *Barton* v. *Hamilton*, 13 O. W. R. 1118.

See VENDOR AND PURCHASER.

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30. TAXATION.

By-law — *Exemption of company from taxation — Discrimination — Ultra vires—Pleading—Judicial notice of statute.*]—By statute the council of the town of Woodstock are empowered from time to time, at their discretion, to give encouragment to manufacturing enterprises within the town, by exempting the property thereof from taxation for a period of not more than ten years:—*Held*, that a by-law of the council exempting any company establishing a woollen mill in the town from taxation for a period of ten years was *ultra vires*, being a discrimination

in favour of a company against private persons engaged in the same business. A bill alleging that the plaintiffs were entitled to exemption from taxation under a by-law passed by the defendants.—*Held*, sufficient, on demurrer, without alleging that the by-law was authorised by statute. *Carleton Woollen Co.* v. *Woodstock*, 26 C. L. T. 315, 3 N. B. Eq. 138.

By-law — *Levying of tax — Statute authorising — Repeal — Abrogation of by-law—Recovery of money paid for taxes.*]— The repeal of an enactment to enable a municipal corporation to levy a tax by by-law abrogates *ipso facto* any by-law passed in the exercise of the power conferred; and sums paid under such a by-law, after the repeal of the enabling Act, may be recovered by action against the corporation. *Royal Ins. Co.* v. *Montreal*, 29 Que. S. C. 161.

By-law — *Powers of taxation — Special Act—General Acts.*] — A town cannot exceed the limit set to the taxing power conferred on it by its special Act of incorporation. The right given it therein to make by-laws as provided by the Towns Corporation Act and by the Municipal Code is subject to the restriction above. A by-law passed by the town under the general Acts which involves taxation beyond the limit prescribed in the special Act is, therefore, null and void. *McClaire* v. *Waterloo*, 29 Que. S. C. 189.

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31. Transient Traders.

By-law — *Conviction — Negativing exception — Evidence before magistrate—Certiorari.*]—Conviction of the defendant under a by-law of a town respecting transient traders. The by-law was in the terms of R. S. O. c. 224, s. 31. The defendant was convicted because he, not being entered on the assessment roll, offered goods for sale without having paid a license fee:—*Held*, that the by-law in the terms of the section was *intra vires*, and the use of the word "effect" instead of "affect" was immaterial; (2) that since 1 Edw. VII, c. 13, s. 1, it is not necessary to negative an exception; and *Regina* v. *Smith*, 31 O. R. 224, is no longer useful; (3) that the objection that the evidence shewed that the defendant was managing the business of his wife, and was not a transient trader nor occupant of the premises, was not open upon *certiorari*. *Rex* v. *Allan*, 21 C. L. T. 585.

By-law — *Conviction — Penalty—Costs — Imprisonment — Distress.*] — *Held*, that the defendant, convicted under a municipal by-law for carrying on business without a transient trader's license, was not brought within either the first or second clause of the by-law, as it was not alleged or charged that she was a transient trader or that she occupied premises in the municipality for a temporary period; and these omissions were fatal to the conviction. *Regina* v. *Caton*, 16 O. R. 11, followed.—*Held*, also, that the conviction was open to objection because of the application of the penalty upon taxes to become due, the award of the costs to the justice, instead of to the informant, and the award of imprisonment upon default in payment of the penalty. The conviction was quashed, and costs were given against the informant. *Regina* v. *Roche*, 20 C. L. T. 307, 32 O. R. 20.

By-law — Municipal Act, sec. 583 — Absence of evidence that premises occupied for temporary period—Conviction—Quashing —Costs—Terms. *R.* v. *Preston Co-operative Association* (1910), 1 O. W. N. 983.

By-law — *Regulation of hawkers—Proviso — Negativing exception — Conviction — Quashing — Costs.*] — A by-law of a county council recited the provisions of s.-s. 14 of s. 583 of the Municipal Act, R. S. O. c. 223, and that it was expedient to enact a by-law for the purpose mentioned in the sub-section; it then went on to enact "that no person shall exercise the calling of a hawker, pedlar, or petty chapman in the county without a license obtained as in this by-law provided;" but the by-law contained no such exception as is mentioned in the proviso to s.-s. 14, in favour of the manufacturer or producer and his servants: —*Held*, that the by-law was *ultra vires* the council, and a conviction under it was bad: —*Held*, also, following *Regina* v. *McFarlane*, 17 C. L. T. 29, that the conviction was bad because it did not negative the exception contained in the proviso, and there was no power to amend it, because the evidence did not shew whether or not defendant's acts came within it. The conviction was therefore quashed, but costs were not given against the informant. *Regina* v. *Smith*, 20 C. L. T. 6, 31 O. R. 224.

By-law — *Sale — Trading stamps.*] — The defendants entered into an arrangement with various retail merchants by which each of them was to receive from him a quantity of "trading stamps," the property in which, however, was to remain in him, and to pay him fifty cents for every hundred of such stamps received, and to give one of these stamps to each customer who purchased for cash ten cents worth of goods, while he on his part was to advertise them in certain directories to be distributed by him, and also in newspapers. A blank space was left in these directories for pasting in such stamps, and every customer of any of the merchants who brought to the defendant one of the directories with 990 stamps pasted in it, was entitled to receive in exchange any one he might select of an assortment of goods kept in stock by the defendant. Apart from this, these goods were not for sale:—*Held*, that these transactions did not constitute a "selling or offering for sale" by the defendant within the meaning of a municipal by-law passed under R. S. O. c. 223, s. 583, s.-ss. 30, 31, the stamps delivered to the defendant in exchange for his goods being of no value to him. The essence of sale is transfer of property from one person to another for money or money's worth. *Regina* v. *Langley*, 20 C. L. T. 2, 31 O. R. 295.

City charter — *Transient traders — License — "Assessed as a resident" — Conviction.*]—Case stated by a magistrate, after the conviction of the defendant, a non-resident of the province of Nova Scotia, for soliciting orders in Halifax for a Glasgow, N.S., firm of tailors. Chapter 57 of the Acts

of 1899 enacts that "no person on his own account or as agent for any person, firm, or body corporate residing or doing business outside of the province of Nova Scotia, shall solicit orders or take measurements or make an agreement or agreements for the furnishing or supplying of clothes or other garments in the city of Halifax, unless he or it has been assessed as a resident of the said city," in the previous general assessment, without first taking out a license therefor from the said city. The defendant did not take out any license, but his principals purchased property in Halifax and were assessed therefor in the same manner as residents of the city. On behalf of the prosecution it was contended that the principals should be residents of the city:—*Held*, that the conviction must be quashed. The defendant's principals were assessed in the same manner as residents, and the statutory prohibition therefore did not apply to them. *Rex* v. *Murray*, 24 C. L. T. 185.

Conviction — Form — Costs — Imprisonment—Evidence. *Rex* v. *Swanton*, 2 O. W. R. 106.

Conviction — *Hawking goods—License—Traveller with sample.*]—One who travels about from house to house for the purpose of selling sewing machines, carrying with him only one machine as a sample, his stock being stored in a shop rented for the purpose, cannot be convicted under 58 V. c. 39, s. 4 (N.B.), of hawking or peddling goods without license. *Semble*, that proof of a single act of sale of goods or merchandise against a man does not constitute him a hawker or pedlar within the meaning of the above Act. *Regina* v. *Phillips*, 35 N. B. R. 393.

Conviction — *Penalty — Costs — Distress — Imprisonment — Uncertainty as to time and place — Amendment — "Butcher"—By-law.*]—Upon motion to quash the conviction of the defendant, a transient trader, for offering meat for sale in quantities less than the quarter carcase, without having paid a license fee, contrary to a by-law of a village:—*Held*, that it was not necessary that the by-law or conviction should contain the words "for temporary purposes" and "assessment roll for the then municipal year," as they relate to the regulation of transient traders under clause 20 of s. 583 of the Municipal Act, R. S. O. 1897, c. 223, which refers to the payment of a license fee before beginning operations; nor was it necessary to refer to or negative the provisions of 58 V. c. 42, s. 22 (O.), making the term "transient trader" applicable to one who has resided less than three months in the municipality before beginning business, the evidence shewing brief visits periodically and regularly to sell meat for a given time at a particular place in the village.—2. The objection that the penalty of $1 was not apportioned under s. 708 failed, because the application was otherwise provided for by the by-law.—3. The objection that the conviction and by-law were in excess of the statute because power of distress was given for both penalty and costs, and because of the commitment, in default of payment, to the common gaol, was not well taken, having regard to the powers given by s. 702, s.-ss. 2 and 3.—4. The uncertainty of the offence in the conviction as to date, place, and meat sold, should be cured by amendment, upon the facts in evidence, under 2 Edw. VII. c. 12, s. 15 (O.).—5. Although ss. 580 and 581 deal specifically with the sale of meat, a transient trader, under s. 583, might include a butcher or dealer in meat. *Rex* v. *Myers*, 23 C. L. T. 286, 6 O. L. R. 120, 2 O. W. R. 533.

Conviction — *Proof of by-law—Offence—Certiorari—Costs.*] — The Municipal Ordinance (R. O. 1888, c. 8, s. 68, s.-s. 31) authorises municipal councils to pass by-laws for "licensing, regulating, and governing transient traders and other persons who occupy premises in the municipality for temporary periods, and whose names have not been duly entered on the assessment roll in respect of income or personal property for the then current year, and for fixing the sum to be paid for a license for exercising any or all such callings within the municipality, and the time the license shall be in force." —The defendant was convicted "for that he, the said (defendant), whose name had not been entered on the last revised assessment roll of the municipality on, etc., within said municipality, was a sewing machine agent, carrying on his business occupation and calling as such sewing machine agent without first having obtained a license so to do, contrary to the provisions of by-law No. 25 of the said municipality." On an application for a writ of *certiorari* it appeared from affidavits filed that the original by-law was produced before the convicting justice, but that neither the original nor a copy was put in as evidence, and it was sought to prove the by-law on this application by affidavit:—*Held*, that the by-law could not be proved by affidavit on the application for the writ of *certiorari*.—2. That therefore the only means available of ascertaining the provisions of the by-law was by reference to the information and conviction.—3. That the offence stated in the conviction was not one which could be created by a by-law passed under the above quoted clause of the Municipal Ordinance, inasmuch as it did not allege that the defendant was "a transient trader or other person occupying premises in the municipality for a temporary period."—4. That costs of quashing a conviction on *certiorari* will not be granted, unless there be misconduct on the part of the informant or of the justice. *Regina* v. *Banks*, 2 Terr. L. R. 81.

License — *Occupant of premises — Conviction.*]—Where goods are consigned by the owner to be sold on commission, and they are sold by the consignee by auction in premises rented by him, the owner is not an occupant of such premises nor a transient trader within the Municipal Clauses Act, R. S. B. C. 1897, c. 144, s. 171, s.-s. 25, as amended in 1898 by c. 35, s. 19. To support a conviction it is essential that the person charged occupy premises in the municipality. *Regina* v. *Wilson*, 20 C. L. T. 144, 7 B. C. L. R. 112.

License — *Travelling salesman of trading corporation.*]—A person in the employ of a trading corporation (the latter having a place of business and paying the usual business

and other taxes), who sells by wholesale to retail dealers and not to consumers, is not a pedlar, and therefore is not obliged to take out a license or pay a special tax as such. *Semble*, that the calling of a pedlar carries with it the idea of petty trade, or of sale by outcry and itinerancy. *Montreal* v. *Emond*, 23 Que. S. C. 77.

Licensing powers — *Hawkers—License fee — Statutes — Effect on by-laws.*]—The authority granted to the city of Montreal by 52 V. c. 79 (Art. 140, s. 36), to empower any person to sell elsewhere provisions usually bought and sold on public markets, by granting him a license upon payment of such sum as shall be fixed by by-law, is equivalent to authority to levy a special fee or tax of $50 from such person.—2. By-laws of the city of Montreal validly passed in virtue of 52 V. c. 79, remain in force until formally repealed, notwithstanding the passing of the new charter, 62 V. c. 58. *Montreal* v. *Hatton*, 21 Que. S. C. 68.

Samples or patterns of goods to be afterwards delivered — *Form of conviction.*]—The defendant was convicted under The Ordinance Respecting Auctioneers, Hawkers and Pedlars, for "going from house to house offering for sale certain books to be afterwards delivered within the said province."—*Held*, that the conviction was bad because it did not state that defendant was "carrying and exposing samples or patterns" of the goods in question. *Rex* v. *Wolfe* (1906), 6 Terr. L. R. 246.

Taking orders for goods.]—There is no power to pass a by-law or to convict under the transient traders' clauses of the Municipal Act in respect to a person living at an hotel and taking orders for clothing to be made in a place outside of the municipality, out of material corresponding with samples exhibited. *Rex* v. *St. Pierre*, 22 C. L. T. 233, 4 O. L. R. 76, 1 O. W. R. 365.

Tax on — *Ultra vires — License.*] — A by-law imposing a tax of $50 on every pedlar or seller of beer within the municipality is *ultra vires* of a municipal corporation, unless the right is specially given by statute—2. Arts 582 and 582a, M. C., do not authorise a tax, but a license. *Hamel* v. *St. Jean Deschaillons*, 29 Que. S. C. 301.

Transient traders by-law—*Taking orders for newspaper published outside municipality—Conviction—Proof of one sale—Insufficiency—Evidence—By whom goods to be supplied.*]—The defendant was convicted for unlawfully, as agent for a company doing business in the city of V., soliciting or taking orders in the city of C. for the sale by retail of certain goods, wares, or merchandise, to wit, a certain newspaper published by a company doing business outside the city of C., without having taken out a license from the corporation of C., contrary to s-s. 6 of s. 1 of by-law No. 64 of the corporation of C. The by-law followed the wording of the provisions in the Municipal Clauses Act respecting transient traders, and imposed a license fee on all persons carrying on business within the meaning of the by-law. The penalty clause in the Act and by-law provided that "no person shall use, practise, carry on, or exercise a trade, occupation, profession, or business described or named," etc. Evidence was given of only one sale:—*Held*, not sufficient evidence upon which to convict the defendant—one act did not bring him within the by-law.—*City of Victoria* v. *Belyea*, 5 W. L. R. 161, 428, 13 B. C. R. 5, distinguished.—*Held*, also, that, as there was no evidence that the alleged goods, etc., were to be supplied by a person doing business outside the municipality, the conviction could not be supported. *R.* v. *Ogle* (1910), 15 W. L. R. 325. B. C. R.

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32. WATERWORKS.

Arbitration — *Payment into Court — Interest.*]—Where a municipal corporation, taking over the works of a waterworks company under the statutory arbitration procedure, wishes to take advantage of the provisions of ss. 445 and 446 of the Municipal Act, it must pay into Court the amount awarded, with interest to the date of payment in and six months' interest in advance. Judgment in 30 O. R. 81, 19 C. L. T. 36, affirmed. *Re Cornwall & Cornwall Waterworks Co.*, 20 C. L. T. 61, 27 A. R. 48.

Board of commissioners — *Statutory body—Powers—Contract*—37 V. c. 79 (O.) —*Action—Parties.*]—By 37 V. c. 79 (O.) the waterworks system of Windsor is placed under the management of a board of commissioners, who are to collect the revenue, paying over to the city any surplus therefrom, and to initiate works for improving the system, the city supplying the funds to pay for the same. The total expenditure is not to exceed $300,000, and not more than $20,000 can be expended in any one year without a vote of the ratepayers:—*Held*, affirming the judgment of the Court of Appeal, 27 A. R. 598, 21 C. L. T. 14, that the board was merely the statutory agent of the city in carrying out the purposes of the Act, and a contract for work to be performed in connection with the waterworks, and authorised by by-law of the council, and incurring an expenditure which would exceed the statutory limit, was not a binding contract. —*Held*, also, that, if an action could have been brought on such contract, the city corporation would have been a necessary party: —*Quære*, whether the city corporation would not have been the only party liable to be sued. *McDougall* v. *Windsor Water Commissioners*, 21 C. L. T. 393, 31 S. C. R. 326.

Breweries — *Distilleries — Illegal rate —Discrimination.*]—The rate which, by 24 V. c. 56, the city of Hamilton is empowered to charge proprietors, occupants, or others for water supplied to them, must be an equal rate. *Attorney-General for Canada* v. *Corp. of Toronto*, 23 S. C. R. 514, followed. Where, therefore, by a by-law passed therefor, a higher rate was imposed on distillers and on brewers than on other manufacturers, such rate was held to be illegal. *Hamilton Distillery Co.* v. *Hamilton, Hamilton Brewery Co.* v. *Hamilton*, 19 O. L. R. 280, 6 O. W. R. 143.

By-law — *Exclusive privilege—Reciprocal obligation not imposed—General provision — Sufficiency — Price of water — Unreasonable by-law — Privilege for 25 years over whole county — Right of appeal from judgment quashing by-law—Status of grantee of privilege—Mis-en-cause.*]—It is not necessary that there shall be a contract between a municipality which grants, by by-law, an exclusive waterworks privilege, and the grantee, to oblige the latter to furnish water to all the ratepayers. The latter have a sufficient guaranty of their right in this regard, in a clause of the by-law thus worded: "Whereas the persons above mentioned bind themselves as partners jointly and severally to perform and conform to all and each of the obligations of the said by-law, and at all times to furnish water drinkable and in sufficient quantity," etc.—2. The grant of such a privilege may be made by virtue of Art. 615a of the Municipal Code, without fixing the rate or price at which the water is to be furnished.—3. A municipal by-law which grants an exclusive waterworks privilege for a period of 25 years, for the whole territory of the municipality, with a surface of 100,000 square miles, is not unreasonable to the point of being illegal on this ground.—4. The grantee of such a privilege, who has not yet used it, *mis-en-cause* in an action to quash the by-law granting it to him, has a sufficient interest to appeal from the judgment which sustains the action. —Judgment in *Pécle*t v. *Corp. du Canton Marchand*, 32 Que. S. C. 346, reversed. *Chartier* v. *Pécle*t, 18 Que. K. B. 41.

By-law — *Petition — Establishment of waterworks for part of municipality—Municipal Code, Art. 637a.*]—A petition signed by two-thirds of the electors who are owners of land in the "territory affected," mentioned in Art. 637a of the Municipal Code, is an essential condition precedent to the exercise of the power of village municipalities to pass by-laws for the establishment of waterworks in a part of the municipality. The petition must be specially for the purposes mentioned in the article, and signed by the prescribed number of electors who are owners of land in the territory affected. Therefore, a petition, signed by a number of ratepayers, representing that the municipality is suffering from an insufficient service of water and demanding the establishment of waterworks, is not a foundation for the passing of a by-law to establish it for a part only of the municipality, and such a by-law adopted in these circumstances is void. *Charland* v. *Deschaillons*, 33 Que. S. C. 471.

Construction on private property — *Destruction.*]—The appellants had constructed a pipe or conduit by means of which they obtained water from a small stream. The respondent insisted that they were not entitled to do so, and they destroyed the part of the pipe which came out at the stream, but left standing other works upon their own land. Hence action was taken by the respondent to force the appellants to destroy even that part of their works made upon their own lands:—*Held*, that the works on the property of the appellant were the cause of no wrong to the respondent and were not a serious menace of trouble justifying his demand for demolition.—2. To order the destruction of these works constructed altogether upon the lands of the appellants and which they declared were necessary for lawful purposes and public use, would be an unjustifiable invasion of the right of property. *Corp. of Limoilu* v. *Paradis*, 9 Que. Q. B. 18.

Contract between municipality and private company — By-law as to pressure — Non-compliance by company — Fire —Company liable to owner of property destroyed by reason of insufficient water supply. *Belanger* v. *St. Louis, St. Louis* v. *Montreal Water & Power Co.* (Que.), 6 E. L. R. 277.

Contract with water company—*Construction — Supply of water to inhabitants —By-laws of municipality—Tariff — Cases unprovided for—Public institutions—Value of "bâtisses"—Lands connected with.*]—1. Contracts between contractors for public services and municipal corporations, in pursuance of by-laws passed by the latter, are interpreted according to the intent of such by-laws and so as to give them their whole effect. Therefore, the grantee of a waterworks privilege, who engages, in these conditions, to furnish water to the inhabitants of a town, in consideration of a remuneration regulated by a tariff, can exact, in cases which are not expressly provided for, only what, according to the circumstances which preceded and accompanied the grant, represents the value, to the consumer, of the water furnished. Thus the omission in the tariff of a clause with respect to institutions such as schools, churches, hospitals, etc., is supplied by a clause of this kind in the tariff of a neighbouring municipality, which, according to the terms of the same by-law, appears to have served as a model for the one adopted.—2. A clause in the tariff making the sum which may be exacted from the consumer depend on the value of the "*bâtisses*" into which the water is brought, applies only to the latter and to the land on which they are constructed, and does not comprise the other lands which are dependent on them. *Montreal Water Co.* v. *St. Henri School Commissioners*, 35 Que. S. C. 54.

Conveyance of water through private lands — Compensation — Special statute—Claim made after 20 years—Statute of Limitations—Interruption — Repairing water pipes—Fresh entry—Assignment of claim for compensation — Champerty. *Re Dyer and Town of Brampton*, 5 O. W. R. 668.

Improper construction — *Notice — Waiver—Condition precedent.*]—A contract for the construction and maintenance of a system of waterworks required them to be completed in a manner satisfactory to the corporation, and allowed the contractors thirty days after notice to put the works in satisfactory working order. On the expiration of the time for the completion of the works, the corporation served a protest upon the contractors, complaining in general terms of the insufficiency and unsatisfactory construction of the works, without specifying particular defects, but made use of the works

complained of for about nine years, when, without further notice, action was brought for the rescission of the contract and forfeiture of the works under conditions in the contract.—*Held*, that, after the long delay, when the contractors could not be replaced in their original position, the complaint must be deemed to have been waived by acceptance and use of the waterworks, and it would, under the circumstances, be inequitable to rescind the contract:—*Held*, further, that a notice specifying the particular defects to be remedied was a condition precedent to action, and that the protest in general terms was not a sufficient compliance therewith to place the contractors in default. *Richmond* v. *Lafontaine*, 20 C. L. T. 51, 30 S. C. R. 155.

Pipes on highways—By-law—Validity. *Peclet* v. *Marchand & Chartier*, 4 E. L. R. 65.

Rates — *By-law — Discrimination.*] — By 24 V. c. 56, s. 3 (C.), the city council of Hamilton was "empowered from time to time to establish by by-law a tariff of rents or rates for water supplied or ready to be supplied in the said city from the said waterworks:"—*Held*, affirming the judgment of the Court of Appeal in *Hamilton Distillery Co.* v. *Hamilton*, *Hamilton Brewing Association* v. *Hamilton*, 12 O. L. R. 75, that the rate for water supplied to any class of consumers must be an equal rate to all members of such class, and a by-law providing for a rate on certain manufacturers higher than that to be paid by others was illegal. *Attorney-General* v. *Toronto*, 23 S. C. R. 514, followed. *Hamilton* v. *Hamilton Distillery Co.*, *Hamilton* v. *Hamilton Brewing Association*, 38 S. C. R. 239.

Right of outsider to water supply—Contract — Easement — Discrimination. *Mackenzie* v. *Toronto*, 4 O. W. R. 457.

Right to construct and operate water-works system — *Exclusive privileges—Expropriation—M. C. 615a, 488a, 619, 616b, C. C. 407.*]—The acquired rights of an individual, who has the exclusive privilege of supplying water, by resolution of its council, within the territory of a municipal corporation, cannot, by a subsequent resolution, be gratuitously lost. Such subsequent resolution is equivalent to expropriation and a preliminary indemnity becomes payable to the grantee. *Paquin* v. *Auger* (1911), 17 R. de J. 277.

Sale of water meters — *Foreign company—Approval of city engineer—Rescission—R. S. N. S. c. 127.*]—Action for water meters sold to the city of Halifax. Plaintiff, a foreign corporation, had not registered as provided by c. 127 above:—*Held*, Act does not apply.—*Held*, further, that there were funds with which to pay and that meters are an extension or improvement within the terms of the by-law. The meters were delivered, inspected, approved of by the city engineer, and accepted by defendants. Plaintiff held entitled to recover. *Neptune* v. *Halifax*, 7 E. L. R. 2.

Special tax — *Submission to ratepayers —Debentures—Attacking by-law—Parties—Ratepayer—Corporation.*]—A by-law of a municipal council for the purchase of an aqueduct and a system of sewers should contain a clause imposing a special tax and be submitted to the vote of the ratepayers.—2. Such a by-law containing only a clause for the issue of debentures, not providing for the imposition of a special tax, and not submitted to the ratepayers, is void.—3. The nullity of such a by-law extends not only to the part which provides for the issue of debentures, but also to the other parts which provide for the purchase of the aqueduct and the system of sewers; the by-law is, therefore, void *in toto* as well as the contract of purchase which it authorises.—4. Such by-law may be attacked by any ratepayer of the municipality.—5. *Semble*, that the corporation cannot itself take proceedings in its own name to have the nullity of the by-law declared. *Gagnon* v. *Point-au-Pic*, 22 Que. S. C. 396.

Statutory contract — *Exclusive franchise—Condition of defeasance—Forfeiture of monopoly—Demurrer—Right of action by municipality—Rescission.*]—By the Quebec statute, 40 V. c. 68, Louis Molleur and others, now represented by the defendants, were substituted as sole owners of the waterworks of St. John's, in the place of the Waterworks Co. of St. John's, incorporated under C. S. C. 1859 c. 65, charged with all the obligations and responsibilities of said company, and, by the said Act, 40 V. c. 68, the new proprietors were granted the exclusive right and privilege of placing pipes or water conduits under the streets and squares of the town of St. John's (now the city of St. John's, the appellants), under certain other conditions and obligations in the last mentioned statute recited, and the monopoly created was, by s. 3, liable to be forfeited in case of neglect or refusal to discharge the obligations thereby imposed:—*Held*, that the contract existing between the parties, in virtue of the above recited statutes, was liable to rescission under the provisions of Art. 1065 of the Civil Code of Lower Canada, upon default in the specific performance by the defendants of the obligations thereby imposed, and that, upon proof of default in the specific performance of any of the said obligations, the municipal corporation were entitled to maintain an action in their corporate capacity, to have the exclusive right and privilege granted by the statute declared forfeited, surrendered, and annulled.—The judgment appealed from, 16 Que. K. B. 530, deciding that the action would lie only for breach of obligations expressly declared to involve forfeitures, was reversed, Davies, J., dissenting. *St. Jean* v. *Molleur*, 40 S. C. R. 629.

Supply to contractor — Action for price—Rate applicable — *Quantum meruit. Stratford* v. *Murphy*, 9 O. W. R. 283.

Water companies.] — Town corporation that passes a by-law ratified by the vote of the ratepayers, under statutory authority to that effect, to grant a water company power to lay an aqueduct and supply water for consumption and protection against fire to the inhabitants and enters into a contract with the company to carry out the by-law, is thereby relieved from liability for damages in case of destruction of property by fire through an in-

sufficient or defective supply of water. The company is liable in damages, recoverable at the suit of the owner, for the destruction of property by fire, when water, in the quantity and under the pressure agreed upon, is not supplied and the destruction or loss is due to this breach of contract. *Belanger* v. *St. Louis & Montreal Water & Power Co.* (1909), 36 Que. S. C. 31.

Water company — *Ratepayer.*] — A municipal corporation which, under the provisions of the Municipal Code, grants to a company the privilege, during a term of years, of furnishing water to the ratepayers, who are to pay for the water according to the tariff established as soon as the company shall offer to furnish it to them, is not liable by reason of the fact that the company will not furnish to one of the ratepayers the quantity of water which he requires. *Wilshire* v. *Milc-end*, 8 Que. Q. B. 479.

Water rates — *Power to discriminate.*] —A water rate imposed by a municipal authority must be an equal rate to all consumers, unless express legislative authority has been given to discriminate. *Atty.-Gen. of Can.* v. *City of Toronto*, 23 S. C. R. 514, followed. Judgment of Street, J., 10 O. L. R. 280, affirmed. *Hamilton Distillery Co.* v. *City of Hamilton, Hamilton Brewing Association* v. *City of Hamilton*, 12 O. L. R. 75, 7 O. W. R. 655.

Water supply — *Meters — Removal by owner of premises—Order to restrain municipal authorities from replacing meters.*]— Appeal from a judgment of Graham, E.J., 9 E. L. R. 189, refusing to continue a restraining order to restrain defendant from turning the water off from plaintiff's premises in consequence of his refusal to allow a water meter removed by him to be replaced. Appeal dismissed with costs. *Dennis* v. *Halifax* (1910), 9 E. L. R. 360, N. S. R. .

Water supply — Use by contractors — Implied license—By-law—Rates—Damages —Penalty. *Guelph* v. *Guelph Paving Co.*, 2 O. W. R. 587.

Waterworks — Evidence — Statutory rights—Revocation. *St. Johns* v. *Malleur, Malleur* v. *St. Johns*, 4 E. L. R. 175.

Waterworks — Injunction granted restraining defendants from constructing or operating a rival system of waterworks within certain area, and, for removal of water pipes laid by them within that area and for $86 damages. *Verrett* v. *Aqueduc de la Jeune-Lorette* (1909), 42 S. C. R. 156.

See CONTRACT—DISTRESS.

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33. MISCELLANEOUS CASES.

Abattoir — Permit for — Action by ratepayer to declare permit void—Special injury. *Emard* v. *Village du Boulevard St. Paul*, 3 E. L. R. 89.

Act of Incorporation — *Repeal—General Act — Constitution of corporation — Municipal council.*]—By an Act of the Legislature passed in the year 1875, c. 47, the "inhabitants of the town of T.," within the limits thereby defined, were constituted "a body corporate and politic by the name of the town of T." In the year 1888 a general Act was passed in relation to incorporated towns (c. 1) whereby previous Acts of incorporation were repealed and the towns incorporated under such Acts, including the town of T., were made subject to the provisions of the Act of 1888.—*Held*, that, under a proper construction of the terms of the original charters and the general Act of 1888, the inhabitants of each of the incorporated towns, including those incorporated under the repealed Acts, as well as those subsequently incorporated under the Act of 1888, were created a body corporate under the name of the town within the limits of which they respectively resided. By s. 5 of the repealing Act in relation to the town of T., it was enacted that "the corporation shall consist of a mayor and six councillors." —*Held*, that, even if this section had not been repealed by the Act of 1888, it could not, in the face of s. 1 of the Act of 1875, incorporating "the inhabitants of the town," be held to mean that the corporation at large consisted merely of the mayor and the six councillors.—*Held*, that the inhabitants of T. constituted the corporation at large, and that the town council was only a portion of it. *Regina ex rel. Lawrence* v. *Patterson*, 33 N. S. R. 425.

Action to set aside a proces-verbal —*Against whom should it be directed?*]— It is against the municipal corporation which homologates it that an action to have a *proces-verbal* set aside should be directed, although it may be sometimes convenient to call into the case those upon the petition of whom the proceedings were taken. *Pelland* v. *Dupont*, (1909), 38 Que. S. C. 143.

Action against corporation — *Corporate name.*] — A municipal corporation may be sued under the name which the statute establishing it gives it, even if that is not its corporate name. *Milton* v. *Parish of Coté St. Paul*, 6 Que. P. R. 446.

Action against corporation—*Deposit —Condition precedent—Husband and wife— Parties to action—Injuries to wife.*]—The deposit of $10 required from persons, not ratepayers, who sue a municipality for damages caused by the bad state of the pavements, is required only as security for costs; it is not a condition precedent to the right of action, and may be made in the course of the action.—2. There is nothing improper in a wife, common as to property, being joined as a party along with her husband claiming, as chief of the community, compensation from a municipality, one part of which is based upon personal injuries suffered by her. *Prevost* v. *Ahuntsic*, 6 Que. P. R. 17.

Action against corporation—*Deposit —Default — Leave to make.*]—A plaintiff who did not, at the time of the issue of a writ of summons, make the deposit required by Art. 793, C. M., in an action against a municipal corporation, may obtain permission to make such deposit at a later stage. *Prevost* v. *Ahuntsic*, 5 Que. P. R. 171.

Action against for damages — *Removing part of approach to private residence — Costs — Undertaking.*]—Plaintiff

built an unauthorised approach to his residence and the municipal council had that part which was in the street removed:—*Held*, that plaintiff was not entitled to damages for such removal. Appeal dismissed. Judgment at trial affirmed. *McLeod* v. *Aurora* (1909), 14 O. W. R. 610.

Action by non-ratepayer — *Deposit—Default—Stay of proceedings.*]—Article 795 of the Municipal Code, in exacting a deposit of $10 from a non-ratepayer who begins an action against a municipal corporation, imposes a prejudicial obligation, the non-performance of which is ground for a stay of proceedings or a dilatory exception. *Lalonge dit Gascon* v. *St. Vincent de Paul*, 27 Que. S. C. 218.

Annexation by city of portions of township—*Arbitration to determine reciprocal rights and liabilities—Debentures issued for bridges—Are bridges "property and assets" within meaning of Con. Mun. Act (1903)*, s. 58?]—Ottawa annexed certain portions of the township of Nepean. To determine the reciprocal rights and liabilities of the two municipalities, a reference was had to arbitration. The arbitrators found $1,642.91 to be due Nepean from Ottawa in respect of debentures issued by Nepean, for construction of bridges within annexed territory, as a debt coming within Con. Municipal Act (1903), s. 58, and they further found that a like sum was due Ottawa from Nepean as the value of the interest the annexed territory had in said bridges at the time of the annexation, as property and assets of the township. The arbitrators set off one against the other. Nepean moved for an order reducing the amount found due from Nepean to Ottawa. The only question was whether bridges erected by Nepean on original road allowances fell within the words "property and assets," as used in above section.—Latchford J., *held* (16 O. W. R. 969, 2 O. W. N. 49), that they did, and dismissed the appeal with costs.— Court of Appeal *held*, that they did not, and reversed above judgment with costs throughout, and the sum of $75 allowed to the city on account of its costs before the arbitrators was struck out. *Ottawa* v. *Nepean* (1910), 17 O. W. R. 1051, 2 O. W. N. 480.

Annexation of part of rural municipality to city — *Statute — Existing rights—License—Certificate.*]—The statute annexing a part of the parish of St. Laurent to the city of Montreal has not affected the rights or advantages conferred by resolution or by-law of the municipality of St. Laurent upon any person or company; the collector of revenue must then approve a certificate of license granted by the parish municipality before the annexation of that part of the parish in which the party demanding the certificate dwells. *Cérat* v. *Boisseau*, 8 Que. P. R. 343.

Annexation of town and city—Petition for submission of by-law—Investigation as to number and qualification of petitioners—Delegation—Withdrawal of names—Addition of—*Mandamus*—Time—Statute—Directory or imperative. *Re McLeod & Town of East Toronto*, 4 O. W. R. 26, 220.

Annexation of village lands to township — *County by-law — Detachment of lands — Petition—Description—Schedules.*]—Under s. 18 of the Municipal Act, 1903, 3 Edw. VII. c. 19 (O.), which provides for the detachment of a special area in a village, and for its annexation to an adjoining township, it is not essential that the whole area sought to be detached should be set out in one petition, but there may be separate petitions setting out distinctive portions, nor is it essential that the area so detached, and the metes and bounds of the new limits, should be set out in the by-law, but they may be set out in schedules attached thereto. *In re Southampton & Bruce*, 24 C. L. T. 353, 8 O. L. R. 106, 3 O. W. R. 729, 4 O. W. R. 341.

Audit of accounts — *Appointment of auditor —Payment — Premature action—Attorney-General — Tariff.*]—A person appointed by the provincial auditor, pursuant to the provisions of the Act respecting the audit of municipal accounts, R. S. O. 1897, c. 228, to audit the accounts of a municipality, has no right of action against the municipality for his fees and expenses until three months after the amount thereof has been specifically determined by the provincial auditor with the approval of the Attorney-General or other Minister, as required by s. 16 of the Act. The approval by the Attorney-General of a tariff according to which the fees and expenses are made up and allowed by the provincial auditor, is not sufficient. Judgment of Boyd, C., 2 O. W. R. 977, reversed. *Williamson* v. *Elizabethtown*, 24 C. L. T. 313, 8 O. L. R. 181, 3 O. W. R. 742.

Commission to investigate misconduct of municipal officer — *Powers of commissioner — Collecting evidence—Hearing in camera — 3 Edw. VII. c. 19, s. 324 (O.) — Jurisdiction of High Court.*]—A commissioner appointed by resolution of the council of a municipality, under s. 324 of the Municipal Act, 3 Edw. VII. c. 19 (O.), to investigate alleged charges of breach of trust or misconduct on the part of a municipal official, has the absolute power of regulating the proceedings of his own tribunal, so long as he keeps within his jurisdiction. He is not to be under the supervision of any court as to his manner of getting at such legal and permissible evidence as he may deem requisite for a full investigation.—It is within his powers, though it may not be discreet, to confer with possible witnesses with a *bona fide* view of ascertaining what they know, and whether it will be worth while to have them subpœnaed. So long as *ex parte* affidavits are not procured from such persons, he may take such steps as are permissible in the case of solicitors preparing for trial.—Such a commissioner is not *pro hac vice* a judicial person—he decides nothing affecting the legal rights of the plaintiff, and is not within the ambit of judicial, quasi-judicial, or administrative officers who become disqualified by interest or bias.—*Semble*, that even in a plain case of unfair dealing on the part of such a commissioner, the application for redress should be directed not to the High Court, but to the appointing power, namely, the municipal council.—In an inquiry into matters of public interest, where misconduct is alleged, it is expedient to have

the investigation conducted as in open Court, unless in cases where the declarations are of a nature unfit for publication. In no case should evidence be taken behind the back of the person chiefly interested. *Chambers* v. *Winchester*, 10 O. W. R. 989, 15 O. L. R. 316.

County council — *Appeal from decision of local council — Previous decision — Res judicata — Procès-verbal — Description of works — Inaccuracies — Functions of councillors — Administrative or judicial acts — Corruption.*] — Rules of law affecting the doctrine of *res judicata* are not applicable to such decisions of municipal councils as are only acts of administration. Therefore, a decision of a council to a particular effect does not afford a ground which may be invoked in an action to set aside a second decision to the opposite effect.—In a *procès-verbal* of works to be done, a rigorous precision of language in the description is not required, and inaccuracies which more or less mar its clearness are not grounds of nullity. The council may always modify the text so as to make it sufficiently intelligible.—The members of a county council, sitting in appeal from a decision of a local council, are not required to observe towards the parties to the appeal the reserved attitude of magistrates or arbitrators. They may properly act towards the parties as members of the legislature act towards those who elect them. Therefore, several glasses of drink supplied before the sitting and a dinner at 25 cents a head eaten afterwards, at the expense of the parties interested, by the members of the county council, could not be regarded as corruption affording ground for setting aside the decision. *Corp. of the Parish of St. Christopher* v. *Corp. of the County of Arthabaska*, 29 Que. S. C. 493.

County council — *Demand for creation of village — Public notice — Discretion — Report of superintendent.*]—A county council to which a demand is made for the setting apart of a certain territory as a village is not obliged to give public notice of taking the demand into consideration. It has no discretion in the matter, and must name a special superintendent and direct him to make a report upon the demand. *Gravel* v. *County of Lake of St. John*, 33 Que. S. C. 527.

County council — *Nature of its functions — Action to set aside its decision — Who must be made parties to it?—Inscription in law — C. P. 191, 31, C. 160, 698, 706, 926, 978, 932.*]—A county council sitting in appeal from a decision of the parish council does so as a judicial appellate tribunal, and cannot be called to account for its decision, unless *ultra vires* or vitiable for gross irregularities. In an appeal brought from the decision of a county council, the petitioner before said council is rightly made a respondent, he being an interested party. *Forget* v. *Letendre & Corp. Du Comté d'Yamaska* (1909), 10 Que. P. R. 309.

Deed — *Petition for — Possession of land—Jurisdiction of town council—Seal of corporation—Presumption of authority—Recitals — Conditions precedent — Statutes — "When."*]—H. by petition applied to the town council of Sydney for a deed of a lot of land, alleging possession for upwards of 30 years and paying the statutory fee. He obtained a deed of the land, under the seal of the town corporation, and having the signatures of the mayor and town clerk. The town corporation could only grant and make such a deed by virtue of a special statute, which contemplated a possession of 20 years by the grantee. When H. presented his petition to the town council he had neither actual nor constructive possession, although the petition contained a representation that he had 38 years of possession:—*Held*, that, on face of his petition, H. did not give the town council jurisdiction to give this deed. The presumption relating to an instrument which has the corporate seal attached, and the signatures of the proper officers, that there was authority to affix the seal, may be rebutted. In order to rebut this presumption, the defendant called the town clerk, who could not produce any resolution authorising the deed, and a majority of the members of the committee of the council, whose duty it would be to report upon such a transaction, and who testified that the granting of the deed never came before him:—*Held*, that the presumption of authority to affix the seal had been disproved.—There were no recitals in the deed.—*Held*, that the plaintiff, in searching the title before purchasing, was bound to inquire whether the conditions precedent to the exercise of the power by the council to grant to H. had been performed. The expression "when" in the statute construed. *Hart* v. *Halifax*, 35 N. S. R. 1, followed. *Cossitt* v. *Cusack*, 40 N. S. R. 446.

Demand for peremptory writ of *mandamus* to compel a mayor to sign a draft deed of retrocession of certain immovables to plaintiff, who alleges that he has become entitled to such retrocession, and that the municipal council has adopted a resolution directing the mayor to sign such draft, is not a matter relating to a municipal corporation or office within meaning of Art. 1090 C. P., and an appeal in such a case will lie to Court of King's Bench. *Municipal Homes & Investment Cor.* v. *Legare*, 16 R. de J. 42.

Dividing a municipality in two — *An arrangement which frees those bound from charges and work on highways—Works and charges in the territory of each of the new municipalities — Existing procès-verbal —Local works and county — Effect of the abandoning of the work of the county on the division of a municipality.*]—*Held*, a provision in a statute to divide a municipality into two new ones, that the contributories are discharged from works on the highway and other municipal charges of the municipality from which they are detached, the *procès-verbal* to the contrary notwithstanding, means the works on the highway and the charges which as a result of the separation ought to be charged on each municipality in such a way as to relieve the other, the contributories are not the less bound as to the works on the highways within the limits of their new municipality, by virtue of the *procès-verbal* existing outside of their division. Hence, each new municipality has the power to amend these *procès-verbal* and to make by-laws dealing with highways in its territory; this is the sense of the 27 V. c. 9, ss. 3 and 4. A statute making a distinc-

tion between local works and county works, defining the latter as "works, etc., made and maintained at the expense of one or more counties, or the inhabitants of more than one local municipality within a county," has not the effect of converting local works described by a *procès-verbal* into a county work, by the mere fact that there is a division of the local municipality where they are situated into two. *Cote* v. *St. Cecile*, 18 Que. K. B. 211.

Ferry — *Powers of municipality — Appliances of ferry — Sale — Duty to purchaser — Liability.*]—The authority conferred on a municipality to make by-laws for establishing, licensing, and regulating a ferry, authorises it to provide a boat and other appliances for operating the same. And where a ferry so established, with the boat and appliances, is sold at public auction by the municipality, they are bound to put the vendee in possession, and are liable in an action of damages for failure to do so, and to an action to recover back the purchase money. *Currey* v. *Victoria*, 35 N. B. R. 695.

Fines — *Conviction — Fine payable to officer.*]—When it is provided by a statute that a fine shall belong to a municipal corporation, a conviction which condemns an offender to pay such a fine to an officer of the corporation, and not to the corporation itself, is void and will be quashed upon *certiorari*. *Wilcox* v. *Montreal*, 23 Que. S. C. 38.

Fire brigade — Defective appliances — Negligence. *Montreal* v. *Enright*, 3 E. L. R. 129.

Formation of village municipality — *Petition for — Withdrawal of signatures — Jurisdiction.*]—After two-thirds of the residents of a locality have signed a petition demanding the formation of their territory into a village municipality, the county council is sufficiently seised of such petition, and the fact that certain of the signers withdraw their signatures so that there no longer remain two-thirds of the residents upon the petition, does not take away the jurisdiction of the council; and the proceedings which it subsequently takes are not in excess of its jurisdiction. Judgment in 20 Que. S. C. 329, reversed. *Martin* v. *Arthabaska*, 21 Que. S. C. 119.

Hospital maintenance — Liability for negligence of officers and servants employed —Death of patient — Nonfeasance — Public Health Act — Pleading — Statement of claim — Motion to strike out as disclosing no reasonable cause of action — Rule 261 — Summary dismissal of action. *Butler* v. *Toronto*, 10 O. W. R. 876.

Incorporation of city — *Separation from county — Agreement between county and city — Adjustment of assets and liabilities — County had large surplus on hand — Not taken into consideration in adjustment — Right of city to share in the surplus — Mun. Act (Ont.) 1903, s. 408.*]—City of Woodstock brought action to recover part of a surplus fund, amounting to $37,000, standing to the credit of defendant, county of Oxford, at the time of the separation of said city from said county. There had been an adjustment of assets and liabilities between the municipalities, but this surplus fund had not been taken into consideration nor dealt with in any way. Plaintiff city alleged that in virtue of their incorporation Act and of the Municipal Act, they were entitled to receive some part of the surplus in question.— At trial Mulock, C.J.Ex.D., *held*, that under s. 408 of the Municipal Act, the surplus formed part of the general fund of the county and was at the disposal of the county, because not otherwise appropriated; and that the Municipal Act did not entitle a minor municipality to maintain an action against the county to recover a share of the county moneys, and dismissed the action.—Court of Appeal *held* that in no case could the surplus have been dealt with, unless, perhaps, by consent of all the municipalities, and from no point of view did it appear that plaintiff city was entitled to share in the fund, and dismissed the appeal with costs. Garrow and Maclaren, J.J.A., dissenting. *Woodstock* v. *Oxford* (1910) 17 O. W. R. 176, 2 O. W. N. 134, O. L. R.

Injury to buildings — *Use of explosives — Works authorised by statute.*]—A municipal corporation are liable for damage to buildings from vibration caused by the use of explosives in the prosecution by the corporation of work under legislative authority, however carefully used. *Murdock* v. *Westmount*; 33 Que. S. C. 243, 4 E. L. R. 469.

Injury to buildings by measures taken by servants of corporation — *Vis major — Fire department.*]—Measures taken by officers and servants of a municipal corporation, in accordance with the law, for extinguishing and preventing the spread of fires, do not render the corporation liable for injury thereby to the property burnt or neighbouring property. They are regarded as the necessary result of *vis major*. *Valières* v. *Montreal*, 33 Que. S. C. 250.

Inquiry into municipal election — *Powers of council — "Good government of the municipality" — Ratepayer — Injunction — Conduct of inquiry — Evidence — Witnesses — Ballot papers.*]—*Held*, that the council of a city had power under s. 324 (1) of the Municipal Act, 1903, to order an inquiry by a County Court Judge into an election for members of the council and board of education, at which it was alleged that corrupt practices had prevailed; the election being a "matter connected with the good government of the municipality," within the meaning of the enactment:—*Held*, also, that the High Court could not, in an action by a ratepayer for an injunction, interfere with the conduct of the inquiry by the Judge in regard to the admission or rejection of evidence, the examination of ballot papers, compelling witnesses to answer incriminating questions, etc. *Lane* v. *Toronto*, 24 C. L. T. 228, 7 O. L. R. 423, 3 O. W. R. 269.

Liability for arrest — *Warrant of mayor — Execution by special constables.*]—The execution of a warrant of arrest, signed by the mayor of a municipality, and intrusted to special constables of the municipality, does not make the municipal corporation re-

sponsible for the consequences of the arrest; the constables in making the arrest acting only in the execution of the functions for which they are employed. *Milton* v. *Municipality of Coté St, Paul*, 24 Que. S. C. 541.

Liability for flooding of lands—Culvert — Negligence — Owner — Evidence. *Jephson* v. *Niagara Falls*, 3 O. W. R. 938.

Maintenance of lunatics — *Contribution by municipality — Collector of provincial revenue — Action — Statutory formalities regarding confinement of lunatics.*]— The remedy of the collector of provincial revenue against municipal corporations for the recovery of what they should contribute to the maintenance of lunatics (R. S. Q., Art. 3225) is subject to the strict observance of the formalities prescribed for the confinement of lunatics (R. S. Q. Art 3195 *et seq.*) Therefore, an action against a county corporation for the recovery of a contribution to the maintenance of lunatics confined, without the production of certificates following forms E. and I. (R. S. Q. Art. 3195*a*) of the mayor or a councillor and of the secretary-treasurer of any municipality within the territory of the county, should be dismissed. *Fortier* v. *Quebec*, 33 Que. S. C. 97.

Misnomer — *Amendment — Penalty — Affidavit.*]—Where a corporation whose true name was "La corporation de la paroisse de St. Columban de Sillery" commenced an action under the name of "La corporation de la municipalité de St. Columban de Sillery," its action was dismissed upon exception to the form, though the writ might have been amended had an application been made for leave to do so. A municipal corporation which sues for a penalty incurred by the infraction of one of its by-laws, ought to furnish the affidavit required by Art. 5716 of the consolidated statutes of Quebec. *Corp. de Sillery* v. *McCone*, 26 Que. S. C. 464.

Municipal election — Voting on by-law —Unsafe condition of polling place—Injury to voter—Liability of corporation — Negligence—Winnipeg charter, R. S. M. 1902 c. 77—Deputy returning officer—Appointment —Fixing polling places—Statutory agency— *Respondeat superior. Garbutt* v. *Winnipeg*, 9 W. L. R. 550.

Negligence — *Explosion — Injury to property — Failure to observe by-laws — Enforcement of by-law optional.*]—In an action against the corporation of the city of Montreal for damages for the loss of a horse, caused by an explosion, an allegation of negligence and fault on the part of the defendants' employees in not causing the by-laws in force to be observed, is sufficient to shew a right of action an inscription in law on the part of the defendants, alleging that the enforcement of the by-law in question was optional, will be dismissed. *Lauzon* v. *Montreal*, 10 Que. P. R. 49.

Notice — *City charter.*] — The requirement of notice under s. 391 of the charter of the city of Montreal (62 V. c. 58) applies only to by-laws enacted under s. 12 of the charter. *Wilder* v. *Montreal*, 26 Que. S. C. 504.

Operation of railway — *Use of streets — By-law or resolution.*] — By the Nova Scotia statute 63 V. c. 176, the appellant company were granted powers as to the use and crossing of certain streets in the town, subject to such regulations as the town council might from time to time see fit to make to secure the safety of persons and property: —*Held*, that such regulations could only be made by by-law, and that the by-law making such regulations would be subject to the provisions of s. 264 of the Towns Incorporation Act, R. S. N. S. 1900, c. 71. *Liverpool & Milton Ry. Co.* v. *Liverpool*, 23 C. L. T. 180, 33 S. C. R. 180.

Parks — *Establishment of — By-law — Dedication of land held by corporation in fee — Subsequent leases for building purposes — Injunction—Private plaintiff—Interest.*]—A by-law was passed by the defendant corporation in 1880 purporting to establish a park on the "Island," which was granted to the corporation by the Crown in fee in 1867, and certain lots were designated therein which, "with such other lands as may hereafter be obtained from lessees or otherwise," were to form a park. Other lands were in 1887 directed to be taken and expropriated in order to enlarge the "Island Park," but no general plan or scheme for park improvements was considered till 1901, when a special committee was appointed to elaborate a plan. The defendant corporation from 1880 till 1901 acted on the belief that there was power to deal with the land designated as park land, by leasing it, imposing and collecting rent and taxes, improving on the laying out of new streets on registered plans, and otherwise exercising the control of owners. The park scheme was not abandoned, but the details and the area were modified from time to time by successive councils:—*Held*, that the corporation had not exceeded their powers in so dealing with the land designated. The doctrine of irrevocable dedication is not applicable to the case of a park which is established by by-law out of land belonging to the corporation as owners in fee. The fact of corporate action being embodied in a by-law implies its revocability:—*Held*, also, that S., who was joined as a plaintiff, claiming under a lease made prior to the park scheme, and renewed in 1895, after registration of plans made in 1883 and 1890, which shewed that the corporation had sanctioned the subdivision of the lands in question into building lots, had not such an interest, by reason of a special grievance, as would entitle her to have the corporation restrained from granting to the defendant L. a building lease of part of the lands. *Attorney-General* v. *Toronto*, 23 C. L. T. 284, 6 O. L. R. 159, 2 O. W. R. 539.

Pauper — *Support — R. S. N. S. (1909), c. 50, s. 25—Disability of father and grandfather.*] — Action against father and grandfather to recover moneys paid out by plaintiff for maintenance of M. There being no direction as to manner in which M. is to be relieved and no refusal, action dismissed. The above statute does not apply to past maintenance. *Overseers* v. *Stevens*, 7 E. L. R. 563.

Payment for sheep killed by dogs — *Sheep Protection Act, s. 18—Municipal Act,*

1903, s. 537.] — Plaintiff's sheep had been killed by dogs. Defendants had their inspector appointed by by-law under s. 537 Consolidated Municipal Act, to estimate value of these sheep:—*Held*, that there was no appeal from his valuation, and that under s. 18 of Sheep Protection Act, it was discretionary on defendants to pay two-thirds of that value or a smaller sum. *Craig* v. *Malahide, Liddle* v. *Malahide*, 13 O. W. R. 686.

Payment of money not owing—*Right to repayment — Inspector of highways — Work not authorised by council.*] — 1. A municipal corporation which pays a sum that it does not owe, has the right to compel repayment, even if the members of its council, who have ordered the payment of it, knew that it was not owing.—2. An inspector of highways who, without having been authorised thereto by the council, has caused work to be done which the ratepayers have neglected to do, has not the right to make the corporation pay the cost of it. *Corp. de Ste. Foye* v. *Labergé*, 35 Que. S. C. 373.

Penal laws —*Strict construction — Meaning of the expression "legally" in a penal clause — Informalities in municipal proceedings.*]—Laws involving penal consequences should be strictly interpreted and applied only to meet the cases for which they were passed. Disqualification which might be incurred by the members of a municipal corporation "who authorise the payment of money of the city exceeding the amount previously voted and legally placed at the disposal of the council," is not incurred by the members of the finance committee of such council who authorise an unforeseen necessary expenditure to give effect to a resolution of the council, when there are at the latter's disposition, moneys available for similar expenditures and sufficient to cover the amount voted in the present instance.—An informality in procedure which might have invalidated the voting of money or even the resolution placing the fund is question at the disposal of the council, but which does not entail absolute nullity and causes no real prejudice, is not included in the expression "legally placed at the disposal" etc. contained in the clause above cited. It follows that the adoption of the resolution by the council, the absence of the controller's certificate establishing the existence of the fund, the omission of the amount to be spent, are not reasons which would authorise the application of the disqualification clause. *Lapointe* v. *Larin*, 19 Que. K. B. 146. (Reversed in the Supreme Court, February, 1910. Leave to appeal to the Privy Council granted. Appeal pending.)

Personal injuries — *Notice of action—Pleading.*]—In an action for the recovery of damages against the corporation of a town, the absence of previous notice required by the charter of such corporation must be specially pleaded. *Sullivan* v. *Magog*, 18 Que. S. C. 107.

Procès-verbal — *Obscure and unintelligible clauses—Action to annul—Petition to quash.*]—An action before the Superior Court will not lie to annul a *procès-verbal* on the ground that clauses in it, relating to some of the work to be performed, are drawn in obscure or even unintelligible language. The proper course for the parties interested is to have the instrument amended and its meaning made clear in the manner provided by law.—Actions to annul and petitions to quash are different remedies and while the matter may be resorted to, within the prescribed delay, to have informal proceedings set aside, the former will not avail for the purpose, after such delay has expired, and in a case in which the document impeached does not impose an illegal burden upon the plaintiff. *Cinet & St. Louis de Gonzague* (1909), 19 Que. K. B. 222.

Procès-verbal — *Report of special superintendent—Time for—Costs.*]—The period within which the special superintendent charged with making a *procès-verbal* must make his report to the council, pursuant to Art. 794 of the Municipal Code, is not fixed under penalty of nullity. It may be given effect to, according to the provisions of the Code, by a *procès-verbal* deposited with a report a day or two after the time fixed, unless some real injustice will result from it; and the special superintendent has the right to recover the costs of it from the corporation whose council has appointed him. *Demers* v. *St. Jean*, 28 Que. S. C. 371.

Public bath — *Drowning of bather — Negligence—Liability.*]—Where a bather was drowned in a public bath kept by a city corporation and under their control, the circumstances that at the time (a) the guardian was not in a fit state of health, (b) that he was not properly clad, and (c) that the life-saving apparatus was inadequate, are not sufficient reasons for holding the city at fault and liable, in the absence of evidence that they were the cause of or contributed to the actual drowning. *Montreal* v. *Duplessis*, 15 Que. K. B. 548.

Public dock — *Invitation to use — Collapse.*]—Under the authority conferred by s. 562 of the Municipal Act, R. S. O. c. 223, the defendants, a municipal corporation, built a dock on the Detroit river, and passed a by-law providing for the collection of wharfage fees from those using the dock, one item of the tariff of fees being ten cents per thousand for loading and unloading bricks; a period of forty-eight hours was allowed for removing freight placed on the dock, and fifty per cent. was to be added if that period was exceeded. The plaintiff unloaded 34,000 bricks from a vessel upon a dock, whereupon the dock, being by reason of some defect incapable of sustaining such a weight, collapsed, and the greater part of the brick were sunk and lost to the plaintiff: —*Held*, that the defendants, having placed the dock in such a position as invited any vessel owner desiring to unload a cargo to do so, if prepared to pay the dock charges, which the statute gave the defendants authority to levy, and having passed a by-law establishing tolls for the use of it, thereby invited the public to make use of it for such purposes as public docks are ordinarily used for, and, if they wished to limit the use of it, they should have made that known in some public way; and, the evidence shewing that the mode adopted in this case of unloading and piling the bricks was

that usually adopted at public docks, the defendants were liable for the loss. *Thompson* v. *Sandwich*, 21 C. L. T. 206, 1 O. L. R. 407.

Public works — *Procès-verbal — Ratepayer—Mandamus.*]—A municipal corporation, in an action by a ratepayer regularly brought, will be ordered to construct works, fences, &c., prescribed by a *procès-verbal*, and such ratepayer is not obliged to proceed against each one of the owners or occupants of the lands liable for such works; but in default of the corporation performing such works within a certain time, the Court will authorise such ratepayer to do them or cause them to be done at the expense of the corporation. *Rousseau* v. *Blandford*, 21 Que. S. C. 464.

Right of appeal to the county council from the decisions of the local council — *Refusal of a request to place roads under the charge of the corporation—Case where the county council may exercise the powers of the local council—Enquiry before the county council—By-law setting forth ultra petita, other requests.*]—There is an appeal to the county council from the decision of the local council rejecting a petition to place the roads under the control of the council of the parish. The county council seized by way of appeal of the above mentioned request, may if the majority of the members of the local council have a personal interest in the question, exercise all the powers of this council which appertain to it, Art. 136 C. M. A county council that adopts, in such a case, a by-law to put the roads under the control of the municipality in the manner provided in Art. 535 C. M., exercises administrative functions and is not bound to make an inquiry touching the facts if it is sufficiently informed by the knowledge of its members. A by-law providing that the roads of the municipality shall be under the immediate control and charge of corporation, following the provisions of Art. 535 C. M., is sufficiently in accord with a prayer of those interested, "to put all the roads under the control of the parish council for all the works that are to be done in the future for the good maintenance of the said roads." It can not be set aside under the pretext that it provides for what was not demanded. *St. Charles* v. *Pontcuf*, 18 Que. K. B. 380.

Rights of telephone company — *Use of municipal bridge—Jurisdiction of Court based on damages—Railway commission — 45 V. (Dominion) c. 95—R. S. C. 1906, c. 37, s. 248.*]—Latchford, J., refused to make a declaration that a telephone company had not the right to erect telephone poles upon a bridge built by a municipality, or grant a mandatory injunction commanding the telephone company to remove its poles from the bridge, as no actual damage was proved to have been suffered, which was necessary to sustain any such actions, and as R. S. C. 1906, c. 37, s. 248, did not apply to existing telephone lines:—*Dicta*, the municipality, however, have the right under R. S. C. 1906, c. 37, s. 248, s.-s. 9, to apply to the Board of Railway Commissioners to have the poles removed. *Haldimand* v. *Bell Telephone Co.* (1911), 19 O. W. R. 535, 2 O. W. N. 1154.

Sale of corporate property — *Committee of council—Authority to sell—Ratification.*]—A committee of a municipal council cannot, unless authorised by the council, sell corporate property, and, if they do, an action lies against them by the corporation for any loss incurred thereby.—Such illegal sale cannot be ratified by resolution of the council carried by the votes of the members of the committee. *New Glasgow* v. *Brown*, 39 S. C. R. 586.

Sale of lands of corporation to other than the highest bidder — *Reasons actuating aldermen — Good faith.*]—Where the action of a municipal corporation in selling real estate of the corporation to a person other than the highest bidder is called in question:—*Held*, that it is sufficient if the Court find (1) that the council acted in perfect good faith, and (2) that they had reasons before them which they might reasonably have considered good and sufficient to justify their action. *Phillips* v. *Belleville*, 11 O. L. R. 256, 7 O. W. R. 49.

Secretary-treasurer — *Account—Payment for services—Absence of authorisation—Resolutions of council—Limitation of actions — Public officer — Rule 536, J. O.—Settled accounts—Audit — Counterclaim — Interest—Costs.*]—In an action for an account against the secretary-treasurer of the plaintiff municipality, the defendant in accounting was credited with $160 paid out to himself for services in collecting taxes from Doukhobors:—*Held*, that this payment was not authorised by virtue of resolutions of the plaintiff's council authorising the defendant to collect all taxes and "to proceed at once to collect from Doukhobors," and "that all the expenses of the council in the conduct of the Doukhobors be paid," nor otherwise authorised.—The defendant set up that he was protected by Rule 536 of the Judicature Ordinance, this action not having been brought within six months after the cause of action arose.—*Held*, that the Rule refers to an action for some act that has been committed in pursuance of the defendant's duty as a public officer, and does not apply in this case.—*Held*, also, that the accounts were not settled between the plaintiffs and defendant; the auditing was not done by or on behalf of the plaintiffs nor adopted by them.—*Held*, also, that the defendant was not entitled to interest on his counterclaim.—*Held*, also, that the defendant should pay the costs of the action, though the balance found in favour of the plaintiff was very small. *Local Improvement District 16 D. 2* v. *Ferrie* (1910), 14 W. L. R. 222.

Snow fences — *By-law — Conditional undertaking by municipality to pay for fences —Compulsory arbitration—Municipal Act.*]—The defendants' council passed a by-law enacting "that where the road is liable to be blocked with snow in winter, and where in the opinion of the council such drifts would be prevented by the removal of any . . . fence and replacing the same by wire or other fence, the council may order the removal of such fence . . . and in the removal of such fence or fences by the owners and the erection of such wire or other fences as the council shall direct, the parties erecting such wire or other fences shall be paid out of the

general funds of the municipality a sum not exceeding, etc. The plaintiff, before erecting certain wire fencing, submitted his contract for it to the council through A., and at a session of the council, and in the presence of the township clerk and several councillors, the reeve expressed to A. the opinion and order of the council that the plaintiff's existing fence should be removed, and its direction for or approval of the erection of the proposed wire fence; and A. communicated this order and direction to the plaintiff, and thereupon the plaintiff removed his existing fence and had the wire fencing in question erected:—*Held*, that the defendants were liable to pay for the wire fencing. The by-law was a conditional undertaking by them to pay, and the plaintiff had fulfilled the required conditions.—By the Act respecting Snow Fences, R. S. O. 1897 c. 240, s. 1, "If the council and the owner cannot agree in respect to compensation to be paid by the council, then the same shall be settled by arbitration in the manner provided in the Municipal Act, and the award so made shall be binding upon all parties:"—*Semble*, that this did not preclude the jurisdiction of the Court, where, as here, the parties were not merely unable to agree as to the amount of compensation, but the municipal corporation wholly repudiated liability. *Brohm* v. *Somerville*, 11 O. L. R. 588, 7 O. W. R. 721.

Special verbal notice given by telephone.]—The notice required by the third paragraph of article 397 M. C. may be given by telephone. In any event, when the notice has been given in this manner and the person notified has acquiesced thereto by performing the work which was the subject of the notice, he cannot complain, under article 16 M. C., of the informality of the notice unless he establishes that he thereby suffered a real prejudice. *Begin* v. *Crawford* (1911), 39 Que S. C. 539.

Subdivision — *Property subject to partition.*]—The property the division of which is referred to in Art. 86, C. M., in the case of the division or sub-division of municipalities, is that of their private domain and not of the public domain, of which they have only the administration. *Parish of St. Denis* v. *Village of St. Denis*, 15 Que. K. B. 97.

Tax exemption — By-law — Bonus to company—Conditions — Ratification—Breach by company—Forfeiture—Demurrer—Judgment "*a quo*." *Commercial Rubber Co.* v. *Jerome*, 4 E. L. R. 56.

Tax exemption — *Resolution of council —Discrimination — Establishment of industry — 36 V. c. 81, s. 1 (N.B.)*]—By s. 1 of 36 V. c. 81, the New Brunswick legislature authorized the town council of Woodstock from time to time to "give encouragement to manufacturing enterprises within the said town by exempting the property thereof from taxation for a period of not more than ten years, by a resolution declaring such exemption." In 1892 the council passed the following resolution: "That any company establishing a woollen mill in the town of Woodstock be exempted from taxation for a period of ten years:"—*Held*, per Davies, Idington and Maclennan, JJ., that this resolution provided for discrimination in favour of companies and against individuals who might establish a woollen mill or mills in the town, and was therefore void. *City of Hamilton* v. *Hamilton Brewing Association*, 38 S. C. R. 239, followed.—*Held*, per Davies, J., that the resolution exempting any company, and not any property of a company, was too indefinite and uncertain to found an exemption upon.—In 1893 a woollen mill was established in Woodstock by the Woodstock Woollen Mills Co., and operated for some years without taxation. In 1899 the mill was sold under execution, and two months later the Carleton Woollen Mills Co. (appellants) were incorporated, and acquired the mill from the purchaser at the sheriff's sale, and had operated it since:—*Held*, that the appellants could not by so acquiring the mill which had been exempted be said to have "established a woollen mill," without shewing that when it was acquired it had ceased to exist as such, which they had not done. Judgments in 3 N. B. Eq. 138, 37 N. B. R. 545, affirmed. *Carleton Woollen Co.* v. *Town of Woodstock*, 27 C. L. T. 316, 28 S. C. R. 411.

Tort — *Breach of by-laws — Police protection.*]—The municipal corporation are not liable to a citizen for damages suffered by him in one of the streets of the municipality by reason of an assault upon him, in breach of the by-laws of the city, even where gross negligence in not providing police protection is alleged. *Ratteau* v. *Drosse*, 28 Que. S. C. 208.

Township by-law licensing storage of gunpowder — *Contract with powder company—Repeal of by-law—Mala fides—Expenditure by licensees — Quashing repealing by-law.*]—A township passed a by-law licensing the applicant company to erect a storage warehouse for gunpowder, the license being for 5 years. The company spent a large sum in buildings and leased certain property. Property owners adjoining the warehouse shortly after the company began storing the gunpowder, petitioned the council to cancel the license, the result being that the council passed a by-law repealing the licensing by-law. The Court holding the repealing by-law was passed in bad faith quashed it. *Re Hamilton Powder Co. and Township of Gloucester*, 13 O. W. R. 661.

Trespass — *Taking land for sidewalk—Remedy — Ascertainment of boundaries — Restoration — Amendment.*]—Action to recover the value of a strip of land in front of which a municipal corporation had laid a sidewalk. The real matter in controversy was the extent of the plaintiff's land. The Courts below dismissed the action on the ground that the proper remedy was by action *en bornage* or *au petitoire*. In order to put an end to litigation, the Supreme Court of Canada reversed the judgments below and directed that the record should be remitted to the trial Court to ascertain the property affected, all necessary amendments being made, and that plaintiff's property should be restored to him, defendants having offered this in their pleadings. *Burland* v. *City of Montreal*, 33 S. C. R. 373.

Voter at municipal election injured —*Respondeat superior.*]—Plaintiff was injured while going into a compartment for marking his ballot when voting on a money by-law. The Manitoba Court of Appeal in affirming the judgment of the trial Judge awarding $250 damages, held the deputy returning officer to be the agent of the defendants, who on the principle of *respondeat superior* were responsible. It was misfeasance, not nonfeasance. *Garbutt* v. *Winnipeg*, 9 W. L. R. 559.

Weights and measures — *By-law requiring weighing of coal on municipal weigh scales—Municipal Act, R. S. M. 1902, c. 116, ss. 368, 632 (i), 654 (f)—Ultra vires—Restraint of trade—Monopoly.*]—Under s.-s. (f) of s. 654 of the Municipal Act, R. S. M. 1902, c. 116, the council of a town may pass a by-law requiring that all coal sold in the town shall before delivery be weighed on the public weigh-scales which the town is authorized by s.-s. (i) of s. 632 to establish, and that the person delivering such coal shall, at time of delivery, hand to the purchaser a certificate of the true weight, signed by the public weighmaster. The power to regulate the sale of coal enables the council to make the above provisions.—2. Such provisions cannot be regarded as in restraint of trade.—3. A by-law of that kind is not in contravention of s. 368 of the Act, as creating a monopoly in the weighing of coal, being only part of the machinery for the administration of the public affairs of the town. *In re Miller and Town of Virden*, 5 W. L. R. 49, 16 Man. L. R. 479.

Work done — *Request of land owner—Assessment roll — Particulars—Pleading.*]—In an action for work done by a municipal corporation (the plaintiffs), for land owners in the municipality, the plaintiffs will be ordered to declare whether the order for the work was oral or written, and if written to produce the writing. 2. A municipal corporation suing a religious community for work done in pursuance of an assessment roll, may be ordered to file an extract from such roll, and the defendants may demand that they be not required to plead before such filing. *Village of Lorimier* v. *Community of the Sacred Names of Jesus and Mary*, 6 Que. P. R. 368.

MUNICIPAL COURTS ACT.

See JUDGMENT.

MUNICIPAL ELECTIONS.

See ELECTIONS.

MURDER.

See CRIMINAL LAW—EXTRADITION—INJUNCTION — INSURANCE—SHIP—WATER AND WATERCOURSES.

MUSIC HALL.

Unlawful business—Art. 1062 C. C. See *Morel* v. *Morel*, 19 Que. S. C. 123, digested *ante* col. 914.

MUTUAL INSURANCE CO.

See INSURANCE.

NAME.

See AUCTIONEER—COMPANY—MISNOMER.

NATURAL GAS.

See CONTRACT — MASTER AND SERVANT — NEGLIGENCE.

NATURALISATION.

See ALIENS—CONSTITUTIONAL LAW.

NAVIGABLE WATERS.

See CONSTITUTIONAL LAW — WATER AND WATERCOURSES.

NAVIGATION.

See NEGLIGENCE — SHIP — WATER AND WATERCOURSES.

NAVIGATION, HARBOURS, AND FISHERIES.

See CONSTITUTIONAL LAW.

NECESSARIES.

See ATTACHMENT OF DEBTS — CRIMINAL LAW—HUSBAND AND WIFE—INFANT—LUNATIC—SHIP.

NE EXEAT PROVINCIA.

See ARREST.

NEGATIVE PRESCRIPTION.

See PRESCRIPTION.

NEGLECTING TO PROVIDE FOR FAMILY.

See CRIMINAL LAW.

NEGLIGENCE.

1. ACTIONS FOR NEGLIGENCE.

(a) *Generally.*

Action by parent as master for death of child — *Damages to estate — Dismissal of previous action under Fatal Accidents Act — Evidence of — Negligence — Contributory negligence — Misdirection — Survival of the right of action.*]—The plaintiff's son, who was employed as a watchman by the government of Canada, and boarded at home with his father, was killed as the result of an accident while attempting to leave a passenger elevator in the defendant's building. The deceased had entered the elevator for the purpose of seeing a tenant whose office was situated on one of the upper floors of the building, and, not finding the person whom he desired to see, had continued to ride up and down in the elevator. He finally attempted to leave the elevator as another passenger entered, and just as the boy in charge started the elevator and was in the act of closing the door, he was caught between the floor of the building and the upper part of the elevator cage, and received injuries from which he died. In an action by the plaintiff personally, and as administrator of deceased, for damages, the jury awarded the plaintiff "for loss of deceased's services since death $1,500." On trial, evidence was offered and rejected of the proceedings in, and judgment dismissing a former action, brought by the plaintiff as administrator, suing for the benefit and on behalf of himself as father and the mother of deceased, under the Act corresponding to Lord Campbell's Act, in respect to the same alleged negligence. The jury, in addition to the damages above mentioned, awarded "for damages to deceased's estate from the happening of the accident to death, and for necessary expenses, $37.50." The trial Judge, in summing up, said to the jury, "I cannot understand myself how the negligence of the deceased contributed to this accident:"—*Held*, that this part of the verdict could not be sustained without overruling the common law rule that "in a civil court the death of a human being cannot be complained of;" that the evidence was improperly rejected, and that, for this reason also, this part of the verdict could not stand; that, there be-

ing no contract for safe carriage, and the case being simply one of tort, for alleged negligence, the action died with deceased; that there was evidence of negligence on the part of deceased in attempting to leave the elevator at the time he did, which contributed to the happening of the accident, and which should have been submitted to the jury; that the remark of the trial Judge was equivalent to telling them that there was no evidence of the fact, and was misdirection; and that the direction to the jury that, if they found that deceased pushed open the closed door to get out, they might find that there was contributory negligence, was calculated to hinder the jury from considering any evidence which they themselves might be able to discover tending to show that there was contributory negligence. *Hanley* v. *Wright*, 37 N. S. R. 77, 24 C. L. T. 63, 136.

Action for damages — *Plea* — *Allegation of coroner's verdict—Inscription in law—C. P. 191.*]—In an action in damages against a railway company for the death of a party, an allegation in the plea which states that according to the coroner's verdict, the employees of the company were guilty of no negligence, will be struck out on an inscription in law, as being irrelevant to the issue. *Blais* v. *Can. Pac. Rw. Co.* (1909), 10 Que. P. R. 355.

Action for death and expenses incurred prior to death.]—A declaration by executrix under Lord Campbell's Act, C. S. N. B. 1903 c. 79, in an action for damages for negligence causing death and for expenses incurred and pecuniary loss sustained by deceased prior to his death, and stating that the action was brought for the benefit of deceased's sisters, was held bad on demurrer, sisters not being beneficiaries under the Act. The provisions of the Workmen's Compensation for Injuries Act, C. S. N. B. 1903 c. 146, place a workman who has been killed by the negligence of his employer in the same position as a stranger, but gave his personal representatives no other or better right than they would have if he were a stranger. *Murray* v. *Miramichi Pulp & Paper Co.*, 39 N. B. R. 44, 6 E. L. R. 247.

Death of prisoner in lock-up—*Neglect of constable—Master and servant—R. C. Municipal Clauses Act, 1897, s. 232.*]—Action by widow for damages for death of her husband arrested for being drunk and placed in municipal lock-up, who, whilst there, set fire to it and was burned to death. By above section municipalities are to police and provide a lock-up within their borders. The constable appointed was acting in discharge of public duties imposed by legislature. There was no *nexus* of master and servant. Action dismissed. *Mackenzie* v. *Chilliwhack* (B.C.), 10 W. L. R. 118.

Electric shock — *Passer-by* — *Aid to injured person—Evidence—Verdict of jury.*]—Where a person passing in front of a construction yard sees a workman fall from a shock caused by allowing the arm of a crane which he was operating to come in contact with wires charged with electricity, and goes to the rescue of the victim, in spite of the cries and warnings of the other workmen, and, putting his hand on the handle of the crane, receives a shock in his turn, a verdict of a jury finding that his injury is not attributable to the fault of the owner of the works is not unreasonable, within the meaning of Art. 501, C. P. C., and there is, therefore, no ground for setting it aside. *Dumphy* v. *Martineau*, 17 Que. K. B. 471, 4 E. L. R. 554.

Electric wires — *Injury to linesman working on telegraph pole — Injury by live wire—Master and servant—Findings of jury —Joint tort-feasors—Injury by live wire.*]—Plaintiff's deceased son, a telegraph lineman, was killed in employ of defendant railway company while ascending a telegraph pole on which defendant electric company had strung their own wires with permission of the railway company. The plaintiff succeeded at the trial against both defendants. On appeal the railway company was held not liable —the primary cause of the accident being the improper insulation of the electric company's wires, of which the railway company had no knowledge. The appeal of the electric light company was dismissed. *Wright* v. *Port Hope Electric Co.*, 13 O. W. R. 210.

Electric wires — Injury to person — Findings of jury—Judge's charge—Nonsuit — Evidence — New trial. *Russell* v. *Bell Telephone Co.*, 11 O. W. R. 808.

Lex loci actus.]—Liability for tort is governed by the *lex loci actus*, and, in an action by an employee against his employer arising out of a personal injury, is not affected by the law of the place where the contract of service was made. Hence, when a railway company, running trains in both provinces of Ont. and Que., hired one of its servants in Que., and he was injured through the negligence of the company in Ont., his claim for compensation is governed by the law of the latter province. *Marleau* v. *Grand Trunk Rw. Co.* (1910), 38 Que. S. C. 394.

(b) Under Statute.

Accident to workman — *Shanty-man —R. S. Q. (1909) ss. 7321 and following.*]—An accident to a shanty-man in the woods does not give rise to a right of action in favor of his representatives under the Workmen's Compensation Act. *Duquette* v. *Lake Megantic Pulp Co.* (1911), 12 Que. P. R. 359. *Novico* v. *Eddy Co.* (1911), 12 Que. P. R. 319.

Action for damages — *Notice — Delay in sending—Prejudice—C. P. 88; 62 V. c. 58, s. 536.*]—The failure to give notice in an action for damages destroys all right of action against the city of Montreal by virtue of section 536 of the charter, whether the city has suffered a prejudice on account of that failure or not. *Zitulski* v. *Montreal* (1908), 10 Que. P. R. 343.

City of Montreal — *Notice of suit — Its sufficiency—C. P. 88; 7 Edw. VII. c. 63, ss. 475.*]—The right of an action for damages against Montreal being based primarily on the sufficiency of the notice as to the place where the accident occurred according to article 536 (a) of the charter, a notice stating that the accident occurred on a sidewalk at the corner of two streets, while it appears by the evidence that the plaintiff fell on a crossing

between these two streets, is insufficient. *Seybold* v. *Montreal* (1909), 10 Que. P. R. 377.

City of Montreal — *Suit for damages —Prescription—C. P. 88, C. C. 2224; 62 V. c. 58, s. 536.*]—The filing of a petition to be heard and to proceed *in forma pauperis* does not interrupt the prescription fixed by section 536 of the charter of the City of Montreal, which provides that a suit for damages against the city must be begun within six months of the date of the accident. *Savard* v. *Montreal* (1909), 10 Que. P. R. 393.

Companies carrying on lumbering operations are not included in the provisions of the law respecting accidents to workmen. *Provost* v. *St. Gabriel Lumber Co.* (1911), 12 Que. P. R. 295.

Contributory negligence—*Construction of statute—"Workmen's Compensation Act," 2 Edw. VII. c. 74, s. 2, s.-s. 2 (c) and 4, sch. 2, art. 4—Remedial legislation—Refusal of damages—Right of appeal—Evidence.*]—In an action in Supreme Court of B. C. claiming damages under "Employers' Liability Act" and, alternatively, under "Workmen's Compensation Act," plaintiff, at the trial, abandoned the claim under former Act and, thereupon, the Judge dealt with the case as a claim under the "Workmen's Compensation Act," found that plaintiff's deceased husband came to his death solely in consequence of his own "wilful and serious misconduct," and, therefore, under sub-sec. 2 (c) of sec. 2 of the Act, *held* that she was precluded from obtaining compensation in consequence of his death. *Per* Davies, Duff and Anglin, JJ.—The right of appeal from a decision in the course of proceedings to which article 4 of the second schedule of the "Workmen's Compensation Act" applies is available only for questioning the determination of the Court or Judge upon some question of law. Decisions upon questions of fact in adjudicating upon a claim brought before the Supreme Court under sub-sec. 4 of sec. 2 of that Act are not subject to an appeal. Whether or not there is any reasonable evidence to support a finding of wilful and serious misconduct is an appealable question. In the circumstances of the case the Court *held*, Davies and Anglin, JJ., dissenting, that there was not reasonable evidence to support the finding of wilful and serious misconduct. Judgment of the Court of Appeal for B. C., 15 B. C. R. 398, 14 W. L. R. 432, affirming judgment at trial: 14 B. C. R. 251, 10 W. L. R. 256, affirmed, Davies and Anglin, JJ., dissenting. *B. C. Sugar Refining Co.* v. *Granick* (1910), 44 S. C. R. 105.

Death of adopted child — *Cause of action — Negligence.*]—The death of an adopted son, though caused by negligence, gives no right of action to the adoptive parent under the Fatal Accidents Act, R. S. O. 1897, c. 166, s. 1, ss. 2. *Blagborough* v. *Brantford Gas Co.*, 18 O. L. R. 243, 13 O. W. R. 573.

Fatal Accidents Act—Plaintiff brought this action in Manitoba under the Fatal Accidents Act of that province as administrator appointed by a Surrogate Court of Manitoba of the estate of his deceased wife who lost her life in the North-West Territories:—*Held*, on appeal from order of Cameron, J., that the action will not lie. *Couture* v. *Dominion*, 11 W. L. R. 412.

Injury to and death of servant — *Workmen's Compensation for Injuries Act—Notice prescribed by s. 9—Reasonable excuse for failure to give—Administrator — Right to give notice before issue of letters—Ignorance of law — Negligence — Workman run over by train in railway yard—Findings of jury — Licensee—Statutory duty—Defective system —New trial—Ground not alleged in pleading.*]—Section 9 of the Workmen's Compensation for Injuries Act, which requires notice of the injury to be given, provides that the notice must be given within twelve weeks after the occurrence of the accident causing the injury, and that in case of death the want of notice shall not bar the action which the Act gives, if the Judge is of opinion that there was "reasonable excuse" for the want of notice:—*Held*, that ignorance of the law is not a "reasonable excuse"; and in this case the plaintiff, the brother of the deceased person who was injured, might have given the notice before he was appointed administrator, and his solicitors' mistaken idea to the contrary did not excuse the want of the notice; and the action therefore failed. Judgment of a Divisional Court reversed. The deceased was employed by the defendants as a workman on the tracks in a railway yard, and, when crossing the tracks with other workmen on his way home from work, was struck by an engine and killed. The negligence alleged was that the engineer in charge of another engine in the yard let off a large quantity of steam, which prevented the deceased from seeing or hearing the engine which struck him. The jury found that the defendants were guilty of negligence by blowing off steam or hot water at such a critical moment with such a large number of employees between the tracks, that the deceased came to his death by reason of the negligence of a person in charge of an engine of the defendants, such negligence consisting in blowing off steam or hot water, and that a proper look-out was not kept in a proper place on both engines when backing; and that there was no contributory negligence. On these findings the trial Judge entered judgment for the plaintiffs:—*Held*, by the Divisional Court, that the position of the deceased, in view of clause 5 of s. 3 of the Workmen's Compensation for Injuries Act, was, in the absence of any finding to the contrary, that of a mere licensee; that he could not claim the benefit of s. 276 of the Dominion Railway Act, because the engine was not passing over or along a highway at rail level; but that the deceased might have had cause to complain of a defective system, within the meaning of clause 1 of s. 3 from the facts developed in the evidence, although not specifically mentioned in the pleadings; and a new trial was ordered, with leave to amend. The Court of Appeal, reversing the judgment upon the other ground, did not as a Court, express an opinion upon these points. But, *semble, per* Osler, J.A., referring to *Willetts* v. *Watt & Co.*, [1892] 2 Q. B. 92, that the discretion of the Court below in allowing the plaintiff to make a new case, after the time has elapsed within which a new action could be brought,

should not, on that ground, be interfered with. *Semble*, per Garrow, J.A., that the true position of the deceased at the time of the accident was not that of a mere licensee, but of a person upon the defendants' premises by their invitation, and one to whom the defendants owed a duty to take reasonable care that he should not be injured. And, *semble, per* Meredith, J.A., that there was no proof of any negligence on the part of the defendants; and the granting of a new trial in order to enable the plaintiff to set up an entirely new case was contrary to proper practice. *Giovinazzo* v. *Can. Pac. Ry. Co.* (1909), 13 O. W. R. 24, 1209, 19 O. L. R. 325.

Longshoreman was engaged by defendant in Montreal, to act as foreman on his contracts as a stevedore at the port of St. John, N.B. While in the performance of his work, the plaintiff went into the hold to re-arrange a part of the cargo in a vessel, in the port of St. John, and, in assisting the labourers, stood under an open hatchway, where he was injured by a heavy weight falling upon him, on account of the negligence of the winchman in passing it across the upper deck. The winchman had attempted to remove the article which fell, without any order from his foreman, the plaintiff, and with improperly adjusted tackle. In an action for damages instituted in the Superior Court at Montreal:—*Held*, that the plaintiff was entitled to recover either under the law of the province of Quebec or under the provisions of the New Brunswick Act, 3 Edw. VII. c. 11, as he came within the class of persons therein mentioned to whom the law of the latter province relating to the doctrine of common employment does not appiy.—Judgment in *Lee* v. *Logan*, 31 Que. S. C. 460, 3 E. L. R. 132, affirmed *Logan* v. *Lee* (1907), 27 C. L. T. 781, 39 S. C. R. 311.

Notice of action — *City of Montreal —Damages — Delay.*]—The slightness of a wound and the intention first taken not to claim damages does not justify delay in giving notice of an accident to the city of Montreal, if later on the claimant changes his mind and decides to make a legal claim. In this case, plaintiff had met with an accident on the 23rd of December, and was informed of the gravity of the wound on the 4th January following; he lost his right of action against the city of Montreal by not giving notice of the accident till the 14th of February following. *Inaunga* v. *Montreal* (1909), 10 Que. P. R. 419.

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2. ANIMALS.

(*b*) *Dangerous.*

See ANIMALS.

Chattel mortgage — Race horse—Loss of—Agency of trainer—Evidence—Application of. *McCullough* v. *Alexander*, 2 O. W. R. 352, 3 O. W. R. 188.

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

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

Injury by, to volunteer — *Necessary appliance—Insufficiency—Liability of owner —Contributory negligence—Damages.*]—The owner of an animal is liable in damages for an injury caused by it to a person who has voluntarily taken charge of it to lead it, if it be shewn that a necessary and customary appliance for doing so, supplied by the owner, was not of sufficient strength. If the person injured, before so taking charge of the animal, saw the appliance and declared it sufficient, the case is one of contributory negligence, and the amount of damages payable by the owner will be reduced accordingly. *Grenier* v. *Wilson*, 32 Que. S. C. 193.

Injury to animal—Fences—Failure to shew cause of injury—Nonsuit—Contractor for building of fence along right of way of power company. *Benner* v. *Dickenson*, 8 O. W. R. 752.

Owner of an animal — *Gross neglect of responsibility—Presumption of neglect— Burden of proof.*]—The responsibility of the owner of an animal recognised in Art. 1055, C. C., arises from his neglect, but this neglect is presumed and he must prove that it does not exist. Hence, the owner of a horse that bucks, is not responsible for the damage caused, if he proves the bucking happened fortuitously and without fault of his. *Birmingham* v. *Gallery*, 1909, 36 Que. S. C. 481.

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3. BUILDINGS.

(*a*) *Demolishing and Removing Adjacent Land.*

Fall of wall of building left standing after fire — Dangerous condition —

Notice and knowledge—Nuisance—Liability of municipal corporation — By-laws — Inspector of buildings — Liability over of owners of building — Indemnity—Municipal Act. *Campbell* v. *Cluff*, 9 Q. W. R. 401.

Injury to materials — *Liability — Contract.*]—The appellants purchased from the respondent certain land with buildings erected thereon, which were to be demolished. The vendor reserved the timber and other materials in the buildings, with the exception of the brick and stone, the materials so reserved to be removed by him as the demolition of the buildings proceeded. The appellants, without notice to the respondent, employed contractors to demolish the buildings, and a considerable quantity of the material was carried away before the respondent was aware that the demolition had commenced, and the timber was so split and broken by the haste with which the work was carried on, that it was unfit for building purposes:—*Held*, that the obligation of the appellants to deliver the materials required the observance at least of ordinary care necessary for safe delivery under such circumstances, and that the appellants were responsible for the damage occasioned by the undue haste of the demolition, proper allowance being made for breaking and splitting unavoidably caused by the process of demolition. *Dominion Express Co.* v. *Cusack*, 10 Que. K. B. 397.

Trespasser — *Licensee — Master and servant—Liability of master for acts of servant—Course of employment.*]—A trespasser or bare licensee injured through negligence may maintain an action. The workmen of a contractor for tearing down portions of a building, in order to make alterations, turned on a water tap in a room where they were working, and neglected to turn it off, whereby goods in the store below were damaged by water:—*Held*, Davies and Nesbitt, JJ., dissenting, that the act of the workmen was done in the course of their employment; that it was negligent; that their employer was liable; and that the owner of the goods could recover damages, though he was in possession merely as an overholding tenant who had not been ejected. *Sweet* v. *Brookfield*, 25 C. L. T. 53, 35 S. C. R. 494.

(b) Unsafe Condition.

Accident to visitor—*Liability of owner —Landlord and tenant—Sub-letting without leave — Damages — Increase on appeal — Costs.*]—It is negligent for the owner of property to leave an unprotected excavation in an open passage leading from the street to the rear of his buildings, and used by his tenants and those having business with them, and he is responsible in damages for an accident occurring in consequence of such unprotected excavation. The fact that the person injured was visiting her son, a subtenant, who had leased from a tenant notwithstanding a clause in the lease of the latter prohibiting sub-letting, does not affect the responsibility of the owner for negligence in permitting the passage to be in an unsafe condition. Where the award of damages and costs by the first Court appears to be inadequate and unjust, the Court of King's Bench will, on appeal of the plaintiff, reform the judgment in this respect, and increase the award to a reasonable extent, and will, moreover, reform the judgment as to costs; *e.g.*, where a woman had her leg broken by falling into an unprotected excavation, and was crippled and incapacitated for work, and the first Court awarded only $50 damages, without costs of plaintiff's *enquête*, the appellate Court increased the indemnity to $200, with costs of suit. *Vachon* v. *Durand*, 13 Que. K. B. 372.

Building collapsed during alterations — *Person in adjoining building injured —Independent contractor—Res ipsa loquitur —Evidence—License — Findings of jury—New trial.*]—Defendant was engaged in repairing his four-storey brick building when it collapsed and fell against an adjoining building, causing injury to plaintiff, a clerk in said adjoining store. The plaintiff brought action to recover $3,000 for injuries sustained. The jury found the plaintiff's injuries were caused by defendant's negligence, which consisted in placing the iron columns on a defective wall, and assessed the damages at $500.—Latchford, J., entered judgment accordingly.—Divisional Court, 16 O. W. R. 743, 21 O. L. R. 545, 1 O. W. N. 1067, dismissed defendant's appeal therefrom with costs.—Court of Appeal *held, per* Moss, C.J.O.:—It would aid materially in arriving at a final conclusion as to the defendant R's liability in law, if more light was thrown upon the part of the case relating to the employment of and instructions to the architect by whom the plan was prepared and under whose direction the work of altering the building was done, and his knowledge and means of knowledge of the condition of the walls, as well as his competency.—*Per* Garrow, J.A.: — An owner may be liable, although out of possession, if he created or permitted to be created the nuisance complained of, or if the injury complained of was brought about through the defective condition of the premises which it was his duty, under a covenant with his tenant, to repair. The alterations which brought about the disaster were none the less Reid's, because he did not perform the work with his own hands, for he authorised and commanded it by an express covenant in the lease. The injury was the direct consequence of the very thing contracted to be done, for which defendant Reid was responsible, unless otherwise excused. His real defence must be that, in doing as he did, he took reasonable care; and the question was one of fact—did he, by employing an independent contractor, and by adopting and acting upon a plan prepared by an architect, do all that a reasonable man, in such circumstances, should have done? That was a question for the jury, to whom it was not clearly submitted at the first trial.—*Per* Maclaren, J.A.:—In such a case as this, it is the tenant or occupier, and not the landlord, who is responsible to third persons. When the building collapsed, the tenant was actually in possession under the lease. Defendant Reid was not liable for an accident resulting from the negligence of the tenant or his architect, in the circumstances of this case. The plaintiff did not make out such a case as would entitle her to a verdict.—*Per* Riddell, J.:—Defendant Reid was not re-

sponsible for the negligence of his tenant, who was not his agent in making the change in the building—nor could it be fairly said that the change was being made for Reid. The improvements were to become and remain the property of Reid, but the changes were for the defendant's advantage and at his desire. The mere fact that there was a possibility that the work would be done in such a way as to do harm, would not fix Reid with liability—the use of the building in the manner contemplated by the lease would not naturally and necessarily cause damage. All the facts, however, not being before the Court, there should be a new trial. New trial ordered, costs of former trial, of Divisional Court, and of new trial, to be in the action. Costs of appeal to be paid by defendant in accordance with the order giving leave to appeal. If defendant declines the new trial, appeal to stand dismissed. *Earl* v. *Reid* (1911), 18 O. W. R. 562, 2 O. W. N. 873, 23 O. L. R. 453.

Elevator — *Injury to passenger — Finding of jury—Damages.*] — A verdict by a jury that an accident in an elevator was due to the fault of the defendants, "owing to the practice of not closing the door before starting the elevator," when there was evidence that on the occasion that practice was followed, will not be disturbed by the Court, and is one on which judgment should be rendered holding the defendants liable.—When an accident resulted in the crushing of the leg of the plaintiff, a civil engineer, so as to leave him a cripple for life, an award of $11,000 damages is not so excessive as to make it evident that the jury was influenced by improper motives. *Odell* v. *Windsor Hotel Co.*, 31 Que. S. C. 370, 3 E. L. R. 82.

Elevator—*Injury to person—Bad condition of premises—Responsibility of owner to stranger.*]—The plaintiff fell into the well of an elevator at the defendant's place of business and thereby injured herself. She brought action for damages alleging negligence on the part of the defendant. At the time of the accident the plaintiff was neither an employee nor a customer, but was merely a stranger upon defendant's premises: — *Held*, that the proprietor had no responsibility towards third parties who might come upon his premises without invitation or without having business to transact there. *Wiggins* v. *Semi-Ready Clothing Co.*, 23 C. L. T. 117.

Falling through hotel verandah — *Hotel leased under covenant to repair except outside repairs—Liability of owner to plaintiff.*]—Owner of an hotel leased the premises, lessee covenanting to repair except outside repairs. Plaintiff sustained injuries by falling through an opening in a verandah and brought action against the owner claiming that owner had covenanted to make outside repairs and was in default after notice before plaintiff was injured:— *Held*, that plaintiff was not entitled to recover as against the owner, even if there were an express covenant by owner to make outside repairs, as plaintiff was a stranger to the covenant. *Marcille* v. *Donnelly* (1909), 14 O. W. R. 1044, 1 O. W. N. 195.

Injury to goods of occupant of building — *Trespasser or licensee — Contractor for alteration of building—Liability to occupant—Negligent acts of servant.*] — Where the plaintiff, a tenant of property subject to mortgage, after foreclosure of the mortgage, though his tenancy had been thereby determined, continued in occupation of the premises, pursuant to an arrangement with the mortgagor (apparently with the cognizance of the purchaser), and afterwards failed to move out as agreed with the mortgagor, because the latter had not complied with a stipulation to find him other premises, and the defendant, who had contracted to make alterations required by the purchaser, entered and commenced tearing down the walls and plaster on the upper floor, in the course of which work the waste pipe leading from a basin on the upper floor became choked with plaster, and the tap over the basin having been turned on at a time when the water was not turned off again, the water subsequently overflowed the basin, and, passing down through the floors, damaged the plaintiff's goods:—*Held*, that there was no duty cast upon defendant of protecting the plaintiff's property except against wilful or wanton injury, of which there was no evidence; that, if any servant of the defendant had turned on the water tap, the defendant would not be liable, such not being within the scope of the employment of such servant; that to render the defendant liable the damage must have been occasioned by some negligent act of the defendant to his servants, and the onus on the plaintiff was not satisfied, there being abundant opportunity for some one else to have occasioned it after the defendant's workmen left the building; and that the plaintiff being in the position of a trespasser, and in the building at a time when the defendant was carrying on his work (the work being done with at least ordinary care), he was there subject to all risks incident to occupation at such a time, and must bear the consequences. *Siecert* v. *Brookfield*, 37 N. S. R. 115.

Injury to linesman of electric company — Duty of strangers — Danger — Precautions—Volunteer or licensee — Jury. *Randall* v. *Ottawa Electric Co.*, 2 O. W. R. 146, 173, 1022, 4 O. W. R. 240, 269.

Injury to stranger working in shop —Duty of owner—*Res ipsa loquitur*—Onus —Evidence shewing no want of care. *McDonell* v. *Alexander Fleck Limited*, 12 O. W. R. 84.

Invitation — *Unguarded hole in floor—Absence of warning—Notice of danger.*] — The plaintiff, a contractor for constructing and repairing roofs, came to the defendants' premises on their invitation to examine the roof and give an estimate of the cost of certain repairs to it. There was a cupola on the roof, from which it could be examined. This cupola was reached by a ladder going up through a hole in the roof. It had two windows and was well lighted. There was also another hole in the floor of the cupola, which was there for the purpose of furnishing light to the floor below and was unguarded. The plaintiff in broad daylight ascended to the cupola, accompanied by the defendants' foreman, for the purpose of examining the roof, and, after looking through one of the windows, he stepped backwards

and fell through the last mentioned hole to the floor below and was injured:—*Held*, that there was no evidence of negligence on defendants' part to go to a jury, and that the plaintiff was properly nonsuited. *Johnson* v. *Ramberg*, 51 N. W. Rep. 1043, followed. *Indermaur* v. *Davies*, L. R. 1 C. P. 274, distinguished:—*Held*, also, that as the danger was obvious, there was no duty on the part of the defendants' foreman, although he was present, to warn the plaintiff of it. *Fonseca* v. *Lake of the Woods Milling Co.*, 15 Man. L. R. 413, 1 W. L. R. 553.

Liability of municipal corporation for unsafe condition of polling booth —*Agency of corporation officer—Municipal election—Respondeat superior.*] — In submitting money by-laws to a vote of the electors under s. 486 of the Winnipeg charter, 1 & 2 Edw. VII. c. 77, the city clerk, acting as returning officer, should be deemed to have acted as the agent of the city corporation, and an elector who enters the polling booth to vote on the by-laws and there receives injuries caused by defects in the apartment provided for marking ballots, the polling booth having been appointed by the council in the by-laws, is entitled to recover damages from the city corporation for such injuries, in an action for negligence; and it makes no difference that the elector is at the same time voting at a municipal election for mayor and aldermen.—*Mersey Docks Trustees* v. *Gibbs*, L. R. 1 H. L. at p. 110, and *McSorley* v. *St. John*, 6 S. C. R. 531, followed. *Per* Howell, C.J.A.—If the plaintiff had been injured simply because of the neglect of some official in preparing booths for the election of mayor and aldermen, the official would have been acting in a public capacity, and the law of *respondeat superior* would not apply so as to make the city corporation liable. *Wishart* v. *Brandon*, 4 Man. L. R. 453, and *McCleave* v. *Moncton*, 32 S. C. R. 106, followed. *Garbutt* v. *City of Winnipeg*, 18 Man. L. R. 345, 9 W. L. R. 550.

Municipal buildings — *Collapse of—Injury to workman—Liability of employers—Contractors for work—Liability of municipal corporation—Employment of architect—Independent contractors.*] — An employee was working on the inside of a municipal building when it collapsed by reason of insufficient truss rods placed therein owing to architect's negligence:—*Held*, there was no liability on the part of the municipality, no evidence having been given to shew negligence on their part in employing the architect. *Hill* v. *Taylor*, 5 O. W. R. 85, 9 O. L. R. 643.

Platform out of repair — *Exhibition association—Injury to licensee—Municipality—Highway — Repair — Invitation.*] — The plaintiff purchased from an exhibition association the privilege of selling refreshments under a certain building, during the holding of the exhibition on the grounds leased from a city corporation for two months in the year for the purpose of holding the exhibition. The city corporation covenanted to repair, but the practice was for the association to repair and charge the repairs to the corporation. In walking across a platform which was constructed between the building and the public sidewalk to give access to people requiring refreshments the plaintiff put her foot into a hole in the platform, which was out of repair, and was injured:—*Held*, that she was not a lessee of the premises, but a mere licensee; that she was lawfully there upon the invitation of the association; that the association owed a duty to the persons whom they induced to go there to keep the place in proper repair; that there was no liability on the city corporation, as they were not the occupiers of the grounds and did not invite the plaintiff to go where she was hurt, and there was no highway to be kept in repair by them, but that the association, who knew the place was out of repair and who had by their negligence caused the accident, were liable. *Marshall* v. *Industrial Exhibition Association of Toronto*, 21 C. L. T. 203, 368, 1 O. L. R. 319, 2 O. L. R. 62.

Unguarded hole in school floor—*Sanitary inspector and truant officer—Fell into hole—Action for damages for injuries sustained—Contributory negligence.*]—Plaintiff, a sanitary inspector and truant officer of the municipality, went to a school to perform certain duties, and while searching for the janitor, fell into an unguarded hole in the floor of the furnace room, sustaining injuries, for which he brought action to recover damages.—Falconbridge, C.J.K.B., *held*, that plaintiff was entitled to $1,200 damages and costs, as there was no evidence of contributory negligence on the part of plaintiff, and there was evidence that a member of the School Board had previously fallen into the same hole. *Shaw* v. *St. Thomas Board of Education* (1911), 18 O. W. R. 165, 2 O. W. N. 510.

(c) Erection of.

Collapse — Injury to workmen — Liability of employers — Contractors — Municipal corporation—Architect — Independent contractor. *Hill* v. *Taylor*, 4 O. W. R. 284, 5 O. W. R. 85.

Construction of building—*Contract for construction—Collapse of wall — Building not completed—Vis major.*]—*Held*, *per* Davies and Maclennan, J.J., that the owner of a building in course of construction owes to those whom he invites into it or upon it the duty of using reasonable care and skill in order to have the property and appliances upon it intended for use in the work fit for the purposes they are to be put to. Such a duty is not discharged by the employment of a competent architect to prepare plans for the building and a competent contractor to attend to the work of construction.—*Per* Idington, J.:—The fact that the building is in an unfinished state may render the obligation of the owner towards a workman employed upon it less onerous in law than it would be in the case of a completed structure.—*Per* Duff, J.:—Does the rule governing the duty of occupiers respecting the safe condition of the premises apply without qualification where the structure is incomplete, and the invitee is engaged in completing it or fitting it for its intended use?—*Per* Davies and Maclennan, JJ.:—In the present case the failure to guard against the effect of a sudden storm of so violent and extraordinary a character that it could not

have been expected, was not negligence for which the owner was liable.—Judgment of the Court of Appeal, 12 O. L. R. 4, 8 O. W. R. 55, and of a Divisional Court, 9 O. L. R. 57, 4 O. W. R. 60, 543, 25 C. L. T. 36, affirmed; Idington, J., *dubitante*. *Valiquette* v. *Fraser*, 27 C. L. T. 486, 39 S. C. R. 1.

Injury to child — Unsafe condition of defendants' premises—Responsibility — Independent contractor — Building operations —Employment of architect—Conflict of evidence. *Ware* v. *Dominion Express Co.*, 5 E. L. R. 224.

Injury to servant — *Hazardous employment—Unskilled workman—Absence of guard—Workmen's Compensation Act—Defect in ways, works, etc.—Negligence—Fatal Accidents Act—Action by widow of workman—Infant children—Parties—Damages—Jury—Powers of trial Judge.*]—The defendants, who were contractors for the erection of an eight-storey building, used an outside hoist for the purpose of raising the materials required in the construction of the different floors. The hoist stood close against the building, and was made in sections, a new section being added as each floor was reached. It was necessary for the workmen to work upon a platform 8 feet square, to the corners of which uprights were fixed and secured on the outside by braces. When the last or roof section of the hoist was being erected, the plaintiff's husband, an ordinary labourer employed by the defendants to assist the skilled carpenters whose duty it was to construct the hoist, in stepping forward quickly, stumbled and fell off the platform, receiving injuries which caused his death on the following day. There was some evidence that the planks forming the platform were rough and of unequal thickness. The jury found that the accident was caused by the negligence of the defendants, by not having a guard on the inside of the uprights and by the unevenness of the platform; that the deceased could not have avoided the accident by the exercise of reasonable care; and that he was not aware of the condition of the hoist:—*Held*, that, even although it should be considered that there was no evidence that the floor was in fact uneven, or of how the deceased came to fall, the plaintiff was entitled to succeed under the Workmen's Compensation for Injuries Act, R. S. O. 1897, c. 160, s. 3, clause 1, as qualified by s. 6, clause 1, inasmuch as the death of her husband was found to be caused by a "defect in the condition or arrangement of the ways, works, machinery, plant, buildings, or premises connected with, intended for, or used in the business of the employer," and the defect had not been discovered or remedied owing to the negligence . . . of some person entrusted (by the employer) with the duty of seeing that the condition or arrangement of the same was proper. The position of an ordinary labourer, like the deceased, was different from that of the skilled workmen who had undertaken the construction of the hoist, and he was entitled to every reasonable safeguard in the performance of so hazardous a duty. *Brown* v. *Waterous Engine Works Co.* (1904), 8 O. L. R. 37, distinguished. Judgment of Falconbridge, C.J.K.B., at the trial, affirmed. The action being brought by the widow alone, without mention of the infant children of the deceased, it was ordered that they should be added as parties plaintiffs, with proper averments in the statement of claim, or that the latter should be amended so as to shew that the action was brought on the behalf of the widow as required by s. 8 of the Fatal Accidents Act.—*Quære*, whether the trial Judge had power to enter judgment for a sum greater than the statutory maximum of $1,500 where the jury were not asked to and did not assess the damages under the Workmen's Compensation Act, but only as at common law. *Linden* v. *Trussed Concrete Steel Co.* (1908), 18 O. L. R. 540, 14 O. W. R. 1003.

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4. Children and Others under Disability.

Dangerous article near highway.—The plaintiff, a boy of twelve, entered upon railway property and took a fog signal out of a box on a hand car standing there, which he struck with a stone and exploded, injuring himself:—*Held*, that, as the boy was a trespasser, the defendants were not liable. *Barnes* v. *Ward*, 9 C. B. 392, distinguished. *Smith* v. *Hayes*, 29 O. R. 283, 18 C. L. T. 134, followed. *McShane* v. *Toronto, Hamilton and Buffalo Ry. Co.*, 19 C. L. T. 386, 31 O. R. 185.

Execution of functions — *Permitting child to ride in vehicle.*]—Although masters and employers are responsible for damage caused by their servants and workmen in the execution of the proper functions of such servants and workmen, they are not responsible for damage caused by such servants and workmen during the time that they are exercising such functions, but not in the actual execution thereof. So, the infant son (ten years of age) of the plaintiff having secretly got into a vehicle owned by the defendant, without the knowledge of the driver of the vehicle, and, when discovered, having been permitted by the driver to remain in the vehicle only because the latter did not wish to leave him upon the public road a long way from his father's house, the defendant was not responsible for the fact that the vehicle was struck by an engine when crossing a railway, and the plaintiff's son hurt, the driver not being engaged in the execution of his functions when he thus permitted the presence of the boy in the defendant's vehicle. *Marquis* v. *Robidoux*, 19 Que. S. C. 361.

Injury to child playing in street at level railway crossing — By-law of municipality—Contributory negligence—Duty to give warning of approach of hand-car—Damages. *Burtch* v. *Can. Pac. Ry. Co.*, 8 O. W. R. 837.

Injury to infant in factory—*Liability of owner — Contributory negligence of infant.*]—A boy of eight years, the appellant's son, was in the habit of playing in the respondent's factory. In consequence of an accident which happened to the boy in the winter of 1899-1900, the respondent instructed his foreman to prevent all persons who had no business in the factory from entering, and particularly this boy. For a certain time these orders were obeyed, but

later the boy began to frequent the factory as in the past, including a room in which was a dangerous machine, and that to the knowledge of the foreman. In August, 1900, the boy entered the factory by the office door. The bookkeeper was not here at the moment; the boy crossed the office and seeing the bookkeeper with whom he was in the habit of playing, threw himself into his arms, and the bookkeeper began to throw the boy into the air and catch him in his arms. In playing thus the boy's foot was caught in a pulley and seriously injured:—*Held*, that in these circumstances, the owner of the factory was liable, and in order to relieve himself of liability he should not have confined himself to giving orders, but should have seen that they were executed. 2. There cannot be on the part of a child of eight years liability for his own negligence, the presumption being that at such age he is incompetent to know the consequence of his conduct. *Belage* v. *Belisle*, 10 Que. K. B. 481.

Injury to infant in highway—Careless driving—Evidence for jury—Damages—Right of infant's father to recover for expenses—Objection not taken at trial. *Banks* v. *Shedden Forwarding Co.*, 11 O. L. R. 483; 7 O. W. R. 88. Digested under subheading 18.

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5. CONTRIBUTORY NEGLIGENCE.

Continuing to time of accident.] — Riddell, J., *held*, 18 O. W. R. 498, 2 O. W. N. 684, that plaintiff in an action for negligence cannot recover if he were contributing to the cause of the accident at the time when it happened.—Divisional Court reversed above judgment, holding that though the plaintiff may have been guilty of negligence and though that negligence may have contributed to the accident, yet if the defendant could in the result, by exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse the defendant. *Radley* v. *London & North Western Rw. Co.*, 1 A. C. 759, followed. *Jones* v. *Toronto & York Radial Rw. Co.* (1911), 18 O. W. R. 966, 2 O. W. N. 979.

Findings of jury — *Contributory negligence—Misdirection — Railway Act, R. S. C. 1906, c. 37, s. 288—Duty of company to pack frogs.*]—Contributory negligence may be a defence to an action for damages suffered in consequence of a breach of a statutory duty. *Graves* v. *Wimborne*, [1898] 2 Q. B. 419, and Beven on Negligence, pp. 633, 634, 643, and the cases there cited, followed.—In an action for damages for injuries suffered by the plaintiff in consequence of putting his foot in a frog which it was alleged had not been properly packed as required by s. 288 of the Railway Act, R. S. C. 1906 c. 37, the trial Judge charged the jury that, if the frog was unpacked, the defendants would be liable, whether the plaintiff was guilty of contributory negligence or not:—*Held*, that this was a misdirection, and that, notwithstanding that the question of contributory negligence was submitted to the jury and answered in the plaintiff's favour, there should be a new trial. *Bray* v. *Ford*, [1896] A. C. at p. 49, and *Lucas* v. *Moore*, 3 A. R. at p. 614, followed. *Street* v. *Can. Pac. Rw. Co.*, 18 Man. L. R. 334, 9 W. L. R. 558.

Foreman permitting labourers to expose themselves to danger — *Voluntary risk taken by the workmen—Common negligence — Reduction of damages.*] — A foreman permitting workmen to work in a shaft under rocks ready to fall from the arch above is guilty of negligence for which his superior will be responsible if accidents occur. A workman who knowing this danger voluntarily runs the risk to gain the favourable opinion of his superiors, is likewise in fault, and as a result of this common negligence, the master is entitled to a proportionate reduction of damages that he must pay. *Cf. Gauthier* v. *Werthein*, 28 S. C. 280. *Lefebvre* v. *Nicholls Chem. Co.*, 1909, 36 Que. S. C. 555.

Hole in ice over harbour — *Accident —Cause—Findings of jury — Contributory negligence.*]—The dead body of the plaintiff's husband was found lying on ice formed over a harbour, the head being in open water where the defendants had made a hole. At the trial of an action to recover damages for his death, questions were submitted to the jury, and answered in favour of the plaintiff, except the following: "Could the deceased by the exercise of ordinary and reasonable care have avoided the accident which occasioned his death; and, if so, in what respect or how could the deceased have avoided the accident?" To this the jury answered: "Yes, he might have taken another road, or if sober, on a bright night, he might have avoided the hole?"—*Held*, that this was a finding of contributory negligence, and the action was properly dismissed, though the trial Judge (10 O. L. R. 37), dismissed it on another ground. *Plouffe* v. *Canada Iron Furnace Co.*, 11 O. L. R. 52, 6 O. W. R. 589.

Injury to passenger in elevator — *Contributory negligence.*] — H. entered an elevator in a public building, after inquiring of the boy in charge if a certain tenant was in his office, and being told he was not, he remained in the elevator while it made a number of trips in response to calls, and had been in it over ten minues when a call came from the fifth floor. The elevator went up, and the passenger who had rung entered, H. at first making no attempt to get out. The operator then shoved to the door of the elevator, and at the same time started the wheel, which had to be completely turned round to move the elevator. The turning of the wheel would also close the door. While it was being turned H., without giving warning, tried to get out through the door, and, the elevator being then descending, he was caught between it and the floor and injured, so that he died soon after. In an action by his administrator against the owner of the building:—*Held*, that the accident was entirely due to the conduct of H. himself, and the owner was not liable. Judgment in 34 N. S. R. 365, affirmed. *Hawley* v. *Wright*, 22 C. L. T. 198, 32 S. C. R. 40.

Injury to pedestrian — *Street railway —Findings of jury — Contributory negligence.*]—In an action founded on personal injuries caused by a street car, the jury found that the defendants' negligence was the cause of the accident, and also that the plaintiff had been negligent in not looking out for the car:—*Held*, reversing the judg-

ment of the Court of Appeal, 2 O. L. R. 53, 21 C. L. T. 369, that, as the charge to the jury had properly explained the law as to contributory negligence, the latter finding must be considered to mean that the accident would not have occurred but for the plaintiff's own negligence; and he could not recover. *Brown* v. *London Street Ry. Co.*, 22 C. L. T. 78, 31 S. C. R. 642.

Injury to servant—Contributory negligence—Findings of jury—Disagreement — Nonsuit — Master and servant. *Wilson* v. *Hamilton Steel and Iron Co.*, 8 O. W. R. 525.

Injury to workman — Contributory negligence—Finding of jury. *Kent* v. *John Bertram Sons Co.*, 8 O. W. R. 874.

Injury to workman — *Machinery — Minor — Contributory negligence—Liability of employer.*]—Plaintiff's son, a boy of 15, who had the ends of two fingers cut off, and a third crushed, was given $1,000 damages. On appeal held that employer is practically an insurer of his employees' safety. The Court will not under ordinary circumstances disturb the finding of the Court below. A boy of 15 can be guilty of contributory negligence. *Allis* v. *Bolduc*, 6 E. L. R. 185.

Landlord and tenant — *Damages to goods of tenant on demised premises—Liability of landlord—Master and servant — Acts in course of employment—Alterations —Damage by steam—Responsibility of contractors—Control of premises.*] — In the lease of a shop the landlord agreed to supply steam heating, and, in order to improve the system, engaged a firm of plumbers to make alterations. Before this work was completed, and during the absence of the tenant, the plumbers' men who were at work in another part of the same building, with steam cut off for that purpose, at the request of the caretaker employed by the landlord, turned the steam on again, which, passing through unfinished pipes connected with the shop, escaped through an open valve in a radiator and injured the tenant's goods:—*Held*, that the landlord was liable in damages for the negligent act of his caretaker in allowing steam to be turned on without ascertaining that the radiator was in proper condition to receive the pressure, and that the plumbing firm were also responsible for the negligence of their employees in turning on the steam, in such circumstances, as they were acting in the course of their employment in what they did, although requested to do so by the caretaker.—The judgment appealed from, *Malcolm* v. *McNichol*, 16 Man. L. R. 411, 5 W. L. R. 45, was affirmed, with a variation declaring the plumbers jointly liable with the landlord. *McNichol* v. *Malcolm*, 27 C. L. T. 664, 39 S. C. R. 295.

Leaving dangerous place unguarded —*Contributory negligence—Nonsuit — Undisputed facts—Inference.*] — The power to nonsuit on the ground of contributory negligence is restricted to cases where it is indisputable that the misfortune would not have occurred but for the plaintiff's own want of proper care. Where the facts, or the proper inference from the facts, are in dispute, the case must go to the jury. And where the defendants negligently left a hole in the floor of a room unguarded, and the plaintiff, going into the room, saw the danger and at first avoided it, but, in turning to go out again, lost sight of it, stepped into the hole, and was injured:—*Held*, these facts being undisputed, that it was properly left to the jury to say whether she was negligent or not. *Scriver* v. *Lowe*, 21 C. L. T. 27, 32 O. R. 290.

Quebec law—*Damages.*]—If the principal cause of an accident is the want of care of the victim, that does not take away all recourse against the party who has contributed to the accident by his negligence. 2. The only effect of the victim's carelessness is to reduce the amount of damages which he may be awarded. 3. It is not necessary in order to establish negligence in a party that the law should have imposed upon him the duty of doing what he has not done; it is sufficient that ordinary prudence imposed the duty upon him. *Jess* v. *Quebec & Levis Ferry Co.*, 25 Que. S. C. 224.

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6. Damages.

(a) *Compensation to person injured.*

Accident to workman — *Provisional allowance ordered—How it may be stopped—R. S. Q. 7346.*]—A demand to stop a provisional allowance, in virtue of the Workmen's Compensation Act, which has been granted by consent, and confirmed by an order of the Court, should be formulated by suit and not by petition. *Duval* v. *Vieu* (1911), 12 Que. P. R. 338.

Defect in goods sold—*Injury to purchaser—Liability of vendor—Accident.*] — The plaintiff's daughter, about eleven years of age was injured by the bursting of a bottle containing cream soda, which had been sold to the plaintiff by the defendant, a manufacturer of soda water. The bottle had been carefully tested by the defendant before it was filled, and was more than ample to support the pressure to which it was subjected. The cause of the accident was not definitely ascertained, but it appeared to be the sudden exposure of a cold bottle in a refrigerator to a current of warm air, or, perhaps, to some unknown flaw or inequality in the glass itself:—*Held*, that whether the accident was attributable to sudden change of temperature or to an unknown defect in the glass, the defendant, as the vendor, was not responsible, it being either the result of imprudence on the part of the plaintiff's daughter, or a case of inevitable accident. The extent of the obligation of persons selling gaseous waters, as to the receptacles which contain them, is to take every reasonable precaution that such receptacles shall be sufficient for the purpose. *Guinea* v. *Campbell*, 22 Que. S. C. 257.

Municipal negligence — *Personal injuries—Road under repair — Varied expert evidence.*]—Action by a physician to recover

$25,000 damages for personal injuries sustained by being thrown from his buggy while driving in the early morning upon the highway in the county of Middlesex, which was undergoing repair.—Riddell, J., *held*, that if a patient refuses to submit to an operation which it was in fact reasonable that he should submit to, the continuance of the malady or injury which such operation would cure is due to his refusal, and not to the original cause.—Neurasthenia is personal injury due to accident.—*Church* v. *Ottawa*, 22 O. R. 548, referred to as to damages.—Judgment for $12,500 and costs. *Bateman* v. *Middlesex* (1911), 19 O. W. R. 442, 2 O. W. N. 1238.

Personal injury — *Labourer while paving street was struck by a light rig—Non-jury trial—Question of negligence for the Judge—No reason to increase damages — Appeal and cross-appeal dismissed.*]—An appeal as to the amount of damages.—Divisional Court *held* that in a non-jury trial for personal injuries, the Judge's verdict and assessment must not be changed without very special reasons. Appeal dismissed with costs. *Wright* v. *Radcliffe* (1911), 19 O. W. R. 439, 2 O. W. N. 1241.

(b) Compensation to relatives.

Carriers — *Death of plaintiff's wife — Fatal Accidents Act—Damages — Evidence —Questions for jury—Misdirection.*] — In an action by a husband as administrator of his wife under the Act respecting compensation to relatives of persons killed by wrongful act, negligence, or default, C. S. N. B. 1903, c. 79, to recover compensation for her death by the negligence of defendants as carriers of passengers, damages based on a claim of $15 per month for loss of prospective services of the wife for a period of 5 years may be recovered and are assessed on a proper principle.—In an action under the statute, the jury should be simply asked if the defendant was guilty of negligence causing the death, and, if so, in what did such negligence consist? If irrelevant and unnecessary questions are asked, and the Judge's charge in respect to them is not warranted by evidence relevant to the issue, a new trial will not be granted unless the effect thereof is to prejudice the minds of the jury as to the real question to be tried: *per* Barker, J., *Collins* v. *St. John*, 2 E. L. R. 490, 38 N. B. R. 86.

Claim of widow and children of the deceased, under Art. 1056 C. C., cannot be affected, nor its amount reduced, by insurance held by the deceased and paid after his death. *Miller* v. *Grand Trunk Ry. Co.*, 15 Que. K. B. 118, followed. *Johnson* v. *Can. Nor. Que. Ry. Co.* (1910), 39 Que. S. C. 263. Appealed 17 R. de J. 182.

Death of a child — *Alleging loss of his future earnings—Inscription in law.*]—In an action for damages for death of a child, the parents may allege that they suffer damages by his decease, which would depend on his earnings in the future, if he had lived. *Perrault* v. *Montreal* (1909), 10 Que. P. R. 361.

Death of a child — *Funeral expenses.*] —The funeral expenses occasioned by the death of a child form part of the damages that the parents may recover from the party responsible for the accident. *Brialofsky* v. *Montreal* (1909), 10 Que. P. R. 387.

Death of person — *Pleading — Damages.*]—In an action for damages for the death of the plaintiff's father by the negligence of the defendant, the plaintiff may allege the services which the father performed, and the value of them.—2. In such an action the plaintiff must not allege the verdict of the coroner's jury upon the cause of death.—3. A plaintiff cannot claim damages for injuries to his sensibilities or feelings.—4. A plaintiff may claim a certain sum, at the same time alleging that the damages suffered cannot be compensated by money. *Thibault* v. *David*, 6 Que. P. R. 55.

Death of son of woman for whose benefit action brought — *Expectation of pecuniary benefit from continuation of life—Evidence of intention to benefit—Findings of jury — Damages.*]—Action under above Act to recover damages for death of M. by reason of defendants' negligence, the action being for benefit of mother of M. She was a widow of about 70, living in Ontario with another unmarried son. M. had told the plaintiff, his brother, of his intention to send some money to his mother. Evidence of intention to benefit held to be admissible: —*Held*, further, that it cannot be said there was no evidence from which a jury could reasonably make the necessary inference. Judgment for plaintiff. *Moffitt* v. *Can. Pac. Ry. Co.*, 11 W. L. R. 608.

Insurance moneys — *Jury assessed $2,200 damages—Deducted $1,000 insurance money received — Verdict corrected — Full amount assessed allowed widow.*]—Plaintiff, the widow and administratrix of George Wm. Dawson, who was killed while in the employ of defendants, brought action under Workmen's Compensation Act to recover $2,500 damages. The jury found in favour of plaintiff and assessed her damages at $2,200, but deducted therefrom $1,000 for insurance money received by plaintiff.—Clute, J., 17 O. W. R. 23, 2 O. W. N. 85, 22 O. L. R. 69, *held*, that having regard to s. 7 of the Act, the jury ought not to have deducted the $1,000 for insurance, and judgment should be entered for full amount of damages assessed by jury with costs. Damages apportioned $2,000 to widow and $200 to mother of deceased. *Beckett* v. *Grand Trunk Ry. Co.* (1885), 8 O. R. 601, 13 A. R. 174, 16 S. C. R. 713, and *Grand Trunk Ry. Co.* v. *Jennings* (1888), 13 A. C. 800, specially referred to. Court of Appeal *held*, that the assessment of damages was not excessive or such as a jury acting reasonably might not upon the evidence have found, but owing to the method used in arriving at the amount being improper the defendants should be allowed a new assessment of damages by a jury. *Dawson* v. *Niagara St. Catharines & Toronto Ry. Co.* (1911), 19 O. W. R. 242, 2 O. W. N. 1080.

Insurance moneys—*Parents of deceased —Damages—Extent—Solatium doloris — Insurance—C. C. 1056.*]—Under article 1056 C. C., when the parents of a deceased person sue the party responsible for the death of

their child, they can only recover the real damages which they have experienced; they cannot claim damages based upon affection —*solatium doloris*.—In assessing their damages, the Court may, according to circumstances, take into consideration the fact that they have already received insurance upon the life of their deceased child. *Bouchard* v. *Gauthier* (1911), 17 R. L. n. s. 244.

(c) *Excessive.*

Death of wife and mother.]—In an action under the Fatal Accidents Act, R. S. O. 1897 c. 166, to recover damages for the death of a married woman, 62 years of age, the jury awarded $3,325, apportioning $825 to the executors of her husband, who survived her, $800 to a daughter 36 years of age, $700 to a son 27 years of age, and $1,500 to a son 21 years of age:—*Held*, that the damages recoverable being entirely pecuniary, the above (except as to the executors), considering the ages and circumstances of the children, and the age and financial ability of the mother, were grossly excessive, and the case must go to a new assessment. *Ronson* v. *Can. Pac. Ry. Co.*, 18 O. L. R. 337, 13 O. W. R. 1179.

Locomotive engineer—*Death caused by jumping from train—Equipment of train—Efficiency of—Negligence of driver—Competency of fellow servants.*]—Plaintiffs brought action to recover damages for the death of their son, a locomotive engineer in defendants' employ, who was killed by having jumped from a train over which he had lost control. The jury found in plaintiff's favour and assessed the damages at $6,000.—Clement, J., entered judgment accordingly.—Supreme Court of B.C., *held*, that the only verdict reasonably open to the jury was that the deceased lost his life by his own negligence; that the damages were excessive and the verdict could not stand. New trial ordered.—Privy Council *held*, that the above order must be reversed. It was too late for the respondents to rely on misdirection to the jury, which they had not excepted to at the trial or in the notice of appeal or in oral argument before the Supreme Court of British Columbia. There were no sufficient grounds for a new trial on the head of excessive damages. — Judgment of Supreme Court of British Columbia set aside, and judgment of Hon. Mr. Justice Clement at trial, restored. *White* v. *Victoria Lumber Co.*, C. R., [1910] A. C. 207, 80 L. J. P. C. 38, [1910] A. C. 606, 103 T. L. R. 323.

New trial—*Volens.*]—In the construction of a tunnel under the Detroit River the respondent company had an apparatus for lifting material to the surface consisting of a crane and cable with hook and buckets hauled up and down through an air shaft by an engine on the surface. At the top of the shaft a "tag man" was stationed to signal the engineer when to start or stop the engine, and when to run fast or slow. The officers and men of the respondent company and of the Detroit River Tunnel Company engaged on the same work were in the habit of coming to the surface through the air shaft, and the "tag man" gave a special signal to the engineer when a man was coming up. R., an employee of the Detroit River Company, was attempting to come up on one occasion when the apparatus did not remain in the centre, but was swinging around, and in a narrow part of the shaft a block on the cable with a hook over which was a ring which R. was grasping, caught in the timbers on the side and the ring came off the hook, throwing him to the bottom of the shaft and causing his death. In an action on behalf of his parents the jury found the respondent company negligent in using an unsafe hook while allowing persons to use this apparatus, and also by the tag man not signalling the engineer to stop until the cable ceased moving. They assessed the damages at $4,000 all for deceased's mother. The verdict was sustained by a Divisional Court, but the Court of Appeal granted a new trial on the ground that the questions of *volens* on the part of R. should be passed upon by the jury:—*Held*, that as such question had been raised for the first time in the Court of Appeal a new trial should not have been granted on that ground. —The evidence as to damages was that deceased gave his mother $25 per month regularly and presents in goods or money that would make his whole contribution over $500 a year.—*Held*, that $4,000 was an excessive sum to give the mother, and the order for a new trial should stand, but be restricted to a proper assessment of the damages.—Order accordingly. *Rorison* v. *Butler Bros.* (1911), 31 C. L. T. 396, 44 S. C. R.

Operation of railway.]—The Court refused to order a new trial or reduction of damages, under the provisions of Arts. 502, 503, C. P. Q., where it did not appear that, under the circumstances, the amount of damages awarded by verdict was so grossly excessive as to make it evident that the jury had been led into error or were influenced by improper motive. Davies, J., dissented in respect of that part of the verdict awarding damages in favour of one of the sons who was almost 21 years of age and earning wages at the time deceased was killed.—*Quære*, in an action under Art. 1056 C. C., can a jury award damages *in solatium doloris*? *Robinson* v. *Can. Pac. Ry. Co.*, [1892] A. C. 481, referred to. *Lachance* v. *Can. Pac. Ry. Co.* (1909), 42 S. C. R. 205, affirming 35 Que. S. C. 494.

(d) *Miscellaneous Cases.*

Damages recoverable — *Diminution of the value of an immovable caused by quasi delict.*]—A tramcar company is responsible beyond the real damages, for damages which represent the diminution in value of an immovable situated at the foot and in face of a sharp incline on the road where the cars frequently run off the rails through the negligence of the motorman, and are hurled on the lands at great risk to those who may be there. *Amyot* v. *Quebec R. L. & P. Co.* (1909), 36 Que. S. C. 141.

Loss of trunk of valuable merchandise — *Railway company liable — Express company's limitation of $50.*]—A manufacturers' agent and commission merchant brought action to recover $3,500 for a trunk of valuable merchandise alleged to have been destroyed by the negligence of the defendant company while in transit on their line. Defendants alleged that the goods had not been entrusted to them, but to the Dominion Ex-

press Co., for whom they were carrying them, and who made it a condition of their receiving the goods that they should not be liable beyond $50, and the defendants claimed the benefit of this condition and paid $50 into Court:—*Held*, that an action for the loss of goods will lie against the railway company, and that they are not entitled to claim the limitation of the express company. Judgment given the plaintiff for 16,000 francs and costs. *Allen* v. *Can. Pac. Ry. Co.* (1900), 14 O. W. R. 752, 1 O. W. N. 84, 19 O. L. R. 510.

Trial by jury — *Verdict assessing the damages in an action for negligence—Declaration in a verdict that a specific sum has already been paid to the plaintiff by the defendant—Judgment fixing the amount of damages on such verdict.*]—When by the same verdict in an action for negligence for an accident to a workman the jury fixes the damages at the amount claimed and declares that a specific sum has already been paid by the plaintiff to the defendant on account of his claim, the Court, in giving judgment, ought not to take this declaration into account nor deduct it from the sum which it fixes. The jury is considered to have done so in fixing the damages, which sum is over and above what it recognizes as having been paid. *Dom. Park Co.* v. *Dallaire*, 18 Que. K. B. 429.

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7. Driving Logs.

Bridge — *Injury to — Navigable river—Sudden rising—Floating logs—Vis major.*]—The plaintiffs were the owners of an iron bridge crossing a navigable river. The defendant was hurriedly floating his logs and timber down the river; and the river suddenly rising, as it often did, a jam was formed, and the plaintiffs' bridge was injured. The defendant pleaded that the damage was caused by an irresistible force over which he had no control.—*Held*, that, the river being navigable, the defendant had the right to use it as an ordinary highway only; that the defendant must be taken to have been aware of the fact that the river was subject to sudden rising; and that the accident was caused not by force *majeure*, but by the negligence of the defendant in placing too many logs in the river at once, without having at the same time a correspondingly sufficient number of men to keep abreast of them in order to prevent a jam. *Ward* v. *Grenville*, 21 C. L. T. 444.

Injury to bridge — *Servitude—Watercourses—Floatable rivers—Statutory duty—Riparian rights—Vis major.*] — The Rouge river, in the province of Quebec, is floatable but not navigable, and is used by the lumbermen for bringing down saw-logs to booms, in which the logs are collected at the mouth of the river, and distributed among the owners. The plaintiffs constructed a municipal bridge across the river near its mouth where the collecting booms are situated. The defendant and a number of other lumbermen engaged in driving their logs, mixed together, down the river, did not place men at the bridge to protect it during the drive, and took no precautions to prevent the formation of jams of their logs at the piers of a railway bridge which crosses the river a short distance below the municipal bridge, nor did they break up a jam of logs which formed there, but they abandoned the drive before the logs had been safely boomed at the river mouth. The river Rouge is subject to sudden freshets during heavy rains, and, on the occurrence of one of these freshets, the waters were penned back by the jam, and a quantity of the logs were swept up stream with such force that the superstructure of the municipal bridge was carried away. In an action by the municipality to recover damages from the lumbermen, jointly and severally:—*Held*, that irrespective of any duty imposed by statute, the proprietors of the logs were liable for actionable negligence on account of the careless manner in which the driving of the logs was carried on, and were jointly and severally responsible in damages for the injuries so caused.—*Held*, further, that the right of lumbermen to float timber down rivers and streams is not a paramount right, but an easement or privilege which must be enjoyed and exercised with such care, skill, and diligence as may be necessary to prevent injury to or interference with the concurrent rights of riparian proprietors and public corporations entitled to bridge or otherwise make use of such watercourses. *Ward* v. *Grenville*, 23 C. L. T. 37, 32 S. C. R. 510.

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8. Evidence of Negligence.

Damages — *Particulars.*]—In an action for injuries alleged to be caused by the gross carelessness and negligence of the defendant, the plaintiff will be ordered to furnish particulars of the alleged gross carelessness and negligence, and of the damages thereby suffered by him. *Forbes* v. *Montreal St. Ry. Co.*, 3 Que. P. R. 449.

Electric shock — *Death caused by — Burden of proof — Liability of suppliers of electricity.*]—Appeal from a judgment condemning the defendants to pay $5,000 damages for the death of the respondent's husband, caused by taking hold of a lamp (supplied by the defendants in the ordinary course of their business) to turn on the light. It was not proved exactly what was responsible for the accident. A guy wire of another electric company's system was, at one point, within an inch or an inch and a half of the appellants' wires communicating with the house of deceased, and, although there was no evidence of actual contact between the wires, yet this was one of the various theories advanced in explanation of the accident:—*Held*, that the burden of proof of the fact, act, or omission constituting negligence was not upon the plaintiff. The presumption was that the fatal current came over the same system and from the same source as that by which his ordinary supply was delivered to the deceased by the appellants. The burden of proof was upon them to shew the contrary. This they had failed to do, and the judgment holding them responsible for the accident should be affirmed. *Royal Electric Co.* v. *Hevi*, 21 C. L. T. 442.

Explosion at gas works — *Death of servant—Protection of employees—Evidence—Questions for jury—Judge's charge—Findings of fact — Inferences.*]—An experienced

employee of the defendants was killed by an explosion of illuminating gas while discharging his duties in the meter-room at the defendants' gas works. It was shewn that there might possibly have been an escape of gas from the controllers or other fixtures in the room or in the blow-room adjoining it; that there had been no special precautions by the defendants to detect any such escape of gas that might occasionally happen; and that the meter-room had always been, and at the time of the accident was, lighted by means of open gas jets. There was no exact proof of any particular fault, attributable to the defendants, which could have been the whole cause of the explosion, and its origin and course were not explained. In an action for damages by the widow and representatives of the deceased, the jury found that the explosion had resulted from the fault and imprudence of the defendants in lighting the meter-room by open gas jets, and contributory negligence on the part of deceased was negatived:—*Held*, affirming the judgment appealed from, 16 Que. K. B. 246, 3 E. L. R. 1, which affirmed 30 Que. S. C. 104, Davies and Maclennan, JJ., dissenting, that, in the circumstances, the jury were justified in finding that there had been such negligence and imprudence on the part of the defendants, in such use of open gas jets, as would render them responsible for the injury complained of. *Montreal Light Heat & Power Co.* v. *Regan*, 40 S. C. R. 580.

Fatal Accidents Act—*Death caused by motor vehicle—Presumption of negligence—Motor Vehicle Act, s. 33 — Application to action by representative of deceased—Evidence to rebut presumption—Insufficiency—Statutory warning—Speed of vehicle—Damages—Dependents — Reasonable expectation of pecuniary benefit.*] — Section 33 of the Manitoba Motor Vehicles Act, 7 & 8 Edw. VII. c. 34, applies to actions under the Fatal Accidents Act, R. S. M. 1902, c. 31, where the death of a person has been caused by an injury sustained from a motor vehicle upon a highway. The only effect of s. 38 is that a presumption is afforded that there has been negligence, and it is for the defendant to rebut that presumption. Therefore, the plaintiffs, suing as the administrators of the estate of a man who was injured upon a highway by the defendant's motor vehicle, and died from his injuries, were entitled to the benefit of the presumption.—And *held*, upon the evidence, and having regard to ss. 12, 13, 22 and 39 of the Motor Vehicles Act, that the defendant had not discharged the onus that the statute had placed upon him—that there was negligence on the part of the defendant.—The deceased had a right to expect that any person driving a motor vehicle along the highway would comply with the statute and otherwise exercise a proper degree of care; and it had not been made to appear that he himself was guilty of any want of care.—The introduction into street traffic of the automobile, combining speed with great weight and size, has brought about new considerations; and the legislature has deemed it necessary to interfere for the protection of pedestrians and vehicular traffic of other kinds; hence the Motor Vehicles Act. — *Cotton* v. *Wood*, 8 C. B. N. S. 568, and like cases, distinguished.—The rule that persons lawfully using a highway are entitled to rely on warnings required by statute, as from railway engines, is applicable where the statute requires from motor vehicles warning by light and sound.—*Hennessey* v. *Taylor*, 189 Mass. 583, 4 Am. & Eng. Ann. Cas. 396, approved.—The persons on whose behalf the action was brought, the father, sister and child of the deceased, were *held* to have a reasonable expectation of pecuniary benefit from the continuance of the life of the deceased; and damages were assessed in their favour at $3,000. *Toronto General Trusts Cor.* v. *Dunn* (1910), 15 W. L. R. 314, Man. L. R.

Fault of the owner of a thing, or person who has the care of it.]—In an action for damages for an injury caused by a thing, it is incumbent upon the plaintiff to establish affirmatively, not only the damage claimed, but also fault, negligence or imprudence on the part of the defendant, as the owner or person having the care of the thing. Such ownership or care has not in law the effect of placing upon the defendant the burden of proving negatively the absence of fault on his part, or that of his servants. *Can. Pac. Ry. Co.* v. *Dionne* (1908), 18 Que. K. B. 385.

Findings of jury — *Question whether plaintiff could have avoided injury by exercising reasonable care—"He might have"—New trial.*]—In an action for damages for injury to plaintiff while crossing defendants' railway, the jury, in answer to the question "could plaintiff, by exercise of reasonable care on his part, have avoided the collision?" answered "he might have;"—*Held*, that the answer "he might have," was only speculative, and not a real answer to the question. Judgment at trial (1909), 13 O. W. R. 683, discharged and new trial ordered. *Rowan* v. *Toronto Ry. Co.* (1899), 29 S. C. R. 717, followed. *Badgeley* v. *Grand Trunk Ry. Co.* (1909), 14 O. W. R. 425.

Judgment after trial — *Reasons for the decision — Liability—Proof—Conflict of testimony—Grave presumptions — Appeal—Summing up of the Judge in his charge.*]—The judgment rendered after trial in an action as to liability for an accident causing death and which is imputed to the negligence of the defendant is sufficiently traced to its source in these terms.—"Considering that the plaintiffs have proved that the accident that caused their son's death happened through the negligence of the defendants' employees." It is not necessary to point out in what this negligence consisted to satisfy the requirements of Art. 541 C. P. In matters of liability for an accident causing death negligence may be inferred from weighty presumptions notwithstanding the conflict of evidence, and a Court of Appeal in these circumstances ought rather to rely on the conclusion of the Judge in the Court below in summing up for the jury. *C. P. R.* v. *Rioux*, 18 Que. K. B. 337.

Presumption — *Onus probandi — Insurance — Subrogation.*]—Where damage is caused to a plate glass window, the *onus probandi* is on the party causing the damage to prove that he was not in fault, the presumption being that the window was broken by his negligence.—2. Where the insurance company replaces the broken window and is

subrogated in the rights of the insured, the company is entitled to claim from the party causing the damage, although the insurance company insures against accident.—3. It is negligence on the part of the roofer not to protect plate glass windows by some means when clearing the roof above from snow. *Lloyds Plate Glass Co.* v. *Powell*, 16 Que. S. C. 432.

Railway — Death of engine-driver — Evidence—Conjecture as to cause of death—Contributory negligence—*Volenti non fit injuria* — Findings of jury — Misdirection—Damages—New trial. *Woolsey* v. *Can. North. Rw. Co.*, 11 O. W. R. 1030.

Railway — *Evidence — Acts subsequently done to remove source of danger—Case for jury—Questions—General verdict—Damages — Functions of jury—Quantum of damages.*]—In an action for negligence, it is not improper to receive evidence as to what may have been done by the defendants subsequently to remedy the defects or dangers complained of, but the jury should be warned that such evidence taken by itself is no evidence of negligence. If there be no other evidence of negligence, the case should be withdrawn from the jury.—The evidence in this case considered, as to whether the case should have been left to the jury or not.—It is within the discretion of the trial Judge to submit special questions to the jury or not; but in either case the jury may render a general verdict.—The words "The Court may give such damages," in C. O. 1898 c. 48, s. 3, mean the Judge at the trial, or the Judge and the jury, as the case may be.—*Semble*, a verdict for $4,500, in the circumstances of this case, could not seriously be excepted to.—Judgment of Stuart, J., 1 Alta. L. R. 244, affirmed. *Toll* v. *Can. Pac. Rw. Co.*, 8 W. L. R. 795, 1 Alta. L. R. 318, 8 Can. Ry. Cas. 294.

Servant working on bridge—*Thrown off and drowned—Defective system—Dangerous place—Question for jury—Non-suit—New trial—Costs to plaintiffs.*]—Plaintiffs, widow and infant children of Wm. Cairns, brought action to recover damages for his death, caused, as they alleged, by the negligence of the defendants, both under the common law and the Workmen's Compensation for Injuries Act. Deceased, at the time of the accident, was engaged in assisting in jacking up part of a bridge over a river which had "canted over" owing to the subsidence of one end of one of its supporting piers. Deceased and another man were working at the outer end of the piers, when, owing to some cause not fully explained, the two men were thrown into the river and drowned.—Falconbridge, C.J.K.B., withdrew the case from the jury and dismissed the action.—Divisional Court ordered a new trial, holding that there was evidence which should have been submitted to the jury. Costs to plaintiff. *Cairns* v. *Hunter Bridge & Boiler Co.* (1910), 17 O. W. R. 947, 2 O. W. N. 472.

Specifically charging act of negligence that caused the injury, estops the plaintiff, in an action of damages, from proving any other act at the trial, and the admission of such evidence by the Judge is a sufficient ground to quash a verdict in his favour. *Lemieux* v. *Montreal St. Rw. Co.* (1910), 38 Que. S. C. 400.

Trial by jury — *Findings — Statutory privilege—Street railway—Condition of highway.*]—On the trial of an action based on negligence, the jury should be asked to find specially what the negligence of the defendant was that caused the injury. General findings of negligence, unless the same is found to be the direct cause of the injury, will not support a verdict.—Where a street railway company have by their charter privileges in regard to the removal of snow from their tracks, and the city engineer is given power to determine the condition in which the highway shall be left after a snow storm, a duty is cast upon the company to exercise their privilege in the first instance in a reasonable and proper way and without negligence. *Mader* v. *Halifax Electric Tramway Co.*, 26 C. L. T. 188, 27 S. C. R. 94.

9. Fires.

Contributory negligence — *Voluntarily incurring risk—Remoteness of damages.*]—The defendant was the owner of a threshing machine and a portable steam engine, and hired from the plaintiff a team of horses with a driver for use in moving the engine about and in drawing straw and grain during the work of threshing. While threshing for a certain farmer, sparks from the engine set fire to a stack of grain, and, the separator being thereby placed in danger, the plaintiff's driver attached his horses to it for the purpose of hauling it into a place of safety; but the fire spread so rapidly and unexpectedly before the separator could be moved or the horses detached that they were severely burned and had to be killed. The County Court Judge, who tried the case without a jury, found that the fire had been caused by negligence on the part of the defendant's servants, also that the horses had been attached to the separator either in obedience to a call from the defendant's foreman or under his personal supervision, and that there was no negligence on the part of the plaintiff's driver:—*Held*, that the evidence fully warranted the finding of negligence, and, unless the plaintiff's driver was guilty of contributory negligence, the defendant was responsible for the loss of the horses.—2. That the driver was not guilty of contributory negligence in exposing the horses to danger, as it was not obvious, and he had acted either on the orders of the defendant's foreman or in obedience to a natural impulse to try to save the defendant's property. *Connell* v. *Prescott*, 20 A. R. 49, 22 S. C. R. 147, followed. *Thorn* v. *James*, 23 C. L. T. 124, 14 Man. L. R. 373.

Destruction of building — *Scope of employment.*] — Defendants' servant while pursuing the ordinary course of his duties drove a steam roller over a gas main which burst, the escaping gas exploding, set fire to the roller, from which it was claimed sparks ignited the church of which plaintiffs were trustees:—*Held*, that the evidence was sufficient to give a reasonable explanation of the origin of the fire in the absence of any other reasonable cause. The defendants' servant

was negligent in the management of the roller and he knew generally where the main was. Judgment for plaintiffs. *Methodist Church* v. *Welland*, 12 O. W. R. 949.

Destruction of house — *Electric light company—Cause of fire—Condition of transformer—Rules of insurance association.*]—A company furnishing electricity for the lighting of a house and conducting a primary current at a tension of 2,000 volts to its transformer, where, in order to avoid danger, it is reduced to a secondary current at a tension of 110 volts, at which it enters the house and is received by wires installed by the owner, are responsible for a fire which occurs in the house, when the evidence shews no other acceptable explanation of it than the state of inefficiency of the transformer, ascertained immediately after the fire, especially when the concomitant facts establish that such state of inefficiency existed at the time of the fire and was not a result of it.—It was in vain for the company to contend that the evidence established that the branch wires in the house had not been installed in accordance with the rules of the association of insurers, for there was nothing to shew that the fire had been occasioned by any breach of the rules. *Union Assce. Co.* v. *Que. Riv. Light & Power Co.*, 28 Que. S. C. 289.

Destruction of property — *Liability of infant—Liability of father—Ownership of property destroyed—Possession—Jus tertii.*]—A father is not liable for negligence in allowing his fourteen year old son to go out alone with a gun to shoot game, if the boy has been carefully trained in the use of a gun and ordinarily exercises great care in handling it; but the son will be liable in damages for the consequences of carelessness in firing the gun so as to start a prairie fire which destroys the plaintiff's property.—Part of the plaintiff's claim was for the loss of a stable on land which he had agreed to sell. The stable had been placed on the land by the purchaser, but the plaintiff had taken possession of the stable and was using it at the time of the fire:—*Held*, that the plaintiff's possession of the stable was evidence of title as against a wrong-doer, and that the defendant could not rely on the purchaser's rights as against the plaintiff, but was liable to the plaintiff for the value of the stable as well as of the other property destroyed by the fire. *Jeffries* v. *Great Western Ry. Co.*, 5 E. & B. 802; "*Winkfield*," [1902] P. 42, and *Glenwood* v. *Phillips*, [1904] A. C. 405, followed. *Turner* v. *Snider*, 3 W. L. R. 385, 16 Man. L. R. 79.

Fumigating premises — *Fire carried to adjoining property — Liability.*]—A henhouse in the defendant's barn was fumigated by placing a pan containing burning paper, splinters of wood, and sulphur, upon the floor of the barn. The fire from the pan was communicated to hay in a loft overhead, and resulted in the destruction of the barn. Sparks from the latter were carried by the wind to the plaintiff's barn, situated some distance away, which caught fire and was also destroyed:—*Held*, that the act of fumigation, in the way in which it was done, amounted to a putting upon the land something which would not naturally come upon it and which was in itself dangerous and might become mischievous, within *Rylands* v. *Fletcher*, L. R. 3 H. L. 330, and that the defendant was liable in damages for the consequences. *Creaser* v. *Creaser*, 3 E. L. R. 216, 41 N. S. R. 480.

Parent and child—*Fire caused by act of imbecile son—Liability of parent—Scienter of propensity—Ability to take care—Law same as in case of animals—Damages approximate —Findings of jury.*]—An action for $1,500 damages, alleged to have been caused to plaintiff by reason of a weak-minded son of defendant setting fire to a stack of straw close to the plaintiff's granary, containing 1,150 bushels of wheat, which was destroyed. The plaintiff alleged and the jury found that the fire was set by an irresponsible, imbecile son of defendant, that the liability in the case was because of the defendants not taking care of a dangerous human being.—Britton, J., *held*, 19 O. W. R. 229, 2 O. W. N. 1025, that a man is an animal as to legal liability as to torts. That there was scienter on the part of the defendant and there was ability to take care of the son. That damages were the proximate result of the negligence. That, upon these general principles, and upon the answers of the jury and upon the whole case, judgment was entered for plaintiff for $570.40 damages with costs. Divisional Court *held*, affirming above judgment, that at common law the family relationship is distinguished from that of master and servant, and does not make a parent legally responsible to damages for the torts of his infant child. The responsibility must be based upon the rules of negligence rather than that of the relation of parent and child. Under the facts established by the trial, this responsibility was placed. Appeal dismissed with costs. *Thibodeau* v. *Cheff* (1911), 19 O. W. R. 679, 2 O. W. N. 1354.

Railway — *Destruction by fire of wood pile near railway siding—Escape of fire from engine—Proof of negligence — Accumulation of combustible matter—Defective condition of screen.*]—Plaintiff, by agreement with defendants, had the right to store cord wood on defendants' property adjoining their track. A large quantity was destroyed by fire caused by sparks emitted from the defective engine, lighting in some dry grass and being communicated therefrom to the cord wood. Defendants held liable for $300 damages. Judgment of Teetzel, J., at trial (1909), 13 O. W. R. 1113, affirmed. *Scott* v. *Pere Marquette Rw. Co.*, 14 O. W. R. 648.

Setting out.]—Damage to property — Casual connection—Findings of jury. *Fabian* v. *Smallpiece*, 4 O. W. R. 268.

Threshing—*Escape of sparks from engine—Negligence—Contributory negligence—Damages.*] — Appeal by defendants from judgment of Prendergast, J., 15 W. L. R. 185, in favour of plaintiffs dismissed. *Spratt* v. *Dial* (1911), 16 W. L. R. 678. Man. L. R.

Threshing engine.] — Destruction of grain—Leaving spark arresters open—Contributory negligence — Acquiescence—Damages. *Gibson* v. *Wickham* (N.W.P.), 5 W. L. R. 319.

10. HIGHWAYS.

(a) Accidents on.

Electric wires.]—Injury to person by — Proximity to highway — Finding of jury—Knowledge of danger—Negligence of both plaintiff and defendant—New trial. *Findlay v. Hamilton Electric Light & Cataract Power Co.*, 9 O. W. R. 434, 773, 11 O. W. R. 46.

Electric wires.]—Injury to person passing in street—Municipal corporation—Electric company — Knowledge of defects—Precautions against danger — Liability — Indemnity—Joint tort-feasors — Contribution. *Sutton v. Dundas*, 11 O. W. R. 501.

Electric wires — *Quebec Act 1 Edw. VII. c. 66, s. 10—Construction—Exercise of statutory powers — Evidence.*]— A derrick used in putting up a house in one of the streets of Montreal was brought into contact with the overhead wires of the respondents, with the result that a current of electricity was diverted to the street and killed the appellant's husband:—*Held*, that the respondents, being authorised by the Quebec Act, 1 Edw. VII. c. 66, s. 10, in the alternative to place their wires either overhead or underground, were not guilty of negligence in adopting one alternative rather than the other, or in neglecting to insulate or guard the wires, in the absence of evidence that such precaution would have been effectual to avert the accident. Judgment in 15 Que. K. B. 11, affirmed. Judgment in 28 Que. S. C. 18 set aside. *Dumphy v. Montreal Light Heat & Power Co.*, [1907] A. C. 454, 16 Que. K. B. 527.

Horse at large on highway — *Injury to passer-by.*]—The defendant left his horse, attached to a vehicle, upon the public highway, without tying it up or putting any person in charge. The horse ran away and struck and injured the plaintiff, who was driving a loaded sleigh:—*Held*, that the defendant was liable to the plaintiff in damages; and it made no difference that the plaintiff had got down from his sleigh, and when struck, was endeavouring to keep the runaway horse from running into the sleigh, as the evidence shewed that he would have been struck had he remained upon the sleigh. *Laflamme v. Starnes*, 18 Que. S. C. 105.

Horse at large on highway — *Injury to passer-by — By-law.*]—The defendant's horse strayed from his field to the highway, the fence being defective, and, being frightened by a boy, ran upon the sidewalk and knocked down and injured the plaintiff. A municipal by-law made it unlawful for any person to allow horses to run at large:—*Held*, that the horse was unlawfully on the highway, and that the defendant was liable in damages for the injury suffered by the plaintiff, the injury being the natural result of, and properly attributable to, his negligence. Judgment in 1 O. L. R. 412, 21 C. L. T. 205, affirmed. *Patterson v. Fanning*, 21 C. L. T. 549, 2 O. L. R. 462.

Injury to passer-by — *Electric company—Operations of a dangerous nature—Insulation of electric wires.*]—The defendants, a company engaged in supplying electric light to consumers in the city of Montreal, under special charter for that purpose, placed a secondary wire, by which electric light was supplied to G.'s premises, in close proximity to a guy-wire used to brace primary wires of another electric company, which, although ordinarily a dead wire, might become dangerously charged with electricity in wet weather. The defendants' secondary wire was allowed to remain in a defective condition for several months immediately preceding the time when the injury complained of was sustained, and it was at that time insufficiently insulated at a point in close proximity of the guy-wire. While attempting to turn on the light of an incandescent lamp on his premises, on a wet and stormy day, G. was struck with insensibility and died almost immediately. In an action to recover damages against the company for negligently causing the injury:—*Held*, affirming the judgment in 21 C. L. T. 442, 11 Que. K. B. 456, that the defendants were liable for actionable negligence, as they had failed to exercise the high degree of skill, care and foresight required of persons engaging in operations of a dangerous nature. *Herd v. Royal Electric Co.*, 22 C. L. T. 358, 32 S. C. R. 462.

Injury to passer-by — *Municipal corporation—Dangerous operations—Neglect of precautions—Personal injuries.*]—Dangerous operations, such as blasting for the purpose of excavation, should be carried on with due regard to the safety of the public; and where it appeared that a person, at a distance of about 250 yards from the works, was seriously injured by a stone hurled through the air by a blast, and that the accident occurred through the fault and negligence of the defendants' employees in not sufficiently covering the blast, the defendants were held responsible. *Larocque v. Montreal*, 19 Que. S. C. 527.

Injury to person—Municipal corporation—Work on roads—Pathmaster — Relationship of master and servant — Infant. *Rock v. Wilmot*, 1 O. W. R. 415.

Operation of electric power—*Liability of contractors.*]—The plaintiff's husband witnessed an accident which happened to an employee of the defendants engaged in building operations on one of the public streets of the city of Montreal. A wire cable used on a derrick coming in contact with high voltage wires of the Montreal Light, Heat and Power Co., the employee received an electric shock and was being assisted by the foreman of the contractors. The plaintiff's husband rushed to their assistance, and, in trying to extricate the employee, both were killed by electricity passing through the cable. The plaintiff brought a joint and several action, on behalf of herself and her children, against the contractors and the Montreal Light, Heat & Power Co., for damages, and charged the contractors with negligence in placing and operating the derrick in dangerous proximity with the live wires. The jury exonerated the appellant's husband from blame in voluntarily going to the rescue of the men who were in contact with the electric current, and found the company at fault for neglecting to protect their live wires, but found, also, that the contractors were not to blame for the acci-

dent. On these findings, in respect to the contractors, the case was referred by the trial Judge to the Court of Review which dismissed the action against the contractors with costs, (1908), 17 Que. K. B. 471. This decision was affirmed by the Court of King's Bench, Trenholme, J., dissenting. The Supreme Court of Canada allowed the appeal with costs in the Supreme Court of Canada and in the Court of King's Bench, and ordered a new trial, the costs of the first trial in the Superior Court, District of Montreal, to abide the results. *Dumphy* v. *Martineau* (1908), 42 S. C. R. 224.

See *Dumphy* v. *Montreal Light, Heat & Power Co.*, [1907] A. C. 454, 15 Que. K. B. 11.

Playing dangerous game on highway — Infant — Contributory negligence. *Coburn* v. *Hardwick*, 1 O. W. R. 733.

Street railway.]—Horse killed by electric wire — Dangerous appliances—Necessity for extraordinary precautions. *Hinman* v. *Winnipeg Electric Street Ry. Co.* (Man.), 3 W. L. R. 351.

(b) Sidewalk—Unsafe Condition.

Fall on slippery sidewalk. *Bell* v. *Hamilton*, 15 O. W. R. 747, 1 O. W. N. 644, affirmed, 1 O. W. N. 784.

Privity of contract—*Accident.*]—When a duty is imposed by law, if one of a class for whose benefit that duty is imposed is injured, by neglect to obey the law, then, *prima facie*, the person injured has a right of action against the person in such neglect. Therefore, where a municipality has passed a by-law putting the construction and maintenance of sidewalks on adjacent proprietor there is a privity of contract between that proprietor and any person injured as the result of its defective condition: C. P. Art. 191. *Laurentide Paper Co.* v. *Baisford* (1910), 17 R. L. n. s. 24.

Surface of boulevard below curb.]—An action for damages brought by John and Joanna Brown (husband and wife), for injuries to Joanna Brown, from falling while crossing a boulevard, alleged to have been caused by the negligence of defendants in leaving the earth some two inches lower than the curb.—Britton, J., *held*, that plaintiffs were not entitled to recover and dismissed the action without costs. *Brown* v. *Toronto* (1911), 18 O. W. R. 996, 2 O. W. N. 982.

Tripping on sidewalk—*Repaired so as to be slightly raised—Action for damages.*]—Plaintiff brought action to recover damages for injuries received by her from a fall, owing to the unsafe condition of the sidewalks.—Clute, J., found that the sidewalk was not in a reasonably safe condition at the time of the accident, and for several months prior thereto, and that defendant was aware, or by reason of the length of time it was out of repair, should have been aware of such condition. — Plaintiff given judgment for $1,767, with costs; damages assessed at $1,300, and doctor's bills and medicine $467. *Jackson* v. *Toronto* (1910), 17 O. W. R. 1007, 2 O. W. N. 461.

(c) Streets—Unsafe Condition.

Digging trunk sewer—*Without taking proper precautions for shoring up sides of sewer—Subsidence of plaintiff's land—Walls of house cracked—Action for damages.*]—An action for $1,000 damages by plaintiff residing on Wyatt Avenue, Toronto, alleged to have been caused by defendants' negligence in digging a trunk sewer along the street without taking proper precautions for shoring up the sides of the sewer whereby a subsidence of plaintiff's land and house resulted, and the walls of the house were cracked, etc.—Riddell, J., *held*, that plaintiff was entitled to judgment for $600 and costs. —Divisional Court dismissed defendants' appeal with costs. *Boyd* v. *Toronto* (1911), 18 O. W. R. 897, 2 O. W. N. 902. O. L. R.

Failure to maintain streets—*Hypothetical plea—C. P. 194.*]—An hypothetical plea is illegal. Thus, a municipal corporation sued in damages caused by the use of dangerous materials in the upkeep of its streets, cannot plead that perhaps the plaintiff suffered the damages complained of while driving in adjoining towns where the same material is used upon the roads. *Dagenais* v. *Dorval* (1911), 12 Que. P. R. 217.

Faulty condition of street and light on street.]—Order made adding the gas company as defendants to action for damages against city owing to alleged faulty condition of the streets and the light thereon. *Hidaca* v. *St. Catharines* (1909), 14 O. W. R. 736, 1 O. W. N. 76.

Obstruction placed upon boulevard—*By-law prohibiting use of boulevard — Plaintiff injured by falling among obstructions — Liability of defendants.*] — Plaintiff, in his hurry to get medicine for his wife, attempted to cross a street diagonally, when he fell among some loose scoria blocks placed upon the boulevard by defendants to be used in repairing the street. Plaintiff broke his leg, and brought action to recover damages.—Latchford, J., *held* (17 O. W. R. 41, 2 O. W. N. 87), that defendants owed no duty to plaintiff to leave the boulevard unobstructed by the blocks: That had plaintiff conformed to the city by-law prohibiting persons from walking on any boulevard where there were crossings, he would not have been injured. Action dismissed, but under the circumstances, without costs.—Divisional Court *held*, that defendants failed in their duty towards the public by creating, without notice, the dangerous condition which caused the accident. Appeal allowed and judgment entered for plaintiff for $1,500 with costs. *Breen* v. *Toronto* (1911), 18 O. W. R. 522, 2 O. W. N. 690.

Raised crossing—*Injury to person driving — Character and population of town—Judicial notice — Condition of crossing — Dangerous spot — Negligence of municipality — Contributory negligence — Findings of trial Judge — Reversal on appeal.*]—Section 383 of the Town Act, c. 17 of 1908 (Sask.), provides that every public highway, crossing, etc., shall be kept in repair by the town, and, on default of the town so to keep in repair, the town shall be civilly responsible for all damage sustained by any person

by reason of such default:—*Held*, that, in order properly to determine the question of the defendants' liability to the plaintiff for injuries sustained by the latter by reason, as alleged, of a street crossing being out of repair or improperly constructed, the character and population of the town should be considered; what might render a large, populous, and wealthy city liable for an omission to repair a street or sidewalk might not render a small and thinly populated town liable, and what might render a town liable might not render the custodians of a highway in a rural district liable. *Lordly* v. *City of Halifax*, 24 N. S. R. 1, *City of Halifax* v. *Lordly*, 20 S. C. R. 595, specially referred to. Review of the Ontario cases. The defendants had constructed a sidewalk on the west side of E. street across F. avenue, in a town. Where the avenue crossed this sidewalk, a roadway 21 feet in width, had been graded and made even with the crossing. On the north side of this roadway the ground dropped, and the top of the sidewalk was some inches above the ground. On a dark evening in November, 1909, the plaintiff was driving a horse attached to a delivery waggon west along F. avenue, and when he came to E. street he saw another waggon in front of him on the crossing. He turned to the right for the purpose of passing this waggon, and the wheel of his waggon struck the sidewalk. He was thrown out of his waggon by the violence of the impact, and his collar bone was broken. Apparently, the reason why the ground north of the road was not filled in, was because it had been left to serve the purpose of a gutter. The trial Judge found that the platform, at the place where the plaintiff's waggon struck it, was 12 inches from the ground and 18 feet north of the graded roadway, which would be 7 feet 6 inches from the north side of the roadway. There was no evidence to shew when the town was incorporated nor the present number of its inhabitants: — *Held*, that the Court could not take judicial notice of these matters, but could take notice of the general condition of the province, and that the towns generally were not thickly populated. The trial Judge found that the crossing was a "dangerous spot without a light, and that, if the utmost care were used, no accident might occur, but it was not in such proper or safe state as to render such accident unlikely to occur." He did not consider the question whether or not those requiring to use the road might, using ordinary care, pass to and fro upon it in safety. —*Held*, that the latter question was the one to be considered, and it was largely a question of fact. If the trial Judge had found upon that question, the appellate Court would not interfere with his finding; but, as he had not so found, it was open to the Court to draw the proper inferences of fact. The mere fact of the crossing being dangerous was not sufficient to fix the defendants with liability. The proper finding, upon the evidence, was, that the platform and crossing respectively were in such a reasonable state of repair that those requiring to use the street might, using ordinary care, pass to and fro upon them in safety.—*Held*, also, that the trial Judge's finding against the defendants on the question of the plaintiff's contributory negligence should be reversed. Judgment of District Court of Battleford, 14 W. L. R. 684, reversed. *Williams* v. *North Battleford* (1911), 16 W. L. R. 301, 8Sask. L. R.

Responsible for the bad condition of roads — *Road under water left open for travel — Traveller who risks himself on it — Common negligence.*]—The fact that a person voluntarily ventures on a public highway flooded by the overflow of a river, does not relieve the municipal corporation of the locality of its responsibility for the consequences of an accident caused by the bad condition of the road. The corporation is doubly in fault, firstly, on account of this bad condition, and, secondly, because it leaves the road open for travel during the inundation, when the ruts, culverts, etc., are hidden by water; there is, nevertheless, contributory negligence by the victim, and the damages ought to be borne proportionately by the two parties. *St. Catharine* v. *Orenstein* (1909), 18 Que. K. B. 569.

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11. Inns—Theatres, Etc.

Calcium light in theatre — *Death of person operating — Employment by playing company—Agreement between company and owners of theatre — Division of gross receipts — Partnership — Control of theatre and operations — Liability of owners.*]—A theatrical company agreed to present a certain play at the defendants' theatre on a date specified, and the defendants agreed to furnish the theatre and all the properties contained in the theatre for the period of the engagement, and also to "furnish electric current for the company's calciums." It was agreed that there should be no other entertainment in the theatre during the engagement, and that the gross receipts should be shared so that 70 per cent. should go to the playing company. The plaintiffs' son was employed by the company to operate, and did operate, a calcium light belonging to them; he was under the charge and direction of their electrician; the company's servants had entire and sole control of the stage and its surroundings, including the place where the lamp was operated. The plaintiffs' son was killed by the action of electricity while operating the lamp:—*Held*, that the effect of sharing the gross receipts was but another mode of paying rent for the premises, and did not indicate that any partnership existed; and the defendants, having no right of control, were not jointly liable with the company, nor in any way liable, for the death of the plaintiffs' son. *Lyon* v. *Knowles*, 3 B. & S. 556, 560, followed. *Flynn* v. *Toronto Industrial Exhibition Association*, 9 O. L. R. 582, and *Indermaur* v. *Dames*, L. R. 1 C. P. 274, L. R. 2 C. P. 311, distinguished. *Bradd* v. *Whitney*, 9 O. W. R. 656, 14 O. L. R. 415.

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12. Neglect of Duty.

Absence of direct proof — *Leaving unguarded hole in ice formed upon navigable water — Evidence of negligence — Death of person walking over ice — Contributory negligence — Argumentative finding*

of jury — Interpretation of.]—Defendants were owners of a large dock at Midland, lying alongside of which in the winter was their tug, which accidentally filled with water and sank at the dock, breaking the ice and leaving open water above her deck. The sunken boat was not immediately raised, and ice formed above it. In a short time they cut the new ice recently formed, and proceeded with the work of raising the tug. Defendants did not place any brush or obstruction or sign near the open water or in any way mark the place of open water or give any warning of danger. While in this condition on the morning of 7th February, 1903, the body of plaintiff's deceased husband was found near this tug. He was lying upon his back, his feet and legs were upon solid ice, his head in open water. On the evening before the morning when the body was found, the deceased had been drinking and there was no doubt that he was that evening in a state of intoxication. Certain questions were submitted to the jury, all of which were answered by the jury, in favour of plaintiff, except the fifth question, which was: "Could the deceased, by the exercise of ordinary and reasonable care, have avoided the accident which occasioned his death, and, if so, in what respect or how could the deceased have avoided the accident?" The latter part of the question was added at the request of counsel for plaintiff. To this question the answer was: "Yes. He might have taken another road, or if sober on a bright night he might have avoided the hole?"—*Held*, there was no doubt that the deceased had a right to be on the ice in the vicinity of the hole. He was not a trespasser. He was upon the ice over navigable water. He was, when he lost his life, at a place "open to" but not "frequented by" the public. Defendants in making the hole through the ice did so in the exercise of their rights for the purpose of saving their tug, which, without fault of theirs, so far as it appeared, had sunk in navigable water. Defendants had no reason to suppose that in the ordinary course of business or travel any one other than those in their employment would be near enough to their boat or to this hole to be in any way in danger. While the public had the right to be, or travel upon the ice, there was no invitation by defendants to deceased or to any of the public to travel upon the ice or to go near the opening. There was not, apart from what was being done by defendants in the raising of the tug, any work or business being carried on, or any road or way defined by bushes or marks or by travel on the ice, that would give notice to defendants that any one would be likely to drive or ride or walk near to where the hole was, and the ice was not in condition to be skated upon. It was quite as reasonable to conclude from the evidence that the deceased voluntarily sat down or fell upon the ice, close to the edge, and perished from cold, as that he accidentally walked into the hole. Upon the evidence, the way in which Plouffe met his death was as consistent with the theory that he did not fall into the water as that he did, and, that being so, the case should not go to the jury: see *Armstrong* v. *Canada Atlantic Ry. Co.*, 4 O. L. R. 589, 1 O. W. R. 612, *Plouffe* v. *Canada Iron Furnace Co.*, 5 O. W. R. 758, 6 O. W. R. 590, 10 O. L. R. 37.

Bailment — *Perishable goods — Injury to — Defective storage plant — Improper operation — Warehouse receipts — Condition limiting liability — Defects in wrappers.*]—The defendants received at different times, in their cold-storage warehouse, cold meat, to be frozen and kept frozen for the plaintiffs until called for. After a few months the meat was found so spoilt that it had to be destroyed. This action was brought to recover damages for the loss alleged to have been caused by the negligence of the defendants. When delivered to the defendants, the meat was inclosed in wrappers, which, according to the evidence, necessitated one or two more degrees of frost to freeze the meat than if there had been no wrapping, and the defendants attributed the damage to this fact, and relied on a provision in the receipts given that they were not to be "responsible for any loss or damage caused . . . from any defects in the packages, barrels, wrappers, or coverings in which the said goods are contained." The trial Judge made the following findings of fact: (1) The meat was in good and sound condition when delivered at the defendants' warehouse. (2) The warehouse was properly constructed for the purpose of cold storage; the plant was a first-class cold-storage plant of modern type and sufficient power; it was operated with the ordinary and reasonable care which might have been expected in the carrying out of the business; and the men in charge of the plant, while not having that higher and special knowledge which a man of scientific attainment might possess on the subject, yet had such practical and even technical knowledge as might be reasonably expected in conducting such a business in an ordinarily satisfactory manner. (3) The real cause of the spoiling of the meat had not been disclosed by the evidence. On these findings, the trial Judge held that the plaintiffs had failed to establish negligence on the defendants' part, and he dismissed the action with costs:—*Held*, on appeal, that the condition in the receipt above quoted did not relieve the defendants from the consequences of negligence, if proved; but, Perdue, J.A., dissenting, that the plaintiffs had failed to prove negligence, and that the appeal should be dismissed.—*Per* Perdue, J.A.: (1) Since the meat was in good and sound condition when received, and the defendants impliedly undertook to promptly freeze it and keep it frozen, the fact that it was found spoiled a few months afterwards speaks for itself, and negligence must be presumed against the defendants. *Kearney* v. *London, Brighton, etc., Rw. Co.*, L. R. 6 Q. B. 759.—(2) The defendants in this case could not meet the plaintiffs' claim by shewing merely that they had used ordinary and reasonable care; but were bound to see that the meat was at once thoroughly frozen and then to keep it in that condition, and anything short of that would be negligence. *Brabant* v. *King*, [1895] A. C. 640. —(3) The evidence shewed that the damage was probably caused by the defendants' failure to maintain a sufficiently low temperature to freeze the meat thoroughly. *Chevrier* v. *Manitoba Cold Storage Co.*, 6 W. L. R. 762, 8 W. L. R. 110, 17 Man. L. R. 539.

Breaking of railing of spectators' gallery in skating rink — *Injury to*

spectator — Liability of owner — Warranty of reasonable safety to spectator passing for place in gallery.]—Action for damages for injuries sustained by falling from gallery of defendants' rink, while witnessing a hockey match, owing, as alleged, to a portion of the railing breaking, whereby plaintiff was precipitated to the ice below and injured:—*Held*, that the accident did not arise from unexpected or unforeseen causes. What happened was just what might have been and should have been expected under the given conditions, and that the defendants were liable. *Stewart* v. *Cobalt Curling Assoc.* (1909), 14 O. W. R. 171; affirmed, 14 O. W. R. 1063, 1 O. W. N. 283.

Collision of railway trains—*Caused by misconduct of crew—Brakesman killed—Action by widow for damages—Failure to shew negligence on part of defendants.*]—Plaintiffs, the widow and children of David Vance, brought action to recover $10,000 damages for the accidental killing of said Vance, as alleged through the negligence of defendants, whereby a collision occurred and Vance was killed.—Latchford, J., at trial, entered judgment for the plaintiffs for $4,320. —Court of Appeal *held*, that judgment should be entered for the defendants, dismissing the action with costs, if demanded, on the ground that plaintiffs had failed to shew any negligence on part of defendants. —Magee, J.A. (dissenting), *held*, that there should be a new trial. *Vance* v. *Grand Trunk Pac. Ry. Co.* (1910), 17 O. W. R. 1000, 2 O. W. N. 489.

Cutting channel through ice formed over navigable water — *Right of navigation — Failure to guard opening—Criminal Code, s. 287 — Drowning of person skating — Cause of action — Findings of jury.*]—The defendants, for the purpose of placing two vessels in winter quarters, cut a channel through the ice formed over the waters of a navigable harbour. They placed the vessels at different points, making for these purposes, at the inner end of the channel which they cut, two openings, which left a triangular piece of ice attached to the shore. This piece of ice, the jury found, was subsequently washed away by the swell of one of the vessels while in motion. The daughter of the plaintiffs, in skating upon the ice, went through some thin ice, which the jury found to have been at a point within the space previously occupied by the triangular piece of ice, and was drowned. The jury found that failure to protect the opening made by the defendants was negligence which caused the girl's death:—*Held*, that the defendants were subject to the obligation imposed by the Criminal Code, s. 287, and the common law, to guard the opening made by them, although made for purposes of navigation; and that failure to discharge that obligation, resulting in the death of the plaintiffs' daughter, gave the plaintiffs a good cause of action.—*Held*, also, that the findings of the jury were sufficient to support a judgment for the plaintiffs. *Pennock* v. *Mitchell*, 12 O. W. R. 767, 17 O. L. R. 286.

Dangerous place on premises — *Part of premises used by licensee — Responsibility of owner — Construction of license — Extent of invitation.*]—Defendants were lessees of large grounds which they used for the purposes of holding an annual exhibition of arts and manufactures, for admission to which grounds they charged a fee. There were several attractions by way of amusements on the grounds, the owners of which paid a license fee to the lessees of the grounds, for the right to charge a further fee for admission to these several attractions. The plaintiff paid his general admission fee to the grounds and also a further fee for a ride on a merry-go-round, which was separate from the general grounds. Here he met with serious injuries, by the merry-go-round breaking by a defect in its construction:—*Held*, the owners of these several attractions were licensees and not lessees and the defendants had a right of supervision which they were negligent in not exercising, and they were liable to plaintiff for holding out an invitation to use the merry-go-round when it was negligently constructed. *Flynn* v. *Toronto Industrial Exhibition Assoc.*, 5 O. W. R. 559, 9 O. L. R. 582.

Druggist.]—Sale of liniment containing poison — Neglect to label as poison—Warning to purchaser — Death of purchaser by drinking — Liability of druggist — Action under Fatal Accidents Act — Expectation of benefit. *Antoine* v. *Duncombe*, 8 O. W. R. 719.

Electric current — Injury to person—Findings of jury — Judge's charge—Nonsuit. *Russell* v. *Bell Telephone Co.*, 10 O. W. R. 802.

Electric lighting — *Dangerous currents —Trespass — Breach of contract — Surreptitious installations — Liability for damages.*]—P. obtained electric lighting service for his dwelling only, and signed a contract with the company whereby he agreed to use the supply for that purpose only, to make no new connections without permission, and to provide and maintain the house-wiring and appliances "in efficient condition, with proper protective devices, the whole according to fire underwriters' requirements." He surreptitiously connected wires with the house-wiring and carried the current into an adjacent building for the purpose of lighting other premises by means of a portable electric lamp. On one occasion, while attempting to use this portable lamp, he sustained an electric shock which caused his death. In an action by his widow to recover damages from the company for negligently allowing dangerous currents of electricity to escape from a defective transformer through which the current was passed into the dwelling:—*Held*, reversing the judgment in 2 E. L. R. 570, that there was no duty owing by the company towards deceased in respect of the installation so made by him without their knowledge, and in breach of his contract, and that, as the accident occurred through contact with the wiring which he had so connected without their permission, the company could not be held liable in damages. *Montreal Light, Heat & Power Co.* v. *Laurence*, 27 C. L. T. 779, 39 S. C. R. 326.

Escape of gas — *Injury to persons — Liability of gas company — Vis major —*

Evidence.]—The owner or operator of an illuminating gas system in a city is liable in damages for asphyxiation of dwellers in a house, into which gas penetrates through the ground, from an escape in a defective portion of the pipes in the street. — 2. Irresistible force, *force majeure*, must be expressly proved, and will not be inferred from circumstances. *Garand & Hamel* v. *Montreal Light, Heat & Power Co.*, 33 Que. S. C. 414.

Explosion of gas — *Independent contractor — Nuisance — Natural gas company —Exercise of statutory powers — Explosion —Collateral negligence.*] — The defendant company, acting within their corporate powers and under the statutory powers conferred by R. S. O. 1897 c. 200, s. 3, and c. 199, s. 22, on such companies, instructed a contractor with whom they had a contract to do such work for them, to make connection with the place of business of the plaintiff's tenant for the supply of natural gas thereto. The contractor's employees negligently allowed gas to escape while constructing a trench for the service pipe from the defendants' main line, which had been laid along a public street, thus damaging the plaintiff's property:—*Held*, that the defendants were liable.—The statutory power to break up and dig trenches in streets implied the duty of seeing that the gas was not allowed negligently to escape in dangerous quantities, which duty the defendants could not rid themselves of by delegating it to another. Such negligence was not merely collateral, but was negligence in the very act the contractor was engaged to perform for the defendants. *Ballentine* v. *Ontario Pipe Line Co.*, 12 O. W. R. 273, 16 O. L. R. 654.

Explosion of gas — *Injury to persons and property — Liability of gas company— Natural gas.*]—Action for damages for loss and injury from an explosion of natural gas supplied by defendants dismissed, no evidence shewing negligence on part of defendants with their main or service pipes. *Harmer* v. *Brantford Gas Co., Holstock* v. *Brantford Gas Co., Williams* v. *Brantford Gas Co.*, 13 O. W. R. 873.

Explosives — *Injury — Knowledge of defendants of plaintiff's proximity — Contributory negligence.*]—Plaintiff was in a tent near where defendants, who were contractors, discharged a blast of dynamite, when plaintiff was injured:—*Held*, that there was no sufficient warning, that defendants knew of plaintiff's tent, and that their workmen were reckless and negligent. Judgment given plaintiff for $2,000 damages. *Longmore* v. *McPherson*, 10 W. L. R. 417.

Gas works.]—Explosion — Injury to person — Slot meter — Damages. *Bastien* v. *Montreal Light, Heat & Power Co.*, 4 E. L. R. 173.

Ice — *Accumulation — Death from — Construction of building.*]—A man hired to work about a building was killed by a mass of ice falling upon him from the roof. In an action, under Lord Campbell's Act, by the administratrix of the deceased against the owners and occupiers of the building:—*Held*, that the latter were not liable in the absence of evidence that they suffered the ice to remain there for an unusual and unreasonable time after they had notice of its accumulation, and might have removed it. In erecting a building the owner may adopt any style of architecture he pleases, provided he does not create a nuisance or violate any law or municipal ordinance; therefore the construction of a roof with projecting eaves, which caused an accumulation of ice and snow thereon, is not *per se* evidence of negligence on the part of the owner, although it may impose upon him a greater degree of watchfulness and care in order to prevent accidents. *Dugal* v. *People's Bank of Halifax*, 34 N. B. R. 581.

Ice — *Building — Owner — Tenant — Liability.*]—The proprietor of a building is responsible for injuries caused by snow or ice falling from the roof thereof, where the fall of the snow or ice results from a want of proper care in keeping the premises in a safe condition; and the proprietor is not relieved from this responsibility as regards the public by the fact that the building is wholly occupied by tenants, or by the fact that the municipal by-laws impose upon tenants the obligation of keeping the roof free from snow. *Jackson* v. *Vanier*, 18 Que. S. C. 244.

Municipal corporation operating electric light plant under statutory authority.]—Spike on post charged with electricity—Failure of person injured to prove negligence. *Prue* v. *Brockville*, 10 O. W. R. 359.

Promissory note — *Agent of bank — Neglect to take in proper form — Subsequent material alteration — Loss of remedy on note — Damages.*] — The defendant, the plaintiffs' agent at a branch, accepted a promissory note, not expressed to be joint and several, as security for an advance, instead of a joint and several one, although expressly instructed to require the latter. Shortly afterwards he discovered the mistake, and at the suggestion of one of the makers of the note, he inserted the words "jointly and severally," on the understanding that the alteration was to be initialled by all the makers. This, however, was not done, and after consultation with the plaintiffs' solicitor, the inserted words were crossed out by the defendant. In the result the bank were held to have lost their remedy on the note on the ground of material alteration. The bank then brought this action against the defendant for damages for negligence: — *Held*, Osler, J.A., dissenting, that the form of the note as taken was to all intents and purposes as valid as if made jointly and severally, and therefore in this regard only nominal damages could be recoverable. The defendant, also, was not liable in damages for the consequences of his subsequent acts. What he did was done in good faith, and in ignorance of the legal consequences. The defendant exercised reasonable care and diligence, in all the circumstances of the case, and the mere fact that his judgment was mistaken, and his acts prejudicial to the plaintiffs, was not enough to render him liable. Judgment of Meredith, C.J., awarding the plaintiffs nominal damages with costs on the appropriate scale and a set-off of costs to the defendant, affirmed

Banque Provinciale du Canada v. *Charbonneau*, 23 C. L. T. 256, 6 O. L. R. 302, 2 O. W. R. 558.

Railway — *Dangerous contrivance — —Permitting access to infants.*]—A railway company who leave a mechanical contrivance (*e. g.*, a turn-table) in an open place to which children of tender years are allowed access, are guilty of negligence and liable for the consequences of the children's unskilful handling of it. Judgment in *Coley* v. *Can. Pac. Ry. Co.*, 29 Que. S. C. 282, 8 Can. Ry. Cas. 289, affirmed. *Can. Pac. Ry. Co.* v. *Coley*, 16 Que. K. B. 404, 8 Can. Ry. Cas. 274.

Sand-pit — *Injury to and death of person taking sand from pit — Falling in of roof — Liability of owner — Knowledge of danger — Warning — Contributory negligence — Volenti non fit injuria.*] — The deceased and a number of other purchasers of sand and gravel from a pit owned and operated by the defendants, were loading sand in an excavation underneath the frozen crust two feet thick. Ten or fifteen minutes before the accident a man employed by the defendants for that purpose warned all those working in the pit that the crust was cracking. The others withdrew in time, but the deceased thought he could complete his loading before the crust caved in, took the risk, and was killed in consequence of the crust falling upon him:—*Held*, that, although it was the defendants' duty to break down the crust as soon as it became dangerous to their customers, yet the maxim "*volenti non fit injuria*" applied in this case, and the defendants were not liable in damages for the death of the deceased. *Roy* v. *Henderson*, 18 Man. L. R. 234, 8 W. L. R. 157, 9 W. L. R. 545.

Statutory duty — *Company—Negligent performance — Independent contractor.*]—Where a statutory duty is imposed on a company, the company are liable for any damage caused to the property of another in consequence of the negligent performance of that duty, and the company cannot avoid liability by shewing that the negligence was that of an independent contractor employed by the company. *McKeary* v. *Dominion Coal Co.*, 40 N. S. R. 89, *McLean* v. *Dominion Coal Co.*, *ib.* 90n.

Street railways — *Accident resulting from contact of electric wires.*]—*Per* Dubuc, C.J.:—A street railway company are not guilty of negligence in failing to take steps to prevent telephone wires crossing above their trolley wire from coming in contact, if broken, with the trolley wire, unless it be at some place known to be especially dangerous.—*Per* Mathers, J.:—Such failure by a street railway company is evidence of negligence to go to the jury. The escape of electricity from wires suspended over streets through any other wires that may come in contact with them must be prevented, so far as it can be done by the exercise of reasonable care and diligence, and the defendants should have put up guards such as were shewn to be in use very generally in the United States and England to prevent such accidents. *Royal Electric Co.* v. *Hevc*, 32 S. C. R. 462. *McKay* v. *Southern Bell Telephone Co.*, 19 Sou. R. 635, and *Block* v. *Milwaukee*, 61 N. W. R. 1101, followed.—The Court being equally divided, an appeal from the County Court jury's verdict in favour of the plaintiff was dismissed. *Hinman* v. *Winnipeg Electric Street Ry. Co.*, 3 W. L. R. 251, 16 Man. L. R. 16.

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13. PUBLIC.

(a) Licensee—Visitors.

Dangerous operations near highway —Injury to person lawfully on highway—Warning—Contributory negligence — Verdict of jury—Refused to disturb—Weight of evidence. *Sinnor* v. *Lamb* (Yuk.), 4 W. L. R. 26.

Injury to person coming on premises —*Dangerous premises — Want of screen or guard.*]—While a teamster was delivering a load of coke on the premises of the defendants, an iron foundry company, he was struck in the eye and injured by a chip, which one of the defendants' workmen, who was cutting off the excrescences on the inside of an iron pipe for the purpose of smoothing it, had chipped off. The accident might have been avoided had there been a screen or guard; or, in the absence of a screen or guard, by the workman stopping work during the delivery of the coke:—*Held*, that the defendants were liable for the injuries sustained. *Fallis* v. *Gartshore-Thompson Pipe Foundry Co.*, 22 C. L. T. 283, 4 O. L. R. 176, 1 O. W. R. 348.

Licensee killed—*Action for damages—Findings of jury — $4,000 awarded aged mother—Excess damages—New trial ordered —Unless parties agree to sum to be awarded plaintiff—Costs.*]—Plaintiff brought action under Lord Campbell's Act to recover damages for the death of her son, a lineman in the employ of the Detroit River Tunnel Company, for which the defendant company was constructing tunnel tubes across the river, alleged to have been caused by the negligence of defendants' servants.—Mulock, C.J.Ex.D., at trial, entered judgment for plaintiff for $4,000 on findings of jury.—Divisional Court affirmed that judgment.—Court of Appeal *held*, that the appeal should be allowed and a new trial ordered unless the parties agreed upon a sum for which judgment may be entered for plaintiff. If a sum was agreed upon the appeal would be dismissed with costs, otherwise there should be a new trial. Costs of last trial and in Divisional Court to be costs in action. Costs of appeal to be costs to defendants in any event. *Rorison* v. *Butler Bros.* (1910), 17 O. W. R. 595, 2 O. W. N. 312.

Pleasure grounds.]—Injury to person —Licensee—No unusual danger — Nonsuit. *Downs* v. *Hamilton & Dundas Rw. Co.*, 10 O. W. R. 657.

(b) Trespassers.

Electric wire — *Trespasser—Evidence —Contributory negligence — New trial.*]—The Ahearn and Soper Co. had a contract to illuminate certain buildings for the visit

of the Duke of York to Ottawa, and obtained power from the Ottawa Electric Co. For the purposes of the contract, wires were strung on a telegraph pole and fastened with tie wires, the ends of which were uninsulated. R., an employee of the Ottawa Electric Co., was sent by the latter to place a transformer on the same pole, and in doing so his hands touched the ends of the tie wire, by which he received a shock and fell to the ground, being seriously injured. To an action for damages for such injury the Ahearn and Soper Co. pleaded that R. had no right to be on the pole and was a trespasser, and on the trial their counsel urged that the work he was doing was connected with the lighting of a building in the city. The Court of Appeal held (6 O. L. R. 619, 24 C. L. T. 5, 2 O. W. R. 1022), that this defence was established and dismissed the action:—*Held*, reversing the judgment, that the counsel's address did not indicate that the building referred to was not one of those to be illuminated under the contract, and the evidence did not shew that R. was engaged in the ordinary business of his employers, and the case should be re-tried, the jury having failed to agree at the trial. A rule of the Ottawa Electric Co. directed every employee whose work was near apparatus carrying dangerous currents to wear rubber gloves, which would be furnished on application. R. was not wearing such gloves when he was hurt.—*Held*, that the mere fact of the absence of gloves was not such negligence on R.'s part as to warrant the case being withdrawn from the jury; that, as to the Ahearn and Soper Co., R. was not bound by the rules; and that, though his failure to take such precaution was evidence of negligence, he had a right to have it left to the jury and considered in connection with other facts in the case. *Randall* v. *Ottawa Electric Co.*, 24 C. L. T. 262. *Randall* v. *Ahearn & Soper Co.*, 34 S. C. R. 698. *See* 2 O. W. R. 146, 173, 1022, 4 O. W. R. 240, 269.

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14. Railways—Street Railways.

(a) Crossings—Accidents at.

Accident to person crossing track—*Contributory negligence — Jury — Trial — Form of questions.*] — When contributory negligence is set up in an action to recover damages for negligence, which is being tried before a jury, the plaintiff is entitled to a clear and distinct finding upon the point. In an action against a street railway company to recover damages, the jury, after finding in answer to questions that the defendants were guilty of negligence, in running at too high a rate of speed, not properly sounding the gong, and not having the car under proper control, and that the plaintiff's injury was caused by this negligence, said, in answer to further questions, that the plaintiff was guilty of contributory negligence in not using more caution in crossing the railway tracks:—*Held*, that this answer was ambiguous and unsatisfactory, and, in view of the previous distinct answers, not fairly to be treated as a finding of contributory negligence. *Per* Osler, J.A.—Instead of putting in such cases the question, "Was the plaintiff guilty of contributory negligence?" involving, as it does, both the fact and the law, it would be better to ask, "Could the plaintiff by the exercise of reasonable care have avoided the injury?" and to provide for the case of an affirmative answer by the further question, "If so, in what respect do you think the plaintiff omitted to take reasonable care?" *Brown* v. *London Street Rw. Co.*, 21 C. L. T. 369, 2 O. L. R. 53.

Action for damages — *Plaintiff struck by engine while on defendants' tracks — Evidence — Contributory negligence.*—Action for compensation for injuries received by plaintiff through coming into contact with one of defendants' engines where defendants' tracks cross a London street. The plaintiff succeeded at the trial. The Court of Appeal, in allowing an appeal and dismissing the action, *held*, that as the jury had found that the plaintiff had so contributed to the accident and her injuries, that, but for her own negligence, the accident would not have happened, and that the engineer of the train could not have prevented the accident by exercise of reasonable care, such findings put her out of Court. Judgment of Meredith, C.J.C.P., at trial, reversed. *Fewings* v. *Grand Trunk Rw.* (1909), 14 O. W. R. 586, 1 O. W. N. 1.

Child playing in street — *Hand-car — By-law of municipality — Warning—Finding of jury — Railway Commissioners — Jurisdiction — Infant plaintiff — Contributory negligence.*]—A child of 10 years of age was coasting down an incline on a street in a town crossed by a railway, and was run down and injured by a hand-car proceeding along the railway. The jury found, in answer to questions, that the defendants were negligent in not giving some warning in approaching the crossing; that the defendants could have avoided injuring the plaintiff by stopping the hand-car; and that it was their duty, apart from the provisions of the Railway Act, to have given warning; —*Held*, that the jury, in finding that warning should have been given, were not assuming to lay down any general rule as to what care or precaution should be taken, but simply that under the circumstances some warning should have been given, and that the answer was unobjectionable and in no way infringed upon the jurisdiction of the Railway Commission. — *Held*, also, that, even if a hand-car is not a train, a warning is necessary apart from the Railway Act.—*Held*, also, that, although there was a municipal by-law prohibiting coasting, the plaintiff had not been notified as required by the by-law, and the onus was on the defendants to prove criminal capacity at common law and under the Code of an infant under 14, and the defendants were not entitled to invoke such by-law for another purpose.—*Held*, lastly, that, although a defendant is not liable if the injury is caused entirely by an infant's own negligence, the capacity of the infant to be guilty of contributory negligence is a question for the jury, and that, as the plaintiff was not a trespasser and was where he had a right to be, and had not been notified under the provisions of the by-law, or his capacity for crime shewn, the whole case was properly

submitted to the jury. *Burtch* v. *Can. Pac. Ry. Co.*, 8 O. W. R. 837, 13 O. L. R. 632.

Excessive speed — *Gong not sounded—Contributory negligence — Findings of jury—Action under Fatal Accidents Act—Damages—Expenses incurred by father of deceased.*]—A passenger on a street car in Toronto, going west, alighted on the side furthest from the other track and passed in front of the car to cross to the opposite side of the street. The space between the two tracks was very narrow, and seeing a car coming from the west as she was about to step on the track, she recoiled and at the same time the car she had left started, and she was crushed between the two, receiving injuries from which she died. In an action by her father and mother for damages the jury found that the defendants were negligent in running the east bound car at excessive speed and not sounding the gong before starting the west bound car. They found also that the deceased was negligent, but that the defendants could, nevertheless, have avoided the accident by the exercise of reasonable care:—*Held*, that the case having been submitted to the jury with a charge not objected to by the defendants, and the evidence justifying the findings, the verdict for the plaintiffs should not be disturbed.—The plaintiffs should not have had the funeral and other expenses incurred by the father of the deceased allowed as damages in the action.—Judgment of the Court of Appeal in *Mulvaney* v. *Toronto Ry. Co.*, 7 O. W. R. 644, affirmed. *Toronto Ry. Co.* v. *Mulvaney*, 27 C. L. T. 225, 38 S. C. R. 327.

Failure to give signals—*Another train passing in opposite direction—No one saw accident—Finding of jury—Neglect of statutory duty—Judgment for plaintiff—Appeal to Court of Appeal dismissed.*]—An action for damages for death of one Griffith, caused by being run down by defendant's train, while deceased was crossing a public highway. The evidence shewed that the train gave no warning either by whistle or bell. Another train was passing upon the other track in the opposite direction at the same time, which gave the necessary signals. No one saw the accident. The jury found that the accident was caused by the violation of the statutory duty to whistle and ring the bell, and negatived contributory negligence.—Middleton, J., 17 O. W. R. 509, 2 O. W. N. 252, entered judgment for plaintiff for $2,000, and costs as awarded by the jury.—Moss, C.J.O., granted leave to appeal direct to the Court of Appeal. —Court of Appeal dismissed defendants' appeal with costs. Meredith, J.A., dissenting, being in favour of granting a new trial. *Griffith* v. *Grand Trunk Ry. Co.* (1911), 19 O. W. R. 53, 2 O. W. N. 1059.

Headlight on snow-plow — *Statutory signals — Excessive speed — Verdict of ten jurors under s. 108 of Judicature Act — Meaning of "Village" in Railway Act, s. 272—New trial—Costs.*]—An action under Fatal Accidents' Act, by the father and mother of Ernest Edgar Zufelt and Ida Marion Zufelt, who while driving on Zorra street in the village of Beachville, and crossing defendants' railway, were struck by a snow-plow attached to a train of defendants and both injured so that they afterwards died, which accident was alleged to have been caused by the negligence of defendants, and plaintiffs claimed $10,000.—The jury found that the snow-plow had a head-light, but it was insufficient, because not placed so as to show the light directly in front of the snow-plow; failure to sound whistle or bell; that 15 miles per hour was excessive speed at that place where it was thickly populated, that there was no contributory negligence and assessed damages at $3,000. Magee, J.A., entered judgment accordingly. Court of Appeal *held*, that above verdict was unsatisfactory, that above judgment should be set aside and a new trial ordered. Costs of former trial and appeal to be costs in the cause.—*Per* Moss, C.J.O., there is no obligation, statutory or otherwise, upon railway companies to maintain a head-light on a snow-plough; but there was a head-light upon this particular snow-plough; and there was no evidence upon which a jury could reasonably find negligence so far as the head-light was concerned. The finding with regard to running at an excessive speed through a thickly peopled portion of the village was not complete, for all the necessary facts were not found. And the finding with respect to the statutory signals was not a reasonable one upon the evidence.—*Per* Garrow, J.A., as to the sufficiency of the headlight, if that was a question proper for the jury at all, which was doubtful, there was evidence to justify their finding. As to the statutory signals, the onus was upon the plaintiffs to give some evidence from which the jury might reasonably find the fact to be that the signals were not given; evidence of persons who say that they did not hear the signals must go for nothing if there is reasonable evidence, by equally credible witnesses, that the signals which the others did not hear were actually given; and that was the situation here. The finding was not merely against the weight of evidence, but approached, if it did not reach, the perverse. The findings as to excessive speed and a thickly peopled place were immaterial without a finding as to fencing.—*Per* Meredith, J.A., the verdict was not rightly found, because the jury were, in effect, told by the trial Judge, that any ten of them could answer any of the questions, and that it was not necessary that the same ten should agree upon more than one answer; and that was erroneous. On the facts of this case, it was necessary that the same ten jurors should have agreed upon some set of facts entitling the plaintiffs to recover before any verdict or judgment could be given in their favour.—*Per* Moss, C.J.O., and Garrow, J.A., that, upon the proper construction of sec. 108 of the Judicature Act, having regard particularly to the language of sub-sec. 2, it is enough if any ten jurors concur in answering each question.—*Per* Garrow and Maclaren, J.J.A., "village" in sec. 275 of the Railway Act of Canada includes what is known as "a police village," that is, an unincorporated village, organised for certain limited purposes under the Municipal Act. *Zufelt* v. *Can. Pac. Ry. Co.* (1911), 19 O. W. R. 77, 2 O. W. N. 1063, 23 O. L. R. 602.

Injury to person crossing track — *Contributory negligence — Findings of jury —New trial.*]—The deceased, in attempting

to cross over one of the streets of a city on which there were street-car lines, passed behind one of the cars, and was just stepping on to the track on which cars coming in the opposite direction ran, when she fell and was struck by an approaching car and killed. In an action brought to recover damages therefor, the jury, while finding that there was negligence on the defendants' part in running at too high a rate of speed, and that there was contributory negligence on the plaintiff's part in not taking proper precautions before attempting to cross, also found that the defendants could have avoided the accident had the car been running at a reasonable rate of speed. Upon their answers judgment was entered for the plaintiff:—*Held*, Garrow, J.A., dissenting, that on these findings the judgment could not be supported, and a new trial was directed. *Hinsley* v. *London St. Rw. Co.*, 16 O. L. R. 350, 11 O. W. R. 743.

Injury to person crossing track — Findings of jury — Evidence — Speed of car — Control — Contributory negligence. *Milligan* v. *Toronto Rw. Co.*, 12 O. W R. 967.

Municipal corporation — *Public park —Gate and watchman at crossing—Injury to person crossing track.*] — Within a public park maintained and controlled by the defendants, a municipal corporation, they erected a gate near a railway crossing, and kept a watchman to open the gate when there was no danger from passing trains, and to close it when trains were approaching the crossing. The plaintiff, driving through the park, desiring to pass through the gate to the highway beyond the railway, and finding the gate open, took that as an intimation that no train was approaching, and attempted to cross the railway, when he was struck by a train and injured:—*Held*, that the defendants owed him no duty, and were not liable in damages for his injuries. *Southby* v. *Toronto*, 9 O. W. R. 871, 15 O. L. R. 13.

Rules of company — *Charge of Judge —Contributory negligence.*]—A rule of the defendants provided that "when approaching crossings and crowded places, where there is a possibility of accidents, the speed must be reduced and the car kept carefully under control. Go very slowly over all curves, switches, and intersections; never faster than three miles an hour. . ." A girl on the south side of Queen street wished to cross to University avenue, which reaches but does not cross Queen street. She saw a car coming along the latter street from the east, and thought she had time to cross, but was struck and severely injured. On the trial of an action for damages the Judge in his charge said: "It is not a question, gentlemen of the jury, as to the motorman's duty under the rule; it is a question of what is reasonable for him to do." The jury found that the defendants were not guilty of negligence; that the plaintiff by the exercise of reasonable care could have avoided the injury; and that she failed to exercise such care by not taking proper precautions before crossing. The action was dismissed at the trial; a Divisional Court ordered a new trial, on the ground that the Judge had misdirected the jury in withdrawing from their consideration the rules of the company; the Court of Appeal restored the judgment at the trial:—*Held*, affirming the judgment of the Court of Appeal, 15 O. L. R. 195, 10 O. W. R. 547, 8 Can. Ry. Cas. 100, which set aside the order of the Divisional Court for a new trial, 13 O. L. R. 425, 9 O. W. R. 198, Idington, J., dissenting, that the action was properly dismissed.—*Per* Girouard and Duff, JJ., that the Judge's charge was open to objection, but as, under the findings of the jury and the evidence, the plaintiff could not possibly recover, a new trial should be refused.—*Per* Davies, J.: There was no misdirection. The jury were not led to believe that the rules were not to be considered, but only that they should not be the standard as to what was or was not negligence, which question should be decided on the facts proved.—*Per* Maclennan, J.: The place at which the accident occurred, where University avenue meets Queen street, is not a crossing nor intersection within the meaning of the rules, and they do not apply in this case. *Brenner* v. *Toronto Rw. Co.*, 40 S. C. R. 540, 8 Can. Ry. Cas. 108.

(b) Excessive Speed.

Injury to motorman — Collision with another car—Failure of motive power — Stranded car—Neglect to signal approaching car—Disobedience of rules by injured motorman—Actual cause of injury—Contributory negligence—Finding of jury. *Harris* v. *London St. Rw. Co.*, 10 O. W. R. 302.

Injury to person — Horse frightened by electric car—High speed and noise — Duty of motorman — Findings of jury. *Dewitt* v. *Hamilton, Grimsby & Beamsville Electric Rw. Co.*, 9 O. W. R. 427.

Injury to person driving on highway —Horse becoming unmanageable — Excessive speed of car—Findings of jury—Liability of electric railway company—Car not under control of motorman—Evidence. *Foreman* v. *Berlin & Waterloo Street Rw. Co.*, 11 O. W. R. 756.

(c) Passengers.

i. Aboarding.

Street railways.]—Injury to passenger —Starting car before passenger alights. *Dupuis* v. *Montreal Street Rw. Co.*, 3 E. L. R. 30.

ii. On board.

Car leaving track.]—Passenger jumping from car. *Shea* v. *Halifax & S. W. Railway Co.*, 3 E. L. R. 431.

Electric shock.]—Fall from car—Damages — Mental shock — Evidence — Improper admission — Excessive damages — New trial — Costs. *Lewis* v. *Toronto Rw. Co.*, 6 O. W. R 1029.

Injury to passenger — *Car leaving track — Obligations of carriers for hire— Burden of proof — Defect in wheel—Neglect of inspection and testing — Purchase from reputable manufacturer.*]—Action for dam-

ages for injury to plaintiff by being thrown off defendants' street car:—*Held*, that defendants were liable, they not having tested the wheels on purchasing nor inspected them properly while in use. They have not exonerated themselves, the onus being on them. *Gaiser* v. *Niagara* (1909), 14 O. W. R. 42, 19 O. L. R. 31. Leave to appeal to Court of Appeal refused, 14 O. W. R. 142.

Injury to person in charge of live stock while being carried free—*Contract with railway—Approval of Board of Railway Commissioners—Liability of railway for neglect to obtain assent to terms of contract.*]—Court of Appeal affirmed judgment of Teetzel, J., 16 O. W. R. 725, 21 O. L. R. 575, 1 O. W. N. 1086. *Goldstein* v. *Can. Pac. Rw. Co. & Robinson* v. *Can. Pac. Rw. Co. & Burns & Sheppard* (1911), 18 O. W. R. 977, 2 O. W. N. 964.

iii. Alighting.

Passenger attempting to alight — *Thrown off by a sharp jerk of car starting—Damages.*]—Defendants held liable for damages to plaintiff, for injuries received while attempting to alight from a car, through the negligence of defendants' servants in causing the car to start with a sharp jerk, which threw plaintiff to the ground. *Mazza* v. *Port Arthur* (1909), 14 O. W. R. 1108, 1 O. W. N. 223; *Letcher* v. *Toronto Rw. Co.* (1909), 14 O. W. R. 1240, 1 O. W. N. 273.

"Stealing ride" on freight train—*Ordered off by conductor—Train moving at dangerous rate — Arm cut off—Action for damages.*]—Plaintiff while stealing a ride on defendants' freight train was ordered off by the conductor, when the train was moving at a dangerous rate of speed. Plaintiff fell and his right arm was cut off. In an action to recover damages the jury found in plaintiff's favour awarding him $2,000 damages. —Court of Appeal, 13 O. W. R. 879, ordered a new trial as an answer to one question submitted to jury was uncertain and verdict against weight of evidence.—Supreme Court of Canada affirmed above judgment. — A second trial was had with same result as the former except the jury awarded plaintiff only $1,000 damages.—Divisional Court dismissed defendants' appeal with costs as the circumstances did not entitle the conductor to force plaintiff off the train when going at a speed that might reasonably have been attended with danger to plaintiff.—Garrow, J.A., in Chambers refused defendants leave to appeal to the Court of Appeal. *Brown* v. *Can. Pac. Rw. Co.* (1911), 18 O. W. R. 409, 2 O. W. N. 773, 834.

(d) *Persons.*

i. On or near tracks.

Accident to person on street railway track—Action claiming damages for injuries received by plaintiff in consequence of the defective condition of defendants' rails —Guard rail—Improper height of rail—Contributory negligence — Evidence — Damages —Quantum. *Chisholm* v. *Halifax Tram Co.* (N. S. 1911), 9 E. L. R. 291.

Collision between street car and fire waggon.]—Injury to person on waggon—Excessive speed — Contributory negligence—Findings of jury. *Ardagh* v. *Toronto Rw. Co.*, 6 O. W. R. 940.

Collision of motor-car with tram-car.]—Absence of air-brakes—Amendment. *Winter* v. *British Columbia Electric Rw. Co.*, 9 W. L. R. 117.

Collision with vehicle — *Motorman.*]—The motorman of an electric car is not necessarily guilty of negligence because he does not at once stop the car at the first notice that a horse is being frightened either at the car or at something else. All that can be expected is that the motorman shall proceed carefully, and it is in each case a question whether that has been done. Upon the facts of this case, the majority of the Court held that there was no evidence to justify a finding of negligence, and set aside a judgment in the plaintiff's favour. *Robinson* v. *Toronto Rw. Co.*, 21 C. L. T. 370, 2 O. L. R. 18.

Contributory negligence — *Act of a child of tender years — Mishap — Divided responsibility — Gravity of the negligence in estimating the damages.*]—The contributory negligence of the victim of an accident which makes him partly responsible becomes a mishap when it is committed by a child of tender years, too young to be conscious of his actions. It is considered in the same manner as common negligence in the fixing of damages. Hence, when a child of three years of age has been crushed by a street car, as a result of his own negligence and that of the motorman, who not looking ahead of him for the moment, did not see the victim in time to apply the brakes, the damages ought to be divided and the company is only responsible for half. In fixing the damages in a case of liability provided for in Art. 1053, C. C., the Court ought to have regard to the gravity of the negligence and assess the damages accordingly. *Champagne* v. *Montreal St. Ry.*, 35 Que. S. C. 507.

Contributory negligence.] — Collision between electric car and another vehicle — Findings of jury — New trial. *Liddiard* v. *Toronto Rw. Co.*, 2 O. W. R. 145, 3 O. W. R. 852, 7 O. W. R. 207.

Contributory negligence of victim of an accident — *Duties of operators of locomotives — Liability through the negligence of their servants.*]—The negligence of a deaf mute walking on a railway contrary to law does not relieve the engine-driver of his duty to do all possible to avoid the accident. There is negligence of the engine-driver who being behind and seeing the pedestrian continuing on the track, in spite of the whistle and bell, does not slacken speed in time to avoid an accident. Although there was contributory negligence of the victim, the railway company is none the less liable through the negligence of its servant, for its proportion of the damages. *C. P. R.* v. *Tapp* (1909), 18 Que. K. B. 552.

Employee walking on track — *Yard-engine—No person stationed at front end—Ringing of bell and sounding of whistle—Application of ss. 274 and 276 of Dominion*

Railway Act — Negligence — Trespass — Contributory negligence.]—S. was employed by the defendants as a labourer in their coal-sheds. In leaving his work one morning, he proceeded to walk through the track-yards of the defendants, in the city of W., and was warned of the approach of a passenger train. He was at that time walking between the rails of the track upon which the train was coming; he walked on to another track, and was struck by a yard-engine and received injuries from which he died. The engine was reversing at the time, and no person was stationed on the foremost end to warn persons crossing or about to cross the track. There was evidence that the bell did not ring nor the whistle blow, but this was contradicted by the engine-driver and the fireman:—*Held*, that s. 276 of the Railway Act, R. S. C. 1906, c. 37 (even as amended in 1910), did not apply; the precaution required by it (placing a man on the foremost end) need only be taken at a crossing, and not along the track between crossings; and the same may be said with regard to the use of bell and whistle in compliance with s. 274.—*Semble*, also, that the ringing of the bell or the sounding of the whistle would not have saved S.; and the evidence that the bell did not ring was not satisfactory.—*Held*, also, upon the evidence, that, though a pathway between the two tracks had been used by the defendants' workmen, there was no pretence of a permitted or acquiesced-in user of the tracks except at the crossings; and the conduct of S. in going upon the track, instead of keeping to the pathway, amounted to a trespass, and shewed him to be guilty of contributory negligence.—Both on the ground of the absence of negligence on the part of the defendants and on the ground of contributory negligence on the part of S., the action was dismissed.—*Skulak* v. *Can. Nor. Rw. Co.* (1910), 15 W. L. R. 699, Man. L. R.

Injury to bicyclist — *Piling snow at side of track—Contributory negligence—New trial.*]—The plaintiff, a telegraph messenger, was riding a bicycle in a southerly direction behind a street car of the defendants on the west track, and the car stopped, in order to avoid running into it, and because he found snow was piled up on the road on the right side, he turned to the left side and was struck by a car coming north on the east track, and injured. It did not appear that the latter car had sounded the gong or given any other warning. The plaintiff was nonsuited at the trial:—*Held*, that the defendants were bound to adopt reasonable precautions to prevent accidents by sounding a gong or otherwise, although there was no statutory obligation; and although the plaintiff may have put himself in a position of peril, this was not *per se* an act of negligence; and, there being evidence which might have satisfied the jury that the accident was caused by omission on the defendants' part to ring the gong, and also evidence from which they might have found that it was attributable to the plaintiff's own negligence, the case should not have been withdrawn from them. *Dublin, Wicklow, & Wexford Rw. Co.* v. *Slattery*, 3 App. Cas. 1155, specially referred to. — *Preston* v. *Toronto Rw. Co.*, 11 O. L. R. 56, 6 O. W. R. 786, 8 O. W. R. 504.

Court of Appeal dismissed appeal from above. Meredith, J.A., dissenting, 8 O. W. R. 504, 13 O. L. R. 369.

Injury to bicyclist by overtaking street car.]—Unusual position of car — Speed—Defect in fender—Failure of plaintiff to look behind—Contributory negligence—Proximate cause of injury—Case for jury—Motion for nonsuit. *Heath* v. *Hamilton Street Rw. Co.*, 7 O. W. R. 459, 8 O. W. R. 32, 937.

Injury to infant.]—Contributory negligence—Findings of jury. *Hackett* v. *Toronto Rw. Co.*, 10 O. W. R. 582.

Injury to infant crossing track — *Duty of company to put on wheel guards — Contributory negligence — Damages — New trial.*]—1. It is negligence in a company operating electric cars in the streets of a city not to have such guards for the front wheels as will prevent persons falling on the track from being run over, and the company will be liable in damages to any person injured in consequence of such negligence, unless there is sufficient contributory negligence on the part of such person to constitute a defence.—2. No such contributory negligence could be attributed to a child under six years old.—3. A verdict for $8,000 damages in such case, where one of the child's legs was cut off, is not so excessive as to warrant the Court in ordering a new trial. *Wald* v. *Winnipeg Electric Rw. Co.*, 18 Man. L. R. 134, 9 W. L. R. 109.

Market gardener run down by car —*Case withdrawn from jury—Appeal—New trial—Costs—Taxation.*]—Plaintiff, a market gardener, brought action to recover damages for injuries sustained by being run down by one of defendants' cars, alleged to have been the result of incompetency, wrongful acts, negligence and carelessness of defendants' motorman. At trial MacMahon, J., dismissed the action at the close of plaintiff's case. On appeal Divisional Court *held*, that the case ought not to have been withdrawn from the jury. New trial ordered. Plaintiff entitled to costs of first trial and of the appeal to be paid on taxation. *Jones* v. *Toronto & York Radial Co.* (1909), 14 O. W. R. 1168, 1 O. W. N. 267, 20 O. L. R. 71.

Appeal pending.

Operation of street cars.]—Upon seeing a child (aged one year and eleven months) approaching the tracks, the motorman sounded the whistle of the car he was driving; the child stopped for a moment and looked towards the car; the motorman then applied full speed without waiting to see whether the child retreated or making any effort to remove it from the dangerous position; the child moved quickly towards the tracks, was struck by the car and received the injuries from which damages were claimed by the action: — *Held*, that the conduct of the motorman was recklessness for which the company were liable, that failure to take proper precautions to avert injury to the child was not to be excused by the alleged necessity of complying with the time-table and preventing delay to passengers, and that the failure of the company to provide its car with a fender was evidence of negligence. *Lott* v. *Sydney & Glace Bay Rw. Co.* (1909), 2 E. L. R. 309, 41 N. S. R. 153, affirmed, 42 S. C. R. 220.

Person driving wagon—*Struck by car —Driver thrown from seat—Bone in foot broken—Action for damages — Finding of jury—Cannot be interfered with — Appeal dismissed.*]— Plaintiff, a teamster, while driving a load of sand with a team of horses through the streets of Port Arthur, was struck by a street car, which threw him from his seat, breaking a bone in his left foot and bruising his left arm. He alleged that the said accident was caused by the negligence of defendants, and claimed damages.—Britton, J., on the findings of the jury, entered judgment for plaintiff for $350 and costs on County Court scale, without right of set-off.—Divisional Court *held*, that the finding of the jury could not be interfered with, and upon the findings it was clearly a case in which plaintiff was entitled to recover. Appeal dismissed with costs. *Sim* v. *Port Arthur* (1911), 18 O. W. R. 822, 2 O. W. N. 864.

Person injured crossing tracks—*Excessive speed — Contributory negligence — Finding of jury — Damages — Appeal — New trial.*]—Plaintiff brought action as executor to recover damages for death of one Rice, who was struck by defendants' car while crossing their tracks. Evidence was received as to excessive speed of car and of plaintiff's contributory negligence. Jury found in plaintiff's favour, assessing damages at $1,000—Meredith, C.J.C.P., entered judgment accordingly.—Divisional Court reversed above judgment and dismissed plaintiff's action without costs, holding that the accident was caused solely by deceased's contributory negligence. *Rice* v. *Toronto Ry. Co.* (1910), 17 O. W. R. 770, 2 O. W. N. 405.

Practice — *Notice for particulars.*]—Plaintiff's husband was killed while on a railway track used by both defendants. In an action for negligence causing death of husband, defendants moved for particulars: —*Held*, entitled to particulars as to how deceased came to be on the right of way and which company's train struck him. Also as to the incompetence and want of skill charged against crew of the freight train which struck the hand car. *Tracey* v. *Toronto Ry. Co.*, and *Grand Trunk Ry. Co.* (1908), 13 O. W. R. 15, distinguished. *Rachar* v. *Grand Trunk Ry. Co. & Wabash* (1909), 14 O. W. R. 548.

ii. Risks assumed by.

Collision — *Injury to motorman — Disobedience of rules—Contributory negligence.*] —Rule 212 of the rules of the defendants provides that "when the power leaves the line, the controller must be shut off, the overhead switch thrown, and the car brought to a stop . . ."—A car, on which the light had been weak and intermittent for some little time, passed a point on the line at which there was a circuit-breaker, when the power ceased to operate. The motorman shut off the controller, but, instead of applying the brakes, allowed the car to proceed by the momentum it had acquired, and it collided with a stationary car on the line ahead of it. In an action by the motorman for damages for injuries received through such collision:—*Held*, that the accident was due to the motorman's disregard of the above rule, and he could not recover. Judgment of Court of Appeal, 10 O. W. R. 302, affirmed. *Harris* v. *London Street Ry. Co.*, 39 S. C. R. 398.

Violation by the employees of a railway company *of by-laws causing the death of one of them—Liability of the company.*]—A railway company is responsible for an accident caused by the violation, by its employees, of the by-laws made for the protection of all, and which causes the death of one of them. It is not permitted to set up as a defence to its liability that the thing complained of was brought about by an understanding among the employees concerned, especially when it is not proven that the victim had full knowledge of it. Under these conditions there could be no ground for setting aside a verdict which declares there was negligence and which assesses the amount of the damages caused. *Lachance* v. *C. P. R.*, 35 Que. S. C. 494.

iii. Trespassers.

Injury to trespasser.]—The P. M. railway company, under an arrangement with the appellants, used the yard and station of the appellants at L. A P. M. train came into that station, discharged its passengers, and was proceeding backwards to its destination for the night when the respondent jumped on board, intending to ride a short distance towards his home. He stood upon the rear platform of a car and was in that position when a collision took place between the train he was on and a train of the appellants upon a "lead" of the appellants, by reason of the negligence of the appellants, whereby the respondent was injured, and in respect thereof he sued the appellants. In the action the jury found that at the time of the accident the respondent was not upon the P.M. company's train or the platform of the car by the company's permission:—*Held*, that the respondent was a trespasser, and that although the appellants were under a duty to the respondent not wilfully to injure him, they were not liable to him for mere negligence, and that as the accident was due to the negligence of the appellants' servants and not to any wilful act the respondent was not entitled to recover. *Grand Trunk Ry. Co.* v. *Barnett* (1911), 31 C. L. T. 385, 27 T. L. R. 359 (P.C.).

iv. Warning and Instructions.

Protection and safety of public.]—The provisions of the Railway Act respecting the protection and safety of the public are not to be considered as foreseeing all possible contingencies and it is not sufficient that the engine crew and other train hands observed such provisions to relieve their employer from liability in case of accident. They are held to the additional duty of obeying the ordinary rules of prudence, and, particularly, to proceed at a rate of speed less than the lawful one at points where, to do otherwise, would be dangerous. *Grand Trunk Ry. Co.* v. *Fecteau* (1910), 20 Que. K. B. 131.

(c) Stations—Yards, etc.

Accident—*Plaintiff slipped in front of train—Injured.*]—Plaintiff brought action to recover damages for injuries sustained by be-

ing struck by an engine of the Wabash Rw. Co.—Middleton, J., *held*, 19 O. W. R. 13, 2 O. W. N. 991, that the accident was the result of plaintiff's own negligence, or, at any rate, something not attributable to defendants' negligence.—Action dismissed without costs. Divisional Court *held* that while a passenger train is yet standing at a station after discharging its passengers, it is not negligence for another train to pass at a rapid rate between the standing train and the station platform providing it fulfils the duty of exercising reasonable care in passing crossings when people might be encountered. —It is not negligence for a train to be late.—There is no case for a jury when the plaintiff's own evidence established reasonable precautions on the part of the defendants.—To enable an injured party to recover damages for negligence he must shew actionable negligence on the part of defendants, that is, the jury must find the particular act of negligence which was the direct cause of the accident, and failing in this, the presumption is that there is no evidence to justify any finding beyond what they have actually found, and a new trial will not be granted. *Andreas* v. *Canadian Pacific Rw. Co.*, 37 S. C. R. 1. —Judgment of Middleton, J., affirmed. *Antaya* v. *Wabash Rw. Co.* (1911), 19 O. W. R. 354, 2 O. W. N. 1175.

Accident to a workman — *Employment on a shunting engine—Backing up, the engine driver not being able to see the track —Negligence of the driver — Contributory negligence of the victim.*]—There is negligence in an engine driver backing his engine out of a roundhouse at the intersection of several roads, in such a way that the view is cut off by the tender. The company is liable for a resulting accident, for its proportion of the damages when there is contributory negligence of the victim. Cf. *G. T. R.* v. *Daoust*, 14 B. R. 548; *C. P. R.* v. *Toupin*, 1909, 18 Que. K. B. 557.

Action for damages—*Injury to brakeman — Struck by switch-stand—Finding of Jury — Evidence — Damages reduced.*] — Plaintiff, a brakeman in the employ of defendants, was struck by a switch-stand on the defendants' railway at St. Thomas and thrown under the wheels of one of the cars which was being moved at the time and had a portion of both feet cut off. He brought action to recover damages, alleging negligence by defendants in placing the switch-stand where it was placed. At the first trial of the action: Teetzel, J., granted a non-suit, with costs, but subject to provision that if Divisional Court was of opinion that there was any evidence on charge of negligence which should have been submitted to a jury judgment should be entered for plaintiff for $2,520.—Divisional Court entered judgment for plaintiff for $2,520.—Court of Appeal (15 O. W. R. 999, 1 O. W. N. 562), ordered a new trial on ground that the best evidence available had not been adduced at the trial. No costs of former trial to either party.—A new trial was had and the jury found in favour of plaintiff awarding him $4,000 damages.—Boyd, C., entered judgment accordingly.—Court of Appeal allowed defendants' appeal to the extent of reducing plaintiff's damages to $2,600. No costs of appeal. *Leitch* v. *Pere Marquette Rw. Co.* (1911), 18 O. W. R. 435, 2 O. W. N. 617.

Action for damages—*Loss of foot—Alleged negligence of foreman—Care in moving cars—Shunting by "Kick"—Failure to give notice—Findings of jury—Not sustainable on evidence.*]—Plaintiff, while in the employ of defendants, was knocked down and run over by a coach of the Grand Trunk Railway in the Union Station, whilst in the performance of his duties, losing his right foot, and brought action for damages.—Falconbridge, C.J.K.B., entered judgment for plaintiff for $1,500 damages and costs, upon the findings of the jury.—Court of Appeal *held*, that there was no evidence of any negligence on the part of defendants. Appeal allowed and action dismissed with costs if demanded.—*Dominion Iron & Steel Co.* v. *Oliver* (1905), 35 S. C. R. 517, followed. *Lennox* v. *Grand Trunk Rw. Co. & Can. Pac. Rw. Co.* (1911), 19 O. W. R. 169, 2 O. W. N. 1078.

Improper light—*Improper time—Excessive speed—Jury finding facts not relied on —Jury ignoring facts pleaded—Duty of railway to employee.*]—*Held, per* Moss, C.J.O.: —When a jury exonerate an injured party from the charge of contributory negligence upon evidence which but for the finding would appear to shew very convincingly that he was the author of his own injuries: The Court should ascertain whether there is evidence to find actionable negligence on the part of the defendants which actually caused the injury and whether the findings of the jury are upon elements upon which the plaintiffs do not rely. Charges expressly put to the jury upon which the jury did not make a finding must be taken to have been negatived. *Per* Meredith, J.A.—There was no duty owed by defendants to the plaintiffs regarding the time of arrival of any of its trains. There is no rule of law limiting the rate of speed of railway trains in the interests of railway workmen. *Paquette* v. *Grand Trunk Rw. Co.* (1911), 19 O. W. R. 395, 2 O. W. N. 1133.

Injury to licensee — *License — Master and servant—Damages — New trial.*]—The plaintiff's son was given leave by a yardmaster of the defendants to learn in the railway yard the duties of car checker, with the expectation that if he became competent he would be taken into the employment of the defendants in that capacity, and he was free to devote as much or as little time to acquiring the necessary knowledge as he saw fit. While he was in the railway yard a few days after this permission had been given, he was killed by an engine of the defendants, which was running through the railway yard without the bell being rung, though the rules of the defendants required this to be done:—*Held*, that the deceased was a licensee, and not a trespasser; that the defendants were bound to exercise reasonable care for his protection; and that the omission to give the warning was negligence which made them liable in damages for his death. The Court, being of opinion, however, that damages of $3,000 allowed by the jury were excessive, ordered that there should be a new trial unless the plaintiffs should consent to accept $1,500. *Collier* v. *Michigan Central Rw. Co.*, 1 C. L. T. 16, 27 A. R. 630.

Injury to workman — *Ship — Unprotected trap—Joint liability of owner of con-*

tractor for work.]—A shipowner who contracts with a ship-liner to put up cattle stalls between decks, is jointly and severally liable with him for an injury sustained by one of the workmen employed in the work, caused by a fall through an unprotected open hatchway, although the ship-liner's foreman knew of the danger and warned his men against it. And such warning to the men, given in a general way, does not relieve the contractor from his liability, in the absence of proof that the plaintiff heard it. *Proulx* v. *Lee*, 27 Que. S. C. 304.

Injury to yardsman.]—Municipal corporation — Coal yard — Railway siding — Construction of wall—Evidence—Findings of jury—Nonsuit. *Hammill* v. *Grand Trunk Rw. Co. & City of Hamilton*, 8 O. W. R. 434.

Injury to yardsman — *Shunting railway cars — Absence of warning — Contributory negligence—Failure to look—Jury.*]—A railway yardsman in the ordinary course of his duty was passing behind the most westerly of four cars standing by themselves on a side line. As he was crossing the track, two cars of the defendants, propelled by a flying shunt, came from the east and ran into the standing cars, with the result that he was knocked down, run over, and killed by the car behind which he was passing. There was no evidence that cars were liable to be shunted negligently or unexpectedly, and he did not see or hear the cars, and no warning was given to him:—*Held*, that there was evidence of negligence on the part of the defendants to go to the jury, and that the fact that the yardmaster did not look for approaching cars before going behind the standing car was not sufficient to shew that he was guilty of such negligence as *ipso facto* to deprive him of his right to recover. Judgment of Meredith, J., reversed. *London & Western Trusts Co.* v. *Lake Erie & Detroit River Rw. Co.*, 12 O. L. R. 28, 7 O. W. R. 511.

Railway Act, R. S. C., 1906, c. 37, s. 264 (c) — *Brakeman injured while going between ends of moving cars to uncouple —Defective apparatus—Costs—Evidence.*]—The plaintiff, a brakeman on duty in the defendants' employ, was injured in an attempt to uncouple a number of cars from an engine, the train being in motion. There was evidence that the lever on the engine tender failed to work properly, that there was no lever on the end of the car next the tender, and that the plaintiff in order to uncouple, had to reach in between the ends of the cars in an effort to pull out the coupling pin. In so doing he either tripped or was knocked down and had an arm cut off by the wheel of the tender:—*Held*, that in view of the requirements of s-s. (c) of s. 264 of the Railway Act, R. S. C. 1906, c. 37, that all cars should be equipped with appliances which would prevent the necessity of brakemen going in between the ends of the cars to uncouple, the plaintiff had made out a *prima facie* case of negligence, and that the nonsuit entered at the trial should be set aside and a new trial granted. Costs of the former trial and of the appeal to be costs to the plaintiff in any event. The trial Judge had made an order that, if a new trial should be granted by the Court of Appeal, then, in the event of either of the plaintiff's witnesses being out of the country, he should have the right to read the evidence such witnesses had given at the trial on the case coming up for trial again, and the Court ordered this provision to be embodied in the judgment. *Scott* v. *Can. Pac. Rw. Co.* (1909), 19 Man. R. 29.

Railway rules — *Special instructions—Defective system—Common law negligence—Workmen's Compensation Act.*]—The "Railway Act" prescribes that rules and regulations for travelling upon and the use or working of a railway must be approved by the Governor-General in Council and that, until so approved, such rules and regulations shall have no force or effect; when approved they are binding on all persons. Rule 2 of the rules of the Grand Trunk Railway Co. provides that "In addition to these rules, the time-tables will contain special instructions, as the same may be found necessary. Special instructions, not in conflict with these rules, which may be given by proper authority, whether upon the time-tables or otherwise, shall be fully observed while in force." Trains running out of Brantford, Ont., are under control of the train-despatcher at London. The railway time-table has for many years contained the following foot-note:—"Tilsonburg Branch.—Yard-engines at Brantford are allowed to push freight trains up the Mount Vernon grade and return to Brantford B. & T. station without special orders from the train-despatcher. Yard-foreman in charge of yard-engine will be held responsible for protecting the return of the yard-engine, and for knowing such engine has returned before allowing a train or engine to follow.—A. J. Nixon, Assistant Superintendent." —This regulation or instruction had not then been submitted for the approval of the Governor-General in Council.—By Rule 224 "all messages or orders respecting the movement of trains . . . must be in writing":—*Held*, Davies, J., dissenting, that assuming the foot-note on the time table to be a "special instruction" under Rule 2, it is inconsistent with the train-despatching system in force at Brantford and if, as the evidence indicates, it purports to authorize the sending out of engines under verbal orders to push freight trains up the grade it is also inconsistent with Rule 224. Such instruction has, therefore, no legal operation.—*Held*, *per* Girouard, and Anglin, JJ., that it was not a "special instruction," but a regulation, and not having been sanctioned by order in council operation under it was illegal.—By "The Railway Act" a "train" includes any engine or locomotive. Rule 198 provides that it "includes an engine in service with or without cars equipped with signals."—*Held*, *per* Girouard, Idington and Anglin, JJ., that an engine returning to the yard after pushing a train up the grade, is a "train" subject to the provisions of Rule 224, and to the rules of the train-despatching system.—The accident in this case occurred through the yard-foreman failing to protect the engine on its return to the yard.—*Held*, Davies, J., dissenting, that the company operated the yard-engines under an illegal system and were liable to common law damages and that subsection 2 of section 427 of the "Railway Act" applied.—*Held*, *per* Duff, J., that since, as regards the danger of collision with trains stopping at Brantford for orders, the system of operating the yard-engines through the

telegraphic despatchers would clearly have afforded greater protection than that in use, and since there was admittedly no impediment in the way of adopting the former system, there was evidence for the jury of want of care in not adopting the safer system; and the fact that the existing system had been in operation for 25 years was evidence from which the jury might infer that the general governing body of the company was aware of it. And further, following *Smith* v. *Baker* ((1891), A. C. 325), and *Ainslie Mining and Railway Co.* v. *McDougall*, 42 Can. S. C. R. 420, that, in these circumstances, the company was responsible for the defects in the system. *Fralick* v. *Grand Trunk Ry. Co.* (1910), 43 S. C. R. 494, 30 C. L. T. 690.

Leave to appeal to P. C. refused 25th July, 1910.

Sectionman — *Ankle fractured by piece of coal falling from a passing train—Ontario Workmen's Compensation Act — Res ipsa loquitur—Release.*]—Plaintiff, a sectionman in defendants' employ, claimed damages for having had his ankle fractured by a piece of coal falling from the tender of a train passing while he was engaged at his work. Defendants pleaded—1, not guilty by statute; 2, notice of injury had not been given within time, and, 3, release after action. The Court of Appeal *held* (1) that defendants were not prejudiced by plaintiff's delay in giving notice of the injury; (2) that in signing a release all plaintiff intended to release was a claim for wages during his compulsory idleness; (3) there was evidence of negligence in piling the coal, *Res ipsa loquitur* applied, and awarded $1,500 damages under the Workmen's Compensation Act. Judgment of Clute, J., at trial, affirmed. See motions before trial in S. C. (1908), 12 O. W. R. 1060, 1227. *O'Brien* v. *Michigan Central Ry.*, (1909), 14 O. W. R. 581, 1 O. W. N. 7, 19 O. L. R. 345.

Servant in railway yard injured — Action for damages—Finding of jury—Defective system—Motion for non-suit — Evidence—Judgment for plaintiff for $2,500 and costs. *Ward* v. *Can. Nor. Ry. Co.* (1910), 17 O. W. R. 636, 2 O. W. N. 378.

Siding.]—Owner of land leaving obstruction near siding—Servant of railway injured in removing it—Damages. *Hence* v. *Standard Chemical Co.*, 2 E. L. R. 553.

Switchman in railway yard—*Negligence—Defective system—Orders of foreman—Contributory negligence—Volenti non fit injuria—Inferences to be drawn from facts—Province of jury—New trial.*]—The plaintiff, a switchman employed by the defendants, was, while engaged in his duties as such in the yard of the defendants, struck by a train and injured. In an action to recover damages for his injuries, he alleged a defect in the ways, works, etc., of the defendants, in that there was not sufficient room between the tracks in the yard to enable him to carry on safely the operations of switching and signalling; that there was negligence in the operation of the train by which the plaintiff was injured, by reason of excessive speed and no warning given; and that he was under the orders of a foreman to which he was bound to and did conform, and was injured as the result of having so conformed; —*Held*, upon the evidence, that there was nothing in the plaintiff's actions that was not in accord with his duties and the orders of his foreman. Although there was no express order from the foreman for him to take certain paces backwards in order to give himself a clear vision of the foreman and to give the engine-driver a clear vision of himself, he was apparently acting within the best of his judgment in order to carry out his orders faithfully, properly and promptly —he did, in the circumstances, what a switchman in his position might be expected to do and what his employers might reasonably expect him to do. With reference to the location of the tracks in the yards, there was some evidence upon which a jury might base a finding that the "lay-out" was defective. The real questions in controversy were the inferences proper to be drawn from facts which were practically not in dispute; and it was the province of the jury, and of the jury alone, to draw those inferences. If the defences of contributory negligence and *volenti non fit injuria* were to be established, they must be established to the satisfaction of the jury.—*King* v. *Toronto Ry. Co.*, C. R. [1908] A. C. 326, and *Higley* v. *Winnipeg* (1910), 20 Man. L. R. 22 followed.—Judgment of Perdue, J.A., in favour of the defendants, withdrawing the case from the jury, reversed, and a new trial ordered. *Wood* v. *Can. Pac. Ry. Co.* (1910), 15 W. L. R. 293, 20 Man. L. R. 92.

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15. Sale of Dangerous Things.

Shot by infant with air-gun—*Loss of eye—Liability of vendor for selling same to infant under 16—Criminal Code, s. 119.*]—Defendants, a business firm, sold an air-gun to a boy of thirteen, who, while on a public street, discharged its contents, which lodged in plaintiff's left eye, causing her the loss of the same. She brought action to recover $5,000 damages for their negligence in selling it to a minor under sixteen. Criminal Code, s. 119.—Britton, J., *held* (15 O. W. R. 790, 20 O. L. R. 639, 1 O. W. N. 647), that plaintiff was entitled to $800 damages and costs. Divisional Court dismissed defendant's appeal with costs.—*Dixon* v. *Bell* (1816), 5 M. & S. 198, followed. *Fowell* v. *Grafton* (1910), 17 O. W. R. 949, 2 O. W. N. 460, 22 O. L. R. 550.

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16. Servants—Injury to by Negligence of Master.

Absence of negligence — Findings of trial Judge—Dangerous work — Voluntary exposure. *Hogan* v. *Butler Bros.*, 14 O. W. R. 341.

Absolute instructions not given — *Common fault.*]—Action for damages by a workman against his employers for injuries from a fall. Defendants' plea was that the accident was caused by gross negligence of plaintiff. The jury found that "the absolute instructions were not given to plaintiff to put a scaffolding where he was working, as should have been done, but that this was left to his judgment;"—*Held*, that sufficient

to establish a common fault, *faute commune*, of the parties, and defendants were liable to contribute a share of the loss, and justified the further finding by the jury of the sum to which that share amounts. *Jodoin* v. *Dominion Bridge Co.* (1910), 39 Que. S. C. 103.

(Affirmed by Supreme Court of Canada.)

Accident — Apprentice—Unskilled workmen—Liability. *Union Card & Paper Co.* v. *Hickman*, 4 E. L. R. 125.

Accident at one's work — *Common negligence — Mode of operation dangerous, permitted by the overseers of a railway company.*]—There is common negligence by a railway company and its employee killed in an action resulting from a dangerous method of operating, tolerated by the conductors and overseers of the company. *G. N. Ry. Co.* v. *Cyr*, 18 Que. K. B. 419.

Accident due to misunderstanding— *Fault of fellow-servant—Absence of negligence — Contributory negligence.*] — The plaintiff was employed as a brakesman at the defendants' smelter. Part of his duty was to indicate to the engine-driver to stop at the required spot where the slag-pots brought out from the smelter were to be emptied, and the engine-driver was not to move again until signalled to do so. Certain points existed where there were chains which were used to anchor the frame of the car to the track in order to prevent the locomotive being capsized when the pot, weighing about 12 tons, was being emptied. On the occasion in question, the engine-driver reached the chain point, when, considering that he had gone too far, he reversed, going back about two feet. The plaintiff, meanwhile, had dismounted, and, thinking the driver was not going to back up, put his hand under to draw the chain through and anchor the car. In doing so his hand was run over and seriously injured. There were hooks supplied for this purpose, but the plaintiff did not use one: — *Held*, on appeal, *per* Hunter, C.J., and Morrison, J. (affirming the judgment of Martin, J., on different grounds) that the accident was due to a natural misunderstanding in the circumstances, and that there was neither negligence nor contributory negligence.—*Per* Clement, J., that the evidence did not warrant a finding that the driver was guilty of negligence, and the action was rightly dismissed. *Harrigan* v. *Granby Consolidated Mining, Smelting & Power Co.*, 14 B. C. R. 89, 9 W. L. R. 486.

Action by infant children to recover damages—*Findings of jury—Impossible to reconcile—Postponement of justice — Action dismissed—No costs.*]—An action by the two infant children of Frederick Miller for $5,000 damages for the death of their father, who was struck in the abdomen with a board flung from the circular saw in defendant's planing mill, at which he was working.—Latchford, J., *held*, that it was impossible to reconcile the answers of the jury to the different questions. Action dismissed but without costs, his Lordship saying that the result was a miscarriage or at least a postponement of justice. *Miller* v. *Kaufman* (1911), 18 O. W. R. 915, 2 O. W. N. 925.

Action for damages for alleged negligence for discharging servant without providing for his safe return.] — Plaintiff, a labourer, brought action against the defendants, railway contractors, for damages for injuries caused by freezing his hands through negligence of defendants' foreman in discharging him without making provision for his safe return to place from which he had been brought by defendants:—*Held*, on the evidence, that the plaintiff failed to shew any grounds for rendering defendants liable. Judgments of the Divisional Court reversed and judgment at trial restored. *Vasilif* v. *McDonald & Stephens* (1909), 14 O. W. R. 654.

Action under Workmen's Compensation Act — Defence — Particulars. *St. Amand* v. *Interstate Consolidated Mineral Co.*, 2 O. W. R. 252.

Actual or constructive fault — *Assumption of risks.*]—No liability for tort attaches where there is no fault, either actual or constructive. When an employee is ordered by his employer to perform work in the ordinary course of his employment, he assumes the ordinary risks inherent to it, and, if he meets with an injury, he must shew, to be entitled to damages from his employer, that the latter caused it by some fault of commission or of omission. *Demeule* v. *Quebec & Jacques-Cartier Electric Co.*, 32 Que. S. C. 318.

Appliances — *Building — Dangerous work — Contributory negligence — Municipal by-law regulating erection and safety of buildings — Applicability of.*] — A steel framework building, some eleven storeys high, was in course of construction, the defendants, a bridge company, being the contractors for the steelwork, and another company for the flooring. The steelwork had been put into position up to the tenth or eleventh storey, the flooring having been laid up to the sixth. Two of the defendants' men were raising a scaffold from the seventh to the eighth storey, for the riveters to stand upon, which was swung by ropes over the steel girders on the eighth storey. One of the ropes had fallen short, and one of the men was about to ascend by a ladder to get it, when the plaintiff, who was standing on the girder, said he would do so, and in the attempt lost his balance and fell, and was injured. He was not called upon to do the act, nor was it any part of his duty:—*Held*, that, as the accident was attributable to the plaintiff voluntarily performing an act which it was no part of his duty to perform, no liability was imposed on the defendants.—A city by-law, apparently passed under s. 542 of the Municipal Act, for regulating the erection of and to provide for the safety of buildings, provided that as soon as all buildings in course of construction were up, and the first or ground floor joists in, the said joists should be covered or floored, temporarily or otherwise, with inch boards, etc. In case of steel structures, where the girders were twelve feet centres or over, not less than two-inch planks should be used, such planks in all cases to be supported so as to insure reasonable safety:—*Held*, that the by-law did not apply to the circumstances of this case, even assuming that its terms were not

confined to the first storey only.—*Quære*, whether the by-law was applicable to a case where there were several contractors for the performance of different portions of the work of a building. *Norman* v. *Hamilton Bridge Works Co.*, 15 O. L. R. 457, 11 O. W. R. 37.

B. C. Workmen's Compensation Act, 1902. s. 6—*Application for issue as to payment of award by insurers—Rules made by Lieutenant-Governor in Council — Ultra vires.*]—Application for an order to make two companies proceed to the trial of an issue whether the applicant is entitled to payment of award under the above Act.—*Held*, that the above rules are *ultra vires* and s. 6 above does not authorise an issue. An action must be commenced by writ of summons in the ordinary way. *Re Disoardi & Sullivan, Re Disoardi & Maryland*, 11 W. L. R. 251.

Bookkeeper in factory — Workmen's Compensation Act not applicable—*Ejusdem generis* rule — Common law liability—Explosion of natural gas — Defect — Cause of explosion—Findings. *Miller* v. *Monarch Manufacturing Co.*, 12 O. W. R. 14.

Breach of Factories Act—Questions for jury—Costs. *Ackernecht* v. *McBrine*, 6 O. W. R. 720.

Breach of statutory duty on part of railway company — Improper couplings — Contributory negligence — Volens — Quantum of damages. *Roylance* v. *Canadian Pacific Ry. Co.* (B.C.), 8 W. L. R. 399.

Building — *Defective condition of appliances — Knowledge of master — Company —Officer of — Admissions by—Evidence — Onus — Nonsuit.*] — The plaintiff was a labourer working for the defendants in the erection of an elevator. He was directed by a superintendent of the work, to go upon a planking which answered the purpose of a scaffolding in an excavation made for the purpose of placing therein the leg of the elevator. The planking gave way while the plaintiff was on it, and he was precipitated to the bottom of the excavation sustaining injuries. It was contended that the plaintiff had knowledge of the defective construction and unsafe condition of the scaffolding through J., their secretary-treasurer. It was not shewn that J. assumed to give orders to the men, or directions as to the practical work which was going on; but there was evidence that he was standing, with his hands in his pockets, looking down into the excavation on the morning of the accident, and that on former occasions he had been seen to call D. on one side and say something to him, which no one overheard. There was no evidence that the persons employed by the defendants were not proper and competent persons, or that the materials used were faulty or inadequate; nor was there any evidence that the defendants had any better means of knowing of the danger than the plaintiff:—*Held*, that the onus was on the plaintiff, and he had not made out a case to be submitted to the jury. Evidence was given of an admission made by J. to the plaintiff, after the accident, as to the defective condition of the scaffolding and the defendant's knowledge of it:—*Held*, that he had no authority to make admissions on behalf of the defendants, an incorporated company. *Wilson* v. *Botsford-Jenks Co.*, 22 C. L. T. 95.

Canal works—Dangerous place—"Way" —Workmen's Compensation Act—Negligence of superintendent—Workman conforming to orders — Contributory negligence. *Birmingham* v. *Larkin*, 5 O. W. R. 549.

Cause of accident — *Evidence — Conjecture.*] — The respondent's husband, a skilled engineer, while employed in the appellants' establishment, in charge of a stationary engine, was accidentally killed. There was no one present at the time, and there was no evidence to indicate the cause of the accident:—*Held*, Lacoste, C.J., and Hall, J., *dissentientibus*, that the appellants being in fault, in not properly protecting the machinery by railings, it was for them to prove that the accident would have occurred even if the machinery had been properly protected. *Per* Lacoste, C.J., and Hall, J.:—Even where there is evidence of general negligence (which had not been established in the present case) the burden of proof is on the plaintiff to shew that the accident occurred as the result of such negligence, and mere conjecture or theory is not sufficient to constitute such proof. *Montreal Rolling Mills Co.* v. *Corcoran*, 8 Que. Q. B. 488. Reversed 26 S. C. R. 595.

Cause of accident—*Injury to servant—Evidence—Negligence.*] — Administrator of the estate of John Wilson the younger, brought action to recover damages for the death of the latter from injuries received by him while in the employment of defendants at Merritton, owing, as alleged, to the unsafe and defective condition of a hoist in defendants' mill. The jury found that the deceased came to his death through a defective elevator; that there was negligence of defendants in not having a guard and not having sufficient light; that the deceased was not guilty of any act which contributed to his death; and assessed plaintiff's damages at $700. There was evidence that the approach to the hoist shaft was unguarded, and that the hoist was defectively constructed in that it had no catch:—*Held*, that defendants were liable, notwithstanding that there was no direct evidence of how the deceased was injured. *Kerwin* v. *Canadian Coloured Cotton Mills Co.*, 28 O. R. 73, 25 A. R. 36, 29 S. C. R. 478, distinguished. *Groves* v. *Wimborne*, [1898] 2 Q. B. 402, followed. *Wilson* v. *Lincoln Paper Mills Co.*, 4 O. W. R. 521, 25 C. L. T. 14, 9 O. L. R. 119.

Coal Mines Regulations Ordinance *C. O. 1898, c. 16—Workman's Compensation Ordinance, 1900, c. 13—Liability for non-performance of statutory duty — Contributory negligence of fellow workmen or of mere strangers.*]—Action brought by administratrix of Prosper Daye, killed in explosion in defendants' mine, under C. O. 1898, c. 48. Plaintiff gave evidence that her husband was killed by explosion of gas in defendants' Canmore mine in June, 1900; that ventilation was defective and not as required by s. 39, rule 1 of C. O. 1898, c. 16; that mine was not inspected as required by rule 3 of last cited section; that the mine was gaseous; that on morning of the accident there was

gas present in explosive quantities for two or three hours prior to the explosion; that the manager knew of the presence of gas; that two fellow workmen of deceased had opened their safety lamps; and no evidence of inspection of the lamps as required by rule 8 of s. 39 above, or that the explosion arose from any act or default of deceased.—McGuire, C.J., *held*, (1) That, having found the effective and proximate cause of death to be an explosion due to the fault and negligence of the defendants and their breach of duty imposed by the Ordinances C. O. 1898 c. 16, they were not relieved if there was contributory negligence on the part of a fellow workman of accused or of a mere stranger. (2) That by reason of Ord. c. 13 of 1900, if negligence was proved there was no reason to enquire whether it was that of a fellow workman.—On appeal to the Court *en banc*: —*Held*, that there was sufficient evidence to support the findings of the trial Judge; that the findings were sufficient to render the defendants liable. Appeal dismissed with costs. *Daye* v. *McNeill Co.* (1904), 6 Terr. L. R. 23.

Collapse of building—*Liability—Owner —Tenant.*]—The plaintiff was employed by the defendant as a storeman. The building in which the latter carried on his business collapsed, and the defendant was carried down in the debris and was severely injured. He brought this action for $3,000 damages, claiming that the defendant knew of the faulty construction of the building, and that he had overloaded it. The defendant denied that he knew of any defect, or that he had overloaded the building. Both parties admitted that the building collapsed because of inherent defects:—*Held*, that the defendant had not overloaded the building; and that, therefore, since under Art. 1055 the owner of a building is responsible for damages caused by its defects, the action should have been brought against the proprietor of the building, and not against the defendant, who was only a lessee. *Dulude* v. *Benoit*, 21 C. L. T. 82.

Common law liability—Defective system—Findings of jury—Workmen's Compensation Act. *Graham* v. *International Harvester Co.*, 5 O. W. R. 613.

Common law liability — *Employers' Liability Act — Fault of fellow servant— Fault of servant himself—Evidence—Findings of jury—Damages—Fatal Accidents Act —Parents' expectation of benefit.*]—Action for damages for death of plaintiff's son, an engineer who, while taking a train down a steep grade, lost control of it, jumped and was killed. At trial judgment given for plaintiff for $6,000. New trial ordered as damages assessed at too high a figure. *White* v. *Victoria*, 11 W. L. R. 480.

Common law liability.]—Plaintiff, a switchman, aged 26, in defendant's employ, while coupling cars, had his right thumb so crushed that it had to be amputated. Judgment was given plaintiff for $1,500 at common law. *Roylance* v. *Canadian Pacific*, 9 W. L. R. 239.

Company—Absence of personal negligence —Power appliances—Competent foreman—Damages — Workmen's Compensation Act. *Linden* v. *Trussed Concrete Steel Co.*, 7 O. W. R. 236, 613.

Company — *Explosion of boiler — Defective appliances—Reasonable care in selection — Incompetence of fellow servant — Knowledge of officers of company—Selection of competent officers—Liability at common law—Workmen's Compensation for Injuries Act — Damages.*]—The plaintiffs were employed by the defendants, an incorporated company, in a rolling mill, and while so employed were injured by the explosion of a boiler. The immediate cause of the explosion was that the water in the boiler had been allowed to become too low owing to the valve which regulated the supply having been closed. It was the duty of the "water tender," who was killed by the explosion, to attend to the valve and see that a sufficient supply of water was maintained. The boiler was built by reputable makers, and there was nothing to shew that it was not originally built of good material or that it had become defective or worn out except as to the "pet-cock," at the foot of the glass gauge. In actions against the defendants at common law and under the Workmen's Compensation for Injuries Act to recover damages for the plaintiffs' injuries, four allegations of negligence were made. (1) that the "water tender" was negligent and incompetent; (2) that the boiler was insufficient and dangerous by reason of the valve which regulated the water supply having been placed upon the vertical pipe or water column, instead of being lower down by itself upon a horizontal pipe through which the water passed on its way to the boiler; (3) that the boiler was also out of repair in that a brass pet-cock at the bottom of or connected with the glass indicator had become broken, and its place imperfectly supplied by a wooden plug; and (4) that the defendants failed in their duty to see that the boiler was kept supplied with water. The actions were tried by a jury, who answered a number of questions mainly in favour of the plaintiffs:—*Held*, that there was no evidence of negligence proper for the jury upon the question of the valve. The real question was, whether the defendants, in buying and using the boiler with the valve as it was, fell short of discharging the duty of exercising reasonable care, which was the limit of their obligation; and the undisputed evidence disclosed that such boilers with valves so arranged were in common use and that the boiler in question was built by makers of good reputation and large experience. —There was evidence proper for the jury that the "water tender" was incompetent when employed and remained incompetent and negligent in the discharge of his duty, and that the defendants' officials had been amply warned thereof, and were negligent in retaining him. But, there being no finding and no evidence that these officials were themselves incompetent, their negligence in carrying on operations could not be imputed to the defendants. And this also applied to any right of action as at common law for failure to repair the pet-cock.—The law laid down in *Wilson* v. *Merry*, L. R. 1 Sc. App. 326, 332, is the law by which the Court is bound; although the rule laid down by the Supreme Court of the United States, that where the master only acts in the management of his business through vice-principals

he will be liable for their negligence as for his own, is a more reasonable rule.—3. The failure to repair the pet-cock was negligence for which the defendants were answerable under the Workmen's Compensation for Injuries Act; it was a fair and reasonable inference from the evidence that with a pet-cock in proper order the real difficulty might have been at once discovered by its use, in time to avert the disaster; and the defect was well known to two of the defendants' officials for several weeks before the accident.—The plaintiffs were, therefore, confined to such damages as were recoverable under the statute.—Judgment of Anglin, J., varied. *Woods* v. *Toronto Bolt and Forging Co.*, *Bunford* v. *Toronto Bolt and Forging Co.*, 11 O. L. R. 216, 6 O. W. R. 637.

Company—Foreman—Open hatch in vessel—Absence of lights — Evidence — Workmen's Compensation Act. *Bassani* v. *Canadian Pacific Ry. Co.*, 7 O. W. R. 271.

Condition of elevator—Jury. *Traplin* v. *Canadian Woolen Mills (Limited)*, 2 O. W. R. 380.

Contract as to liability — *Railway company — Provident society — Release of claim — Rights of widow — Nullity — Indemnity or satisfaction — Motion for judgment — Peremption.*]—1. The provisions of Art. 494, C.C.P., are not on pain of nullity, and failure to move for judgment in accordance with the verdict of a special jury until after the lapse of the time prescribed by this article, does not deprive the party of the right to a judgment, unless the action itself has been declared perempted for failure to proceed there during two years.—2. A railway company cannot, under a contract between their employee and an insurance and provident society, in consideration of an annual subscription to such society, be exempted from responsibility for damages caused by neglect and failure on their part to comply with a duty imposed on them by law for the safety of passengers and employees, *e.g.*, equipment of the cars with efficient brakes, such stipulation being without effect under s. 243 of the Railway Act of Canada, 51 V. c. 29.—3. The right of the widow and other relatives under Art. 1056, C.C., is not a representative one, but is independent of that of the injured person, and, therefore, even if an agreement stipulating immunity from responsibility for damages caused by *faute lourde* were valid as regards the injured person, it would be without effect as regards his widow or other persons having rights under Art. 1056, C.C. —4. An agreement exempting a party from responsibility for damages caused by his gross negligence, or *faute lourde*, is null and void, as being contrary to public order.—5. The words "indemnity or satisfaction," in Art. 1056, C.C., imply compensation by the person responsible for the damage suffered, and not a payment made under a contract with an insurance society. Judgment of 21 Que. S. C. 346, affirmed. *Grand Trunk Ry. Co.* v. *Miller*, 12 Que. K. B. 1.

Contractor — Sub-contractor — Independent contractor — Foreman — Evidence —Partnership — Contributory negligence— Damages. *Kitts* v. *Phillips*, 10 O. W. R. 986.

Contributory negligence — *Action by widow — Pleading — Reply — Railway.*]—In an action for damages by the widow of a railway company for the death of her husband, where the defendants plead that the victim took no steps to protect his own train, as required by the rules and regulations of the company, and that such negligence was the determining cause of the accident, it is not legal for the plaintiff to reply that the deceased "had done all that was customary for the employees of the said railway company defendant," and such allegation being too vague will be rejected on an inscription in law. *Leahey* v. *Grand Trunk Ry. Co.*, 5 Que. P. R. 350.

Contributory negligence — *Evidence —Mine.*]—In an action to recover damages for negligence causing the death of the plaintiff's son, a workman employed in defendants' mine, the defence of contributory negligence was raised. The cause of death was the breaking away from its fastening of a car, used for the purpose of hauling coal up a slope leading from the mine. The evidence showed that the fastening used to attach the car to the rope was fit for the purpose for which it was employed, and that it was in good condition; also that the deceased was on the "haulage way," where the accident occurred, contrary to orders, there being a "travelling way" by which workmen were required to go up and down:—*Held*, that the plaintiff could not recover. *Hawcie* v. *Dominion Coal Co.*, 37 N. S. R. 111.

Contributory negligence—*Pleading — Particulars — Damages — Allegations concerning.*]—A master who alleges that an accident caused to a workman in his employment is due to the latter's own want of care, attention, and skill, may be ordered to give particulars shewing in what such want of care, attention, and skill consists.—2. A plaintiff claiming damages for an injury may allege that he is married and the father of a family, since his obligations to his wife and children must be taken into consideration in assessing the damages. *Labossière* v. *Montreal Light, Heat, and Power Co.*, 6 Que. P. R. 410.

Contributory negligence — Proximate cause—Voluntary incurring of risk—Workmen's Compensation Act—New trial—Jury. *Cameron* v. *Douglass*, 5 O. W. R. 35.

Contributory negligence — *Railway— Workman on — Neglect of rules — Cause of injury.*]—A rule of the defendants required the display of a blue signal (blue flag by day and blue light by night) while a car was being repaired on the track. Solely in consequence of the failure of the plaintiff, an employee of the defendants, to comply with this rule a train backed down while he was working at a car on the track, and he was injured:—*Held*, that the plaintiff had no claim for compensation under the circumstances. *Coutlée* v. *Grand Trunk Ry. Co.*, 23 Que. S. C. 242.

Contributory negligence — Unsatisfactory verdict—New trial. *Reid* v. *Paul*, 3 O. W. R. 821.

Contributory negligence—*Volenti non fit injuria* — Findings of jury — Nonsuit. *Keiller* v. *John Inglis Co.*, 6 O. W. R. 334.

Coal mine—Employers Liability Act—Contributory negligence. *Bell* v. *Inverness Coal and Rw. Co.*, *Aird* v. *Inverness Coal and Rw. Co.*, 4 E. L. R. 144.

Damages — *Pleading—Financial circumstances of parties.*] — A plaintiff claiming damages from his employers, on account of an accident while at work, may allege his poverty and the illness of his wife, but not the pecuniary standing of his employers. *Desrosiers* v. *Wighton*, 6 Que. P. R. 429.

Danger — *Knowledge of master—Neglect to inform servant.*]—In an action against an employer to recover damages for injuries received while operating a mangle, it is incumbent on the plaintiff to shew an omission on the part of the employer to inform her of something which she needed to know in order to be safe. The burden is on the plaintiff to shew that she did not know of the danger incident to the work. *McPherson* v. *Voit*, 40 N. S. R. 517.

Danger — *Order of foreman — Mine — Voluntary risk — Common fault.*]—An employer is responsible for an accident caused by the falling into a mining pit of a rock which has threatened to fall in for some time, and which the foreman had, foreseeing the danger, endeavoured to detach from the wall of the pit. There is no common fault on the part of a workman who, believing there is danger nevertheless descends, upon the order of the foreman and upon his affirmation that there is no danger, to work at the bottom of the pit. *Gauthier* v. *Wertheim*, 28 Que. S. C. 280.

Dangerous machine—*Absence of guard —Contributory negligence.*] — The plaintiff was employed by the defendant to "edge" boards at a machine known as a jointer, which consisted of two revolving knives about sixteen inches wide driven by steam power, set in and projecting slightly above the surface of an iron table about three feet high and eight feet long. The knives were not guarded, and it was proved that a guard could have been used; that without one the machine was dangerous; and that the defendant's foreman knew this. The workman as he edged each board stood it on end against the table at his left hand for removal by other workmen. One of the boards, owing either to the vibration of the machinery, or to a knock given to it by another workman, fell upon the plaintiff's arm and forced his hand upon the knives, and he was seriously injured:—*Held*, that the absence of a guard was a defect in the machine; that the foreman's knowledge of this defect and failure to remedy it constituted negligence for which the defendants were liable; that the absence of the guard and not the placing of the board against the table was the proximate cause of the accident; and therefore that the plaintiff was entitled to damages. *Godwin* v. *Newcombe*, 21 C. L. T. 228, 1 O. L. R. 525.

Dangerous machine—Absence of guard —Factories Act—Proximate cause of injury —Damages. *McLain* v. *Waterloo Manufacturing Co.*, 8 O. W. R. 335.

Dangerous machine—*Absence of guard required by law—Order of factory inspector*

— Damages — Quantum.] — The owner of a factory who, contrary to law and the directions of the factory inspector, fails to guard a dangerous machine with appliances which will protect the operator thereof, is guilty of negligence, and, if this negligence is the cause of an accident, is liable to the person injured in damages for the injury. An assessment of $1,000 damages for an injury consisting in the loss of three fingers and the stiffening of the index finger of one hand, in the case of a workman aged 20, is not excessive. Judgment in 26 Que. S. C. 555, affirmed. *Desrosiers* v. *St. Laurence Furniture Co.*, 27 Que. S. C. 73.

Dangerous machinery — Absence of guard—Evidence—Factories Act—Contributory negligence. *Allard* v. *Cleveland Saw Mills Co.*, 12 O. W. R. 729.

Dangerous machinery — Absence of guard—Violation of Factories Act—Liability at common law—Release of cause of action—Understanding of plaintiff—Evidence as to fitness to transact business. *Lennox* v. *McAuliffe*, 12 O. W. R. 183.

Dangerous machinery — Defects in condition — Knowledge of defendants — Workmen's Compensation Act—Evidence of working of machine subsequent to accident —Admissibility. *Green* v. *Kilgour Brothers*, 11 O. W. R. 752.

Dangerous machinery — Defects in —Common law liability — Damages. *Coltic* v. *Canada Turpentine Co.*, 12 O. W. R. 422.

Dangerous machinery — *Failure to follow instructions—Contract of hiring—Immunity from liability for accidents—Public policy.*]—A covenant in a contract of hire of labour that the employer shall not be liable for accidents to the employee from the use of a machine he is hired to operate, is lawful and not against public policy.—2. An employer is not liable for an accident to an employee caused by his failure to comply with the instructions given him for operating a dangerous machine. *Conan* v. *Charest*, 32 Que. S. C. 385.

Dangerous machinery — *Inexperienced workman—Failure to instruct — Dangerous work.*]—An employer who orders a workman, a youth of nineteen, alone and unaided, to select and take out from among a number, certain iron plates six feet by two and of a quarter of an inch thickness, weighing from 100 to 114 lbs., without instructing him in the manner of handling them, is guilty of negligence and liable in damages for an injury thereby caused to the workman. *Boucher* v. *La Compagnie Marticana*, 33 Que. S. C. 515.

Dangerous machinery — No fault of master—Absence of negligence—Pure accident. *Calce* v. *Northern Industrial Co.*, 5 E. L. R. 226.

Dangerous machinery.] — Plaintiff, a boy of fifteen, having violated the orders of his superior officers, went near some machinery, and in stumbling had his left hand caught in the cog wheels, part of his thumb

and one finger being taken off. The injury was caused by his negligence, machinery was dangerous and unguarded, but plaintiff went there notwithstanding repeated warnings, and brought the injury on himself. Action was dismissed. *Mammelita* v. *Page-Hersey Co.*, 13 O. W. R. 109.

Dangerous machinery—Precautions — Negligence of fellow workmen—Jury—Damages. *Myers* v. *Sault Ste Marie Pulp and Paper Co.*, 1 O. W. R. 280, 3 O. L. R. 690.

Dangerous machinery—Verdict of jury —Weight of evidence—Dismissal of action. *Baker* v. *Canadian Rubber Co.*, 5 E. L. R. 141.

Dangerous machinery — Workmen's Compensation Act—Factories Act—Common law liability—Evidence—Damages. *Lougheed* v. *Collingwood Shipbuilding Co.*, 12 O. W. R. 871.

Dangerous objects — *Precautions — Notice of action—Time—Knowledge.*]—Any person who uses dangerous objects in any industry or manufacture must take the greatest possible care to prevent accidents by adopting all the means and inventions known; and where it is proved that such precautions have not been taken, the owner of the industry is responsible for injuries to workmen arising from the dangerous machinery.—2. The notice required in certain cases previous to the bringing of an action for a tort or quasi-tort is in time and will be considered sufficient if it has been served as soon as the plaintiff has knowledge of the facts which give him a right of action. *City of Montreal* v. *Gosney*, 13 Que. K. B. 214.

Dangerous operation — *Defective system — Findings of fact — Common fault — Contributory negligence—Apportionment of damages.*]—The Supreme Court of Canada affirmed the unanimous judgments of the Courts below, whereby it was held that the defendant was liable in damages for injuries sustained by the plaintiff through an accident which occurred in consequence of a defective system of blasting rocks with dynamite, permitted by the foreman of works, where the plaintiff was engaged by him in a dangerous operation. *Montreal Rolling Mills Co.* v. *Corcoran*, 26 S. C. R. 595, and *Tooke* v. *Bergeron*, 27 S. C. R. 567, distinguished. The plaintiff had been guilty of contributory negligence, and damages should be apportioned according to the practice in the province of Quebec. *Paquet* v. *Dufour*, 27 C. L. T. 779, 39 S. C. R. 352.

Dangerous operations — *Mining — Neglect of fellow-servant—Liability of master.*]—An employer whose business necessitates dangerous operations is responsible for an accident to a workman caused by the neglect of his employees to follow the orders which he gives them touching the precautions to be taken. Therefore, a mining company are liable for damages suffered by a workman in consequence of an explosion of explosive substances left and forgotten in a rock-drilling, after an abortive attempt at mining, by the employees charged with clearing up. *Blouin* v. *Johnston Co.*, 30 Que. S. C. 390.

Dangerous place—Cause of death—Inference—Negligence—Jury. *Griffiths* v. *Hamilton Electric Light, etc., Co.*, 2 O. W. R. 594, 6 O. L. R. 296.

Dangerous place—Guard—Factories Act —Defect in way—Workmen's Compensation Act—Jury. *Colbourne* v. *Hamilton Steel and Iron Co.*, 2 O. W. R. 548.

Dangerous ways, works, etc. — *Inspection—Evidence—Presumptions — Appeal —Reversal of findings of fact.*]—While at work in the pit of an asbestos mine, the pit foreman was killed by a loose rock falling upon him from the wall of the pit. Some time before the accident, after setting off a blast, the wall had been inspected by a competent person under the personal direction of the pit foreman himself, and the particular spot from which the loose rock fell tested by sounding and prying with a crowbar, and judged to be safe. In an action to recover damages the Courts below inferred from the evidence that the wall of the pit had been allowed to remain in an unsafe condition, and held the defendants responsible on account of negligence in this respect. On appeal to the Supreme Court of Canada:—*Held*, reversing the judgment appealed from, Girouard, J., dissenting, that as an inspection had been duly made by competent persons using their best judgment in the honest discharge of their duty, who reported the wall to be secure, there could be no negligence imputed to the company in that respect, although it afterwards appeared that there had been error in judgment or in the manner in which the inspection was performed:—*Held*, also, Girouard, J., dissenting, that where there is evidence that makes it unnecessary to draw inferences or rely upon presumptions from facts proved, the findings of two Courts below which have acted upon such inferences or presumptions, should be reversed. *Girard* v. *Canadian Asbestos Co.*, 25 C. L. T. 96. *Canadian Asbestos Co.* v. *Girard*, 36 S. C. R. 13.

Dangerous work—Absence of inspection — Findings of jury — Common law liability — Joint *tort-feasors* — Death of one — Action against survivor and executors of deceased—Damages—Motion for new trial on affidavits—Charge of unprofessional conduct against solicitor — Affidavits—Contradiction. *Casselman* v. *Bury*, 7 O. W. R. 528.

Dangerous work — *Accident — Inexperienced workman—Infant — Superintendence—Instruction.*]—The employer owes to his workman, in the execution of his work, all the protection which a father owes to his child, and ought to take the necessary precautions to avoid accidents which may happen to his workmen, even by reason of their imprudence, inexperience, and want of skill; he is liable not only as regards habitual dangers, but also as regards possible accidents, and is responsible for an accident which happens to a workman in the course of dangerous work, which he has ordered him to do, especially when the workman is an infant, ignorant of the danger which he incurs, and having neither the prudence nor the experience necessary to protect himself. Therefore, in this case, the foreman of the defendant company having ordered the plaintiff's son (aged sixteen) to do a dangerous piece of

work, without having instructed him sufficiently as to the mode of doing it without danger to himself, and without having superintended the work or caused the workman to be assisted by an experienced person, the defendant company were liable for the consequences of the accident which happened to the plaintiff's son by reason of his inexperience and his want of skill, known to the foreman. *McCarthy* v. *Thomas Davidson Mfg. Co.*, 18 Que. S. C. 272.

Dangerous work — Defective system — Knowledge of danger—Damages. *Dagg* v. *McLaughlin*, 11 O. W. R. 1080, 12 O. W. R. 407.

Dangerous work — Findings of jury — Liability at common law—Workmen's Compensation Act. — *Dodds* v. *Consumers' Gas Co., Mills* v. *Consumers' Gas Co., Heard* v. *Consumers' Gas Co., Webster* v. *Consumers' Gas Co.*, 9 O. W. R. 905.

Dangerous work — *General warning—Supervision.*] — Where employment is attended with danger to life, *e.g.*, from poisonous exhalations in a manufactory of chemicals, an employer is bound to give special warning to his employees of the dangers of the different tasks given them, and to have some system of supervision over them while at work. A general warning to the men that their work is dangerous and demands the exercise of care, is not sufficient, and will not relieve the employer from liability for accidents. *Nicholls Chemical Co. of Canada* v. *Forster*, 15 Que. K. B. 411.

Dangerous work — *Neglect to provide safeguards — Evidence for the jury—Excessive damages.*]— The plaintiff, employed as a workman in the defendants' foundry, was working within a few feet of another workman, who was chipping off the rough projections from a large cast iron cylinder, when he was struck in the eye by one of the flying chips so as to cause him to lose the sight of that eye. The evidence shewed that the work was dangerous to those in the immediate vicinity, and that the accident might have been avoided by the use of a screen, or by having the casting on a pivot, and having the chipping done in a direction away from the other workmen, or by having it done in an open yard apart from the other employees: —*Held*, that there was evidence of negligence to submit to the jury.—*Held*, also, that a finding of $2,000 damages was not under the circumstances excessive. *Allan* v. *Sawyer-Massey Co.*, 12 O. L. R. 282, 8 O. W. R. 269.

Dangerous work — Negligence—Findings of jury—Workmen's Compensation Act —Want of guard—Evidence—Assessment by jury of damages at common law—Right of trial Judge to assess damages under statute at more than statutory maximum — Fatal Accidents Act—Action not brought for benefit of infant children of deceased—Amendment—Apportionment of damages. *Isaden* v. *Trussed Concrete Steel Co.*, 11 O. W. R. 1083.

Dangerous work — *Precautions — Liability.*]—Judgment of the Court of King's Bench, Quebec, affirming the judgment of the Court of Review. *Sub nom. Fournier* v. *Lamoureux*, 21 Que. S. C. 99, reversing judgment in 21 Que. S. C. 32, affirmed, *Lamoureux* v. *Fournier*, 33 S. C. R. 675.

Dangerous work — Proximate cause of injury—Findings of jury — Common law liability—Workmen's Compensation Act — Joint *tort-feasors* — Death of one—Action against survivor and executors of deceased— Excessive damages—New trial. *Casselman* v. *Barry*, 8 O. W. R. 198.

Dangerous works — *Knowledge of master—Workmen's Compensation Act—Liability at common law.*]—T., an employee in a mill, entered the elevator on the second floor to go down to the ground floor, and, while he was in it, the elevator fell to the bottom of the shaft, and he was injured. On the trial of an action against his employers for damages, it was proved that the elevator was over 20 years old; that it had fallen before on the same day owing to the dropping out of the key of the pinion gear, which had been replaced; and the jury found that the vibration and general dilapidation of the running gear caused the key to fall out again, occasioning the accident:—*Held*, that the defendants were liable under the Workmen's Compensation Act.—*Held*, also, Nesbitt, J., dissenting, that the defendants were negligent in not exercising due care in order to have the elevator in a safe and proper condition for the necessary protection of their employees, and were, therefore, liable at common law. *Per* Nesbitt, J., that, as the defendants had employed a competent person to attend to the working of the elevator, they were not liable at common law for their negligence. Judgment of the Court of Appeal, *Traplin* v. *Canadian Woollen Mills (Limited)*, 3 O. W. R. 416, affirmed. *Canadian Woollen Mills (Limited)* v. *Traplin*, 25 C. L. T. 26, 35 S. C. R. 424.

Dangerous works—*Liability of incorporated company—Fault of employee.*]—An incorporated company carrying on dangerous operations is liable at common law for damages sustained by an employee in consequence of injuries occasioned by the use of a system which failed to provide a safe and proper place in which the employee could do his work; it is not relieved from this responsibility by the fact that the operations were superintended by a competent foreman. *Alaska Mining & Railway Co.* v. *McDougall*, 42 S. C. R. 420, followed. Judgment in 15 B. C. R. 461, 15 W. L. R. 493, affirmed. *Brooks, Scanlon, O'Brien Co.* v. *Fahlcron* (1911), 44 S. C. R. 412.

Dangerous works — *Ordinary precautions — Knowledge of risk — Contributory negligence—Voluntary exposure to danger.*] —An employer carrying on hazardous works is obliged to take all ordinary precautions, commensurate with the danger of the employment, for the protection of employees, and, where this duty has been neglected, the employer is responsible in damages for injuries sustained by an employee as the direct result of such omission. *Lapitre* v. *Citizens' Light and Power Co.*, 29 S. C. R. 1, referred to. In such a case it is not a sufficient defence to shew that the person injured had knowledge of the risks of his employment, but there must be such knowledge shewn as, in the circumstances, leaves no doubt that the risk was voluntarily incurred; and this must

be found as a fact. *McDougall* v. *Montreal Park and Island Rw. Co.*, 25 C. L. T. 98; *Montreal Park and Island Rw. Co.* v. *McDougall*, 36 S. C. R. 1.

Death—*Absence of direct evidence as to cause of injury—Inference—Case for jury—Dangerous machinery—Factories Act.*]—The plaintiff sued as the personal representative of her deceased husband to recover damages for injuries sustained by him while working as a sawyer in the employment of the defendants, which, as she alleged, resulted in his death, and were caused by a defect in the condition or arrangement of a "jointer" at which the deceased was working, the revolving knives of which it was, as she contended, the duty of the defendants under the Factories Act to guard, and which were not so guarded. There was no direct evidence of the cause of the injury:—*Held*, that certain circumstances shewn afforded evidence which, if believed, warranted the inference being drawn that the injuries to the deceased happened while he was in the act of putting the board through the jointer, and that, owing to the knives being unguarded, his fingers, without fault of his, came in contact with the revolving knives by which the ends of them were taken off. *Montreal Rolling Mills Co.* v. *Corcoran*, 26 S. C. R. 595, *Canadian Coloured Cotton Co.* v. *Kerrin*, 29 S. C. R. 478, and *Wakelin* v. *London and South Western Rw. Co.*, 12 App. Cas. 41, [1886] 1 Q. B. 196n., distinguished.—*Held*, also, following *Graves* v. *Wimborne*, [1898] 2 Q. B. 402, and *Sault Ste. Marie Pulp and Paper Co.* v. *Meyers*, 33 S. C. R. 23, that failure to obey the direction of the Factories Act as to guarding dangerous machinery, which resulted in injury being caused to an employee, gives a right of action. *Billing* v. *Semmens*, 24 C. L. T. 83, 7 O. L. R. 340, 3 O. W. R. 17. Affirmed, 8 O. L. R. 540, 4 O. W. R. 218.

Death — Action by parent under Fatal Accidents Act — Evidence of negligence — Refusal of trial Judge to withdraw case from jury—Appeal. *McDougall* v. *Ainslie Mining Co.*, 4 E. L. R. 275.

Death — *Action by widow under Fatal Accidents Ordinance—Proof of marriage — Negligence of master—Proximate cause of injury—Neglect of statutory duty—Negligence of fellow workmen.*]—In an action by the administratrix of the estate of D., who was killed in an explosion in the defendants' mine, brought under C. O. 1898 c. 48, there was evidence of the plaintiff that she was married to D. in Belgium, was living with him to the time of death, and that he was the father of her children, oldest aged 17 years; that he was killed by explosion of gas in the defendants' mine in June, 1900; that ventilation was defective and not as required by s. 39, rule 1, of C. O. 1898, c. 16; that the mine was not inspected, as required by rule 3 of that section; that the mine was gaseous, that on the morning of the accident there was gas present in explosive quantities for two or three hours before the explosion; that the manager knew of the presence of gas; that two fellow workmen of deceased had opened their safety lamps; there was no evidence to rebut presumption of marriage, and no evidence of inspection of the lamps, as required by rule 8 of s. 39 above, or that the explosion arose from any act or default of deceased:—*Held*, *per* McGuire, C.J., at the trial, that the oral evidence of the widow was sufficient proof of marriage, according to the general rule that cohabitation and reputation is sufficient evidence of marriage, though in cases of bigamy and divorce, and petitions for damages for adultery, stricter proof is required. —2. That the effective and proximate cause of death having been found to be an explosion due to the fault and negligence of the defendants and their breach of the duty imposed by Ordinance C. O. 1898 c. 16, they were not relieved if there was contributory negligence on the part of a fellow workman of the deceased or of a mere stranger.—3. That by reason of Ordinance c. 13 of 1900, if negligence was proved, there was no reason to inquire whether it was that of a fellow workman.—*Held*, by the Court *en banc*, that marriage was sufficiently established by the plaintiff's evidence; that strict proof was not required; that the fact that the alleged marriage took place in a foreign country did not affect the question, as the *lex fori* governs questions of proof.—2. That there was sufficient evidence to support the findings of the trial Judge, and the findings were sufficient to render the defendants liable. *Dupe* v. *R. W. McNeill Co.*, 6 Terr. L. R. 23.

Death — Acting by widow under Fatal Injuries Act—Cause of death—Defective appliances — Absence of precautions—Dangerous employment — Voluntary acceptance of risk—Knowledge of master — Knowledge of servant. *Campbell* v. *Ontario Lumber Co.*, 3 O. W. R. 255.

Death — Action under Fatal Accidents Act—Action maintainable although deceased an alien and action brought for benefit of aliens resident abroad. *Gyargy* v. *Dawson*, 8 O. W. R. 784.

Death — *Casual connection — Evidence—Conjecture — Defect — Want of guard — Findings of jury.*]—The plaintiff's husband, who was working on a platform projecting a few feet from a gallery in the defendants' workshop, fell from the platform and was killed, there being no evidence to shew how he fell. There was no railing or guard to the platform, but when the deceased was last seen he was standing on the platform near the gallery in a place of safety, and after that, up to the time when he was found lying on the floor, nothing had happened in connection with his work to make it necessary for him to change his position:—*Held*, Meredith, C.J., dissenting, that there was no case to go to the jury, it being merely at best a matter of conjecture that the accident had happened because of the want of a guard. *Brooks* v. *Waterous Engine Works Co.*, 24 C. L. T. 315, 8 O. L. R. 37, 3 O. W. R. 943.

Death — *Cause of — Unauthorised misconduct of fellow-workman—Finding of jury—Irrelevancy — Negligence — Workmen's Compensation Act—Factories Act.*]—An action under the Workmen's Compensation for Injuries Act by a widow to recover damages for the death of her husband, caused by an accident while in the defendant's employment. The deceased was working on the first floor of the defendant's door and sash factory. There was an opening in the floor through which boards were passed from the lower to the first floor when required. The usual me-

thod before and at the time of the accident was, that when a number of boards had to be put up-stairs a workman was sent up to stand by the hole and receive each board as it was handed up by a man on the ground floor. When only a few boards were to be put up at a time, the man below would push a board up a little way and rattle it about until some one on the first floor came forward and took it. On the occasion of the accident an employee of the defendants engaged on the ground floor, finding three boards standing with the upper ends in the opening above and in the way of his work, pushed one up a little way and rattled it. No attention being paid, he violently shoved a board up so that it shot through the hole and landed on the first floor. He repeated this with the second and third, and the last one struck the deceased while walking past the hole and caused his death:—Held, that the defendant was not responsible, inasmuch as the act of the employee which caused the accident was wholly unauthorised and opposed to the usual course, and the defendant or foreman could not be blamed for not assuming that any workman would resort to such unlikely and extraordinary measures for removing boards from the lower floor; and the findings of the jury were irrelevant and must be disregarded. Judgment of Britton, J., 2 O. W. R. 395, reversed. *Alexander* v. *Miles*, 24 C. L. T. 124, 7 O. L. R. 103, 3 O. W. R. 193.

Death — *Danger — Knowledge of master — Ignorance of servant — Absence of direct evidence of cause of death.*]—In an action by the administratrix of an employee against the employer for negligence, the employee's ignorance of the danger as well as the employer's knowledge of the danger must be shewn and should be alleged in the statement of claim.—M. was a night track-walker in the service of the defendants, and his duty was to walk backwards and forwards on the railway tracks of the defendants and keep the tracks clear. The roof of the shed over the defendants' blast furnace projected some distance on each side. The tracks were under the projecting roof, and persons walking along the tracks were entirely protected from the falling of ice from the roof. If the tracks were obstructed, the walker would have to go outside the track or take the track on the other side of the shed. The deceased was found dead one morning about 12 feet outside of the track, covered with pieces of ice, and with marks on the back of his head. There was no direct evidence of the cause of his death. The trial Judge found the facts consistent equally with negligence by the defendants, contributory negligence by deceased, and death under circumstances for which the defendants would not be responsible. The action was dismissed. On appeal this judgment was affirmed. *McNeil* v. *Dominion Iron, etc., Co.*, 40 N. S. R. 513.

Death — Dangerous employment — Foreman—*Volenti non fit injuria* — Findings of jury—Nonsuit on undisputed evidence. *Cameron* v. *Douglas*, 3 O. W. R. 817.

Death—Dangerous employment—Primary negligence of servant immediate cause of injury—Findings of jury—Voluntary assumption of risk. *Wilson* v. *Davies*, 10 O. W. R. 315.

Death — *Dangerous machinery — Want of guard—Finding of jury—Damages — Insurance on life of deceased.*]—A foreman employed in the defendants' paper mill, in which uncovered revolving machinery was in motion, suddenly reaching out by a natural impulse to seize a dropping rope and prevent its becoming entangled, lost his balance, and, falling on the machinery, was crushed to death:—*Held*, that the finding of the jury that the death was caused through the neglect of the defendants in not having the machinery covered, was properly within their province and should not be set aside as unreasonable. A defendant liable for damages caused by death has no right to a reduction of the amount by reason of insurance on the life of the deceased paid to the plaintiff. *Cameron* v. *Royal Paper Mills Co.*, 31 Que. S. C. 275.

Death — Dangerous work—Instructions of foreman—Defective appliances — Finding of jury—Knowledge of danger—Voluntarily incurring risk — Workmen's Compensation Act. *Mitchell* v. *Canada Foundry Co.*, 3 O. W. R. 907.

Death—*Defect in machinery — Defective system of inspection—Workmen's Compensation for Injuries Act.*]—On the trial of this action—which was against a railway company to recover damages for the death of the deceased through scalding by the escape of steam occasioned by the giving way of a water tube in a locomotive engine on which he was working—the jury, in answer to questions submitted to them, found that the death was caused by a defect in the condition of the locomotive, "through the defendants not supplying proper inspection," the defect itself not being specified, but from a discussion which the trial Judge had with the jury when they brought in their answers, and from the answers to further questions submitted to them, such defect, it appeared, consisted in the fact that the end of the tube in question had not been sufficiently "belled" by one J., who had put the tube in the boiler:—*Held*, that there was no evidence to support liability at common law, but that the evidence and findings of the jury sufficiently established what the defect was, and that J. was a person intrusted with the work, so that there was liability under the Workmen's Compensation Act in respect of which the deceased's widow and administratrix could maintain the action, and was entitled to recover the damages assessed by the jury under the above Act; Meredith, J.A., dissenting on the question of liability under the Act. *Schwoob* v. *Michigan Central R. R. Co.*, 8 O. W. R. 710, 13 O. L. R. 548.

Death — *Defective appliances—Construction by deceased—Evidence—Appeal.*] — In an action for damages by reason of an accident in a workshop causing the death of a man, where the defendant pleads that the contract of the deceased contained a stipulation that the scaffolds, of which that which caused the accident was one, were to be constructed by the deceased and his father, and were so constructed, may call witnesses to prove such stipulation.—2. A judgment maintaining objections to the *enquête* falls within the cases enumerated in Art. 46, C. P. *Beaudoin* v. *Petit*, 6 Que. P. R. 322.

Death — *Defective system — Immunity from accident for long period.*]—The defend-

ant was the owner of a derrick for hoisting coal from vessels, which was drawn up by a bucket and emptied into a hopper at the top of the derrick. Under the hopper was a platform with an opening in it, across which there were rails for a tram car, into which the coal was loaded when it was desired to weigh it, the coal being then dropped through the opening into a lower hopper; but when the weigh car was not in use, the coal fell directly from the upper hopper through the opening into the lower hopper. The sides of the platform were three feet nine inches from the opening, and were not fenced so as to prevent coal from falling over its edge. There was a ladder from the corner of the platform to the ground, which, though not the ordinary means of access to and from the derrick, was being properly used by deceased, one of the employees, on his way to inspect a vessel then being unloaded, when he was struck on the head and killed by a piece of coal, which had fallen from the platform. The derrick had been in use for fifteen years without the occurrence of any similar accident, or proof of any coal having previously fallen from, though occasionally falling on, the platform. In an action by the administrator to recover damages by reason of the death of the deceased:—*Held*, that the unfenced sides of the platform were obviously a cause of danger, which was necessarily increased by the existence of the rails across the opening causing coal striking them to be driven outward, and that the plaintiff was therefore entitled to recover. Judgment of a Divisional Court, 2 O. W. R. 396, affirmed. *Bisnaw* v. *Shields*, 24 C. L. T. 120, 7 O. L. R. 210, 3 O. W. R. 112.

Death — *Electric plant — Defective appliances—Electric shock — Engagement of skilled manager — Contributory negligence.*]—An electrician engaged with the defendants as manager of their electric lighting plant, and undertook to put it in proper working order, the defendants placing him in a position to obtain all necessary materials for that purpose. About three months after he had been placed in charge of the works he was killed by coming in contact with an incandescent lamp socket in the power house, which had been there the whole of the time he was in charge, but, at the time of the accident, was apparently insufficiently insulated:—*Held*, that there was no breach of duty on the part of the defendants towards the deceased, who had undertaken to remedy the very defects that had caused his death, and the failure to discover them must be attributed to him. The judgment appealed from, 14 Man. L. R. 74, 22 C. L. T. 266, ordering a new trial, was affirmed, but for reasons different from those stated in the Court below. *Davidson* v. *Stuart*, 24 C. L. T. 113, 34 S. C. R. 215.

Death — *Electric shock — Live wire.*]—An electric company who permit the entrance into their workshops of an unprotected live wire, charged with an electric current of 11,000 volts, at a place to which access of the company's workmen is allowed, are responsible for the death of a workman caused by contact with the wire. *Vezina* v. *North Shore Power Co.*, 29 Que. S. C. 305.

Death—*Employers' Liability Act—Cause of injury — Negligence—Contributory negligence.*]—Action under the provisions of the Employers' Liability Act, by the widow and administratrix of McN., who was a night track walker in the services of the defendants, and whose duty was to walk backwards and forwards on the railway tracks of the defendants to see that the tracks were clear. There was a shed over the defendants' blast furnace, the roof of which projected on each side for some distance. The tracks were under the projecting roof, and persons walking along the tracks would be entirely protected from the falling ice and snow from the roof. If slag or metal was being poured from the furnaces, or the track was otherwise entirely obstructed, the walker would have to go outside the track or take the track on the other side of the shed. The deceased was found dead one morning about 12 feet outside the track, covered with pieces of ice, one arm broken and with marks on the back of his head. There was no direct evidence of the cause of the death:—*Held*, following *Wakelin* v. *London and South Western Rw. Co.*, 12 App. Cas. 41, that the facts proven were consistent equally with negligence by the defendants, contributory negligence by the deceased, and death in circumstances for which the defendants would not be responsible; and the action was dismissed. *McNeil* v. *Dominion Iron and Steel Co.*, 24 C. L. T. 236.

Death — Evidence of negligence — Case for jury. *Cuff* v. *Crozier*, 3 O. W. R. 631.

Death — *Failure of action at common law and under Employers' Liability Act — Workmen's Compensation Act, 1902—"Dependents"—Arbitrator—Power to take commission evidence—Costs — Apportionment — Set-off.*]—The plaintiffs received money at times from the deceased in his lifetime, but there was no evidence of the money having been sent at regular intervals or in regular amounts:—*Held*, on appeal, that the plaintiffs were, on the evidence, dependents, within the meaning of the term in the Workmen's Compensation Act, 1902.—An action at common law for damages for the death of a workman having failed, the trial Judge proceeded, under s. 2, s.-s. 4 of the Workmen's Compensation Act, to assess compensation. On the question of apportionment of costs of the abortive action and the assessment under the Act, the plaintiffs' counsel set up his inability under the Act to take evidence on commission:—*Held*, *per* Martin, J., at the trial, that s. 2 of the second schedule and Rules 2, 34, and 81 of the Workmen's Compensation Rules, 1904, give the arbitrator power to direct the taking of evidence on commission. *Follis* v. *Schaake Machine Works, Limited*, 8 W. L. R. 14, 13 B. C. R. 471.

Death—*Fatal Accidents Act — Alien—Action for benefit of—Negligence.*]—The administrator within this province of a foreigner who was killed in an accident here through his employer's negligence is entitled, under the amendment to the Fatal Accidents Act, as embodied in s. 2 of R. S. O. 1897, c. 166, to maintain an action on behalf of the deceased's family, foreigners residing out of Canada, for the recovery of damages sustained by reason of his death. *Gyorgy* v. *Dawson*, 8 O. W. R. 784, 13 O. L. R. 381.

Death—*Fatal Accidents Act—Workmen's Compensation Act—Pleading — Status of plaintiff — Expectation of benefit — Person*

for whose benefit action brought.]—No person can sue under the Workmen's Compensation Act, R. S. M. 1902 c. 178, for damages for the death of a deceased relative, who could not sue under R. S. M. 1902 c. 31, and the statement of claim must shew either that the plaintiff is the executor or administrator of the deceased or that there is no executor or administrator, or, if there be one, that no action has been commenced within six months after the death of the deceased by or in the name of the executor or administrator; and it is not sufficient for the plaintiff to state simply that he is the father and sole heir-at-law of the deceased. It is necessary that the statement of claim should shew that the plaintiff had a reasonable prospect of future pecuniary benefit from the continuance of the life of the deceased. It is not necessary in every case, and it was not necessary in the circumstances of this case, to allege that the action was brought for the benefit of all persons entitled to claim damages. *Makarsky* v. *Canadian Pacific Ry. Co.*, 15 Man. L. R. 53.

Death—Fatal Accidents Act—Workmen's Compensation Act—Railway—Engine-driver—Disobedience of rules—Nonsuit. *Holden* v. *Grand Trunk Rw. Co.*, 5 O. L. R. 501, 2 O. W. R. 80.

Death—Finding of jury — Inconclusive verdict—Failure to establish cause of injury—Evidence—Dismissal of action. *Edie* v. *Canada Foundry Co.*, *Lynn* v. *Canada Foundry Co.*, 10 O. W. R. 629.

Death — Mine — Negligence — Onus — Waiver—Disobedience of servant. *Anderson* v. *Mikado Gold Mining Co.*, 3 O. L. R. 581, 1 O. W. R. 276.

Death — *Neglect to provide medical attendance.*]—The refusal or neglect of the master to provide medical or surgical attendance for the servant injured in his service by his alleged negligence gives no cause of action where death ensues from the injuries. *Makarsky* v. *Canadian Pacific Ry. Co.*, 15 Man. L. R. 53.

Death — Negligence — Common law liability—Workmen's Compensation Act — Defect in engine—Repair—Inspection—Reasonable care—Person intrusted with duty of providing proper appliances—Findings of jury—Interpretation of—Refusal to grant new trial. *Schwoob* v. *Michigan Central R. R. Co.*, 8 O. W. R. 710.

Death—Negligence—Destruction of vessel by fire—Warning — Watchman — Common employment—Findings of jury—Absence of evidence to sustain — Nonsuit. *Finch* v. *Northern Navigation Co.*, 8 O. W. R. 412.

Death—Negligence — *Res ipsa loquitur*. *Bisnaw* v. *Shields*, 3 O. W. R. 396.

Death — Negligence of master—Mine—Defective machinery — Contributory negligence—Fatal Accidents Act—Death of widow of servant after action. *Adams* v. *Culligan*, *Howe* v. *Culligan*, 1 O. W. R. 38.

Death — *Persons entitled to sue for.*]—Where a person has been injured by the negligence of his employer and has died as the result of his injuries, without having received compensation, the right to recover belongs exclusively to the persons mentioned in art. 1056, C. C., which is restrictive and ought to be interpreted strictly. *St. Laurent* v. *Telephone Co. of Kamouraska*, 7 Que. P. R. 293.

Death — *Precautions against danger — Machinery—R. S. Q., art. 3024.*] — An employer is responsible for the death of a workman caused by an accident which an obvious precaution, simple and inexpensive, would have prevented if it had been taken. Thus, the omission to stop a moving horizontal shaft while the workman is whitening the ceiling of the workshop above, and must for that purpose approach the shaft in a dangerous manner, when the shaft might be stopped without serious inconvenience, is a fault which involves the responsibility of the employer. That responsibility may also be implied from the injunction to employers in art. 3024, R. S. Q., to instal and maintain their machines in the best possible condition for the security of their workmen. *Kirk* v. *Canada Paint Co.*, 29 Que. S. C. 500.

Death —*Railway—Defective appliances.*]—Where a car used by a railway company kills a man who is in charge of it, the company are responsible for the damages sustained by the widow and children of the deceased, unless the company can prove that they could not have prevented the accident. 2. Where, as in this case, the accident could have been avoided by using more perfect appliances, which are easy to procure, as, for example, automatic couplers, compressed air brakes, etc., the company are guilty of negligence in not having these appliances. *Le May* v. *Quebec and Lake St. John Ry. Co.*, 25 Que. S. C. 82.

Death — Railway — Person in charge — Workmen's Compensation Act — *Res ipsa loquitur*. *Warren* v. *Macdonnell*, 10 O. W. R. 614.

Death — *Workmen's Compensation Act —Application by parents for compensation—Arbitration — "Dependents" — Jurisdiction of County Court—Lord Campbell's Act—Aliens.*]—Section 8 of the second schedule to the Workmen's Compensation Act, 1902, provides for the recording of any award of compensation, or of any matter decided under the Act, in the County Court for the district in which any person entitled to such compensation resides:—*Held*, on the facts, that the applicants had not proved that they were dependents of the deceased.—*Semble*, however, that the principle governing Lord Campbell's Act governs the Workmen's Compensation Act, viz., given the wrongful act in respect of which the deceased, had he lived, would have had a right of action, the statute intends, in case of death, to make the wrongdoer liable in damages to those who, irrespective of race or residence, stood to the deceased in any of the relationships mentioned in the Act. *Varesick* v. *British Columbia Copper Co.* 12 B. C. R. 286, 5 W. L. R. 56.

Death — Workmen's Compensation Act—Application by parents for compensation — Arbitration — "Dependents" — Jurisdiction of County Court. *Re Varesick and British Columbia Copper Co.* (B.C.), 5 W. L. R. 56.

Death — *Workmen's Compensation Act—Defect.*]—M., proprietor of iron works, had built an engine in the course of business, and, while it was standing on a railway track in the workshop, a heavy dray standing near, owing to the horses attached being startled, was thrown against it, whereby it was overturned and killed a workman at a bench three or four feet away. On the trial of an action by the administratrix of the workman's estate, the jury found that the accident was due to the negligence of M. in not having the engine properly braced:—*Held*, that this finding was justified by the evidence and M. was liable under the Workmen's Compensation for Injuries Act, R. S. O. 1897, c. 160:—*Held*, also, that the accident did not occur through "a defect in the condition or arrangement of the ways, works, machinery, plant, buildings, or premises connected with, intended for, or used in the business of the employer." *King* v. *Miller*, 24 C. L. T. 283. *Miller* v. *King*, 34 S. C. R. 710.

Death — Workmen's Compensation Act—Failure of evidence to establish how injury occurred — Workmen's serious neglect — Onus of proof. *Re McAloney & Western Fuel Co.* (B.C.), 5 W. L. R. 163.

Death — Workmen's Compensation Act—Notice of injury—Excuse for want of—Evidence — Statement of deceased—Negligence—Cause of injury—Jury. *Armstrong* v. *Canada Atlantic Ry. Co.*, 1 O. W. R. 612, 4 O. L. R. 569.

Death of husband thrown from high ladder while repairing electric light.]—Plaintiff, widow and administratrix of Alphonse Paquette, brought action against defendants claiming damages for death of husband, an electrician in the employ of defendants, who was thrown from a high ladder while repairing an electric light, in the centre of defendants' rink, by reason of a boy skating against said ladder. Plaintiff alleged negligence that the ladder supplied by defendants was not properly constructed for the purpose for which it was used, and was unsuitable for said purpose, being defective in design and manufacture. At the trial Anglin, J., dismissed the action on finding of the jury. The Divisional Court on appeal vacated this judgment and ordered a new trial. The Court of Appeal reversed the Divisional Court and restored the trial judgment on the grounds that the unsuccessful party must be able to point to something like misdirial or unreasonable conduct on the part of the jury in order to attack a verdict for his opponent. *Paquette* v. *Rideau Skating Club* (1909), 14 O. W. R. 845, 1 O. W. N. 108.

Defect in engine — *Consequent death—Negligence—Workmen's Compensation Act—Repair — Inspection — Reasonable care — Person intrusted by master to provide proper appliances—Evidence for jury—New trial.*]—The deceased was in the employment of defendants as fireman on locomotive engine No. 480, which was of what is known as the "Atlantic" type, and was provided with arch flues or hot water pipes which passed through the fire box and had their ends inserted into the hot water tank surrounding the fire box. On 17th November, 1903, while the engine was on its journey from Windsor to Niagara Falls, one of these tubes drew out of the tank, with the result that the boiling water and steam from it escaped, and the deceased was so badly scalded that he died a few hours afterwards. Plaintiff's case as presented at the trial was: (1) that the use of arch flues or hot water pipes was improper, because, as it was attempted to be shewn, it was highly dangerous to use them, owing to their being very liable to draw out; (2) that this danger was increased by an unsafe and improper method of keeping the pipes in place, which was adopted and in use by defendants; and (3) that the pipe which drew out when deceased received his injuries was insecurely and negligently fastened into the side of the tank to which it was attached. It was also alleged that defendants had not made proper provision for the inspection of these appliances, and it was contended that, having regard to the liability of the hot water pipes to become displaced and to draw out, special care and vigilance should have been exercised to see that they were always in good and efficient repair and condition. It appeared in evidence that the pipe which drew out when the deceased was injured had been put in, in defendant's workshop, to replace one that had become defective, but it was not shewn by whom this was done or in what circumstances the engine was sent to the workshop to be thus repaired. There was evidence that in making this repair the pipe had not been properly secured, and the inference might be drawn that it was owing to this that the pipe drew out:—*Held*, "It was clear at common law that the contract between employer and employed involved on the part of the former the duty of taking reasonable care to provide proper appliances and to maintain them in a proper condition, and so to carry on operations as not to subject those employed to unnecessary risk." It was also clear that at common law the employer was not bound in person to execute the work in connection with his business, but he was bound, if he did not personally superintend and direct the work, to select proper and competent persons to do so, and to provide them with adequate materials and resources for the work, and that, having done this, he had done all that he was bound to do, and for the negligence of the persons so selected he was not answerable: *per* Lord Cairns in *Wilson* v. *Merry*, L. R. 1 Sc. App. 326, 332. One of the duties flowing from that obligation of the employer was to take due and reasonable care that machinery which, if out of order, would cause danger to his employee, was safe and in such a condition that the employee could use it properly without incurring unnecessary danger. What was due and reasonable care was a question of degree in each case and depends upon the nature of the machinery, its liability to get out of order, and the danger incurred by the employee if he was suffered to use it when not in a condition to be safely used: *Murphy* v. *Phillips*, 24 W. R. 649, 35 L. T. N. S. 477. The employer who omits to discharge this obligation to his employee, either by performing it personally or by employing a competent person to do it, was liable at common law to answer in damages to his employee (unless the employee himself knew of the defect) for any injury happening to him owing to a

defect in the condition of the machinery which, by reasonable examination from time to time, might have been discovered. The purpose of ss.s. 1 of s. 5 and ss.s. 1 of s. 6 was to take from the employer the immunity from liability for the neglect of the person to whom he had intrusted the duty of providing and maintaining in proper condition the appliances for the work in which his employees were engaged, but it was not intended otherwise to affect the common law liability of the employer, and it did not do so. If defendants in this case did not provide for a proper examination from time to time of the locomotive upon which the deceased was working, and the defect in it which caused the injury to him would have been discovered had such an examination been made, they were answerable for a breach of the duty which they owed to deceased of taking reasonable care to provide proper appliances and to maintain them in a proper condition, and if, on the other hand, they did provide for such an examination, if the defect could have been discovered they are answerable for the negligence of the person or persons whom they intrusted with the performance of that duty. Defendants are also answerable for the negligence of any persons whom they had intrusted with the duty of seeing that the locomotive was repaired so as to make it fit to be safely used, for such a person would be a person intrusted by them with the duty of seeing that the machinery was proper, within the meaning of ss.s. 1 of s. 6: *Markle v. Donaldson*, 7 O. L. R. 576, 3 O. W. R. 147 affirmed in appeal, 4 O. W. R. 377. There was evidence which would support a finding by the jury of negligence in the discharge of the duty which defendants owed to deceased, and that deceased came to his death owing to that negligence. Appeal allowed and new trial ordered; costs of appeal and of last trial to be costs in the cause; upon the new trial it was not to be open to plaintiff to rely upon the first and second grounds of complaint, and as to these the action remained dismissed. *Schwoob v. Michigan Central Ry. Co.*, 5 O. W. R. 157, 6 O. W. R. 639, 9 O. L. R. 88, 10 O. L. R. 157.

Defect in machine — *Contractor — Subcontractor — Owner — Superintendence — Common fault — Liability.*] — Where an injury to a workman caused by the use of a defective machine, happens in the course of work done under contract, with a sub-letting of the hand work and machine work and executed under the direction of a servant of the owner, there is a common fault of the owner, the contractor, and the sub-contractor, which makes them severally responsible. *Dominion Iron and Steel Co. v. Cook*, 14 Que. K. B. 563.

Defect in machine—Findings of jury. *Connell v. Ontario Lantern and Lamp Co.*, 7 O. W. R. 77.

Defect in machine—Findings of jury —Particulars — Damages. *McCarthy v. Kilgour*, 7 O. W. R. 44, 8 O. W. R. 515.

Defect in machinery — *Workmen's Compensation Act.*] —Order of a Divisional Court, 9 O. L. R. 86, 5 O. W. R. 157, affirmed by the Court of Appeal. *Schwoob v. Michigan Central Ry. Co.*, 10 O. L. R. 647, 6 O. W. R. 639.

Defect in ways — Contributory negligence — Course of employment — Sunday work — Jury — Nonsuit. *Hopkins v. Barchard*, 5 O. W. R. 246, 6 O. W. R. 350.

Defective apparatus — *Death of servant — Action by widow and children.*]— The use of a wooden beam as part of the operating plant of a brewery, which gave way owing to dry rot and fell upon a man employed in the brewery and killed him, was *held* to be such negligence as made the employer liable in an action by the widow and children of the man who was killed. *Demers v. Montreal Brewing Co.*, 28 Que. S. C. 25.

Defective appliances — *Care — Liability.*]—An employer is not absolutely bound to provide the latest tools and appliances, but if old fashioned inferior, and dangerous tools and appliances (link and pin couplings for cars) are provided, this in itself constitutes an element of negligence imposing the obligation to exercise the greatest care. In the present case the care exercised by the employers was not such as it should have been in view of the defective nature of the couplings provided, and they must be held responsible for the injury and death of the servant. Judgment in 25 Que. S. C. 82, affirmed. *Onchee and Lake St. John Ry. Co. v. Lemay*, 14 Que. K. B. 35.

Defective appliances—Findings of jury —Evidence of no previous accident—Contributory negligence — Damages. *Commerford v. Empire Limestone Co.*, 6 O. W. R. 1018, 11 O. L. R. 119.

Defective condition of machine — Findings of jury. *Connell v. Ontario Lantern and Lamp Co.*, 8 O. W. R. 201.

Defective gear — *Injury to workman— Use of property of defendants—Knowledge —Res ipsa loquitur.*]—A chain was part of certain gear owned by the defendants which was hired by a contractor. The plaintiff, an employee of the contractor, had to use this chain and gear in connection with his work, and while using it the chain broke, and the plaintiff was severely injured. No one could account for the breaking of the chain. There was no evidence that anything wrong with the defective link could have been discovered by a reasonable examination:—*Held*, that from the breaking of the chain, in these circumstances, an inference should not be drawn that when the defendants supplied the chain they had not taken reasonable care to ascertain such a defect, or that the defendant ought to have known of its conditions, or that it was not then in a reasonably safe condition.—The practice in England of periodic testing by chain testers is not feasible in this country. The phrase *res ipsa loquitur* referred to. *Murray v. Phillips*, 35 L. T. N. S. 477, distinguished. *McLellan v. Halifax Graving Dock Co.*, 40 N. S. R. 99.

Defective implements — *Right of servant to assume tools furnished are in good order — Accident — Burden of proof—Admissions of servant — Value of.*]—An em-

ployer is bound to furnish his workmen with tools in good order; if an accident happens by reason of a tool supplied being in bad order, the employer is responsible. The employer should have a foreman capable of judging the condition of tools furnished, and, when they become dangerous, they should be withdrawn from the workmen. The employer has the duty imposed on him to guard the workmen against dangers which may be the consequence of the work at which he is employed. In this case the workman was occupied in cutting a steel rail with a cold chisel; he and another workman, in turn, struck with iron hammers on the head of the chisel which another workman held on the rail with tongs; the head of the chisel was broken, and, when struck with the hammer of the plaintiff's companion, a sliver of steel was detached from the chisel and struck and injured the eye of the plaintiff; the latter had the right to take for granted that the head of the chisel was in good order; — *Held*, that the defendants were liable for the accident. An admission of a party has value and is binding only on questions of fact and not on questions of law. The admission of the plaintiff, after the accident, that the tools were in good order, that the accident was not the fault of the defendants, is contrary to the evidence and the truth, and it does not bind him, he not having the necessary ability to judge whether the tools were in good order or not, nor the legal knowledge necessary to appreciate the legal consequences resulting from the fact. He who alleges that an accident was due to mere chance (*cas fortuit*) must prove it. *Drolet* v. *Metabetchkwan Pulp Co.*, 26 Que. S. C. 107.

Defective machine — Fault of superior workman — Workmen's Compensation Act — Damages. *Glasgow* v. *Toronto Paper Manufacturing Co.*, 5 O. W. R. 104.

Defective plant — *Ship.*] — As a fisherman, employed by the defendants, was dragging by its wooden handle according to the usual practice adopted on the defendants' fishing tug, a heavy box of fish along the deck, the handle, which was made of a poor quality of wood, broke, and the man fell overboard and was drowned;—*Held*, that the defendants were bound, even at common law, to exercise due care to furnish to their men material and plant in a sound and proper condition, and that they were liable in damages. *Sim* v. *Dominion Fish Co.*, 21 C. L. T. 371, 2 O. L. R. 69.

Defective scaffolding — Liability at common law — Workmen's Compensation Act — Want of inspection. *Keiller* v. *John Inglis Co.*, 8 O. W. R. 170.

Defective system — *Dangerous work—Findings of jury.*]—When a water tank is used, from which water is distributed through pipes by means of compressed air pressure, and its lid has to be removed from time to time for re-filling, the failure to provide it with a valve or stop-cock, to relieve the pressure, is negligence which makes the owner liable for accidents; and the finding of a jury that the death of a workman, employed to remove the lid, against whom it was thrown by an explosion, was partly due to such negligence, is proper and will not be disturbed. *Stevenson* v. *Grand Trunk Ry. Co.*, 32 Que. S. C. 423.

Defective system — *Ontario Workmen's Compensation Act — Injury in Ontario — Action brought in Manitoba — Time for bringing action.*]—Action under the Workmen's Compensation Act and at common law to recover damages for injury sustained while working for defendants in Ontario. The plaintiff invoked the aid of the Ontario Workmen's Compensation Act, under which notice of injury must be given within 12 weeks, and action commenced within six months from the accident. Under the Manitoba Workmen's Compensation Act, two years is the limitation within which action may be brought:—*Held*, that the plaintiff must be governed by the Ontario Act, and not having given notice, has lost his rights.—Held, also, that he cannot succeed at common law. *Lawrence* v. *Kelly*, 11 W. L. R. 347.

Defects in machinery — Contributory negligence — *Volenti non fit injuria. Shutt* v. *Canadian Pacific Ry. Co.* (N.W.T.), 3 W. L. R. 326.

Dilapidated condition of elevator — Common law liability — Finding of jury. *Traphin* v. *Canadian Woollen Mills (Limited)*, 3 O. W. R. 416.

Disobedience—*Enforcing rules of factory —Verdict against weight of evidence—Misdirection — New trial — Costs.*] — Action brought by respondent against the company for recovery of compensation for injuries sustained by him while employed in their factory. Jury found that the company was at fault for laxity in enforcement of its regulations made to secure the safety of employees and that plaintiff had contributed to the accident which occasioned the injuries sustained by him by disobedience to the orders given to him in pursuance of those regulations. Jury estimated damages to plaintiff at $3,500, made a deduction of $2,000 therefrom on account of the fault which they attributed to him and returned a verdict against the company for $1,500. Upon this verdict judgment was entered against the company by the trial Judge and this judgment was affirmed by the Court of Review, 36 Que. S. C. 425. Principal grounds urged by the company on their appeal to Supreme Court of Can. were that the jury had been misdirected by the trial Judge and that the findings and verdict were against the weight of evidence. Supreme Court of Can. directed a new trial should be had. No costs allowed on appeal to Supreme Court of Can. Costs in courts below should follow event of new trial. *Can. Rubber Co.* v. *Karacokivic* (1909), 44 S. C. R. 305.

Disobedience of orders — *Dangerous machine — Findings of jury — Questions left unanswered.*]—Plaintiff sued for damages to her hand which was caught in defendant's laundry mangle, at which she was working. The trial Judge left certain questions to the jury, part being answered, and as they could not agree on the others they were excused from answering them:—*Held*, that as found by the jury, plaintiff was working where she should not have been, it

was quite unnecessary for the jury to deal with the other questions. *D'Aoust* v. *Bissett*, 13 O. W. R. 1115.

Disobedience of orders — *Dangerous work.*] — Where a foreman has given the necessary orders to ensure the safety of a workman engaged in dangerous work, the employee who disobeys such orders, and, in consequence, sustains injuries, cannot hold his employer responsible in damages on the ground that the foreman was bound to see that the orders were not disobeyed. *Lamoureux* v. *Fournier dit Larose*, 33 S. C. R. 675, discussed and distinguished. *Royal Electric Co.* v. *Paquette*, 25 C. L. T. 3, 35 S. C. R. 202.

Disregard of warning — *Danger — Liability.*] — The plaintiff was employed in shovelling coal from a large pile, and carting it to the defendants' furnaces. The pile of coal was frozen over on the outside, and plaintiff was instructed not to undermine the crust, and, moreover, had been frequently warned by his fellow workmen of the danger of shovelling coal from under the crust so formed, but he took the risk, with the result that a portion of the frozen coal fell upon him and caused him serious injury. In an action by the plaintiff to recover damages for this injury:—*Held*, that employers are not obliged to indemnify their workmen when accidents happen in consequence of their not obeying the instructions given them as to the safe and proper method of performing their work; and under the circumstances the defendants were not responsible. *Primeau* v. *Merchants Cotton Co.*, 19 Que. S. C. 62.

Duty of master — *Protection of workmen — Enforcement of obedience to orders.*] —The employer owes a duty to his workmen, not only to give the necessary orders for their protection, but further, especially in the case of young and inexperienced workmen, to see that his orders are obeyed. His neglect to do so renders him responsible for accidents which happen in consequence. *Union Card and Paper Co.* v. *Hickman*, 17 Que. K. B. 303.

Duty of master to obtain surgical assistance—Damages. *Delorme* v. *Locomotive and Engine Co.*, 3 E. L. R. 328.

Duty of servant—*Insulation of electric wires — Onus of proof.*] — An electric lineforeman in the defendants' employ met his death from contact with imperfectly insulated live wires while at work in proximity to them in the power-house. The evidence left some doubt whether the duties of deceased included the inspection and care of the wires both inside and outside of the power-house, or whether his engagement was to perform the duties in question in respect only to the wires outside the power-house walls:—*Held*, that the onus of proof as to the point in dispute was on the defendants, and, such onus not having been satisfied, they were liable in damages.—Judgment appealed from affirmed, Davies, J., dissenting, on a different view of the evidence and holding that the duties of deceased included the inspection and care of the interior wiring. *Quebec Rw. Light and Power Co.* v. *Fortin*, 40 S. C. R. 181.

Duty of the employer—*Fault of the workman.*]—Although the employer is bound to take the necessary precautions to protect the workman in the execution of dangerous work, he is not bound to foresee the latter's fault or imprudence, and to take means to prevent the consequences thereof. Hence, the representatives of a workman, who, while working on a pontoon, falls into the water and is drowned by his own fault, cannot blame the employer for not having provided life-saving facilities in anticipation of such an accident. *Loomis* v. *Bedard* (1909), 20 Que. K. B. 28.

Duty to case shaft — Evidence—Jury — New trial. *Cameron* v. *Douglass*, 6 O. W. R. 673.

Duty to servant—Defective appliances — New trial. *Tylaki* v. *Dawson Gyargy* v. *Dawson*, 6 O. W. R. 569, 7 O. W. R. 590.

Electric lamp.]—Injury by — Evidence —Non-direction—Liability of master for acts of servant causing injury to stranger — Findings of jury—Damages. *Sedore* v. *Toronto Electric Light Co.*, 3 O. W. R. 407.

Electric wire left on ground — *Injury to passer-by—Liability of gas company —City corporation—Immediate cause of injury — Damages — Costs.*]—Plaintiffs were injured by a wire which had been cut and allowed to hang loose by the workmen of defendant company while straightening a pole. It came in contact with a power wire and thus became a live wire injuring the plaintiffs. Defendants held liable owing to original negligence of defendants' workmen. *Labombarde* v. *Chatham Gas Co.*, 5 O. W. R. 534, 10 O. L. R. 446.

Electrical appliances — *Intermittent danger — Duty to give warning — Notice— Burden of proof.*] — A master who makes an intermittent use of electrical appliances, dangerous when charged with electricity, and necessarily placed within reach of his workmen, is under obligation to cause them to be warned on every occasion upon which the current of electricity is turned on, and in default is responsible for injuries which may occur from contact with the appliances.—The burden of proof that a sufficient notice to employees has been given is upon the master. *Shawinigan Carbide Co.* v. *Saint-Onge*, 15 Que. K. B. 5.

Elevator — Defective appliances — Inspection — Duty of tenant — Duty of landlord — Evidence for jury — Nonsuit. *Talbot* v. *Hall, Delaire* v. *Hall*, 5 O. W. R. 751.

Elevator — Defective appliances — Inspection — Duty of tenant — Findings of jury — New trial. *Talbot* v. *Hall, Delaire* v. *Hall*, 7 O. W. R. 187.

Employers' Liability Act — Common employment — Negligence in operating railway in mine — Contributory negligence — *Volenti non fit injuria* — Applicability of rule to cases of breach of statutory obligation. *Bell* v. *Inverness Coal and Rw. Co.*, 4 E. L. R. 405.

Employers' Liability Act—*Dangerous place — Contributory negligence — Obedience to orders.*]—Where the plaintiff was required to perform a piece of work in a dangerous place, by a person in the employment of the defendants, whose orders he was required to obey, and, while so engaged was struck by a moving car and severely injured, the company having failed to provide proper plant and a reasonably safe place for the performance of the work he was directed to do:—*Held*, that the plaintiff was entitled to recover compensation for the injuries sustained; and that, as the plaintiff, although aware of the serious danger of working where he did, felt obliged to do so under peril of dismissal if he refused, he was not guilty of such contributory negligence as would preclude his recovery. *Oliver* v. *Dominion Iron and Steel Co.*, 37 N. S. R. 183.

Employers' Liability Act — *Defect in ways, works, etc.—Care in moving cars — Contributory negligence.*]—O., a workman in the employment of the defendant company, was directed by his superior to cut sheet iron and to use the rails of the company's railway track for the purpose. The superior offered to assist, and the two sat on the track facing each other. O. had his back to two cars standing on the track, to which, after they had been working for a time, an engine was attached, which backed the cars towards them, and O., not hearing or seeing them in time, was run over and had his leg cut off:—*Held*, that O. did not use reasonable precautions for his own safety in what he knew to be a dangerous situation, and could not recover damages for such injury:—*Held*, also, that the employees engaged in moving the cars were under no obligation to see that there was no person on the track before doing so.—*Held*, *per* Sedgewick, Nesbitt, and Killam, JJ., that the want of a place specially provided for cutting the sheet iron was not a defect in the ways, works, etc., of the company, within the meaning of s. 3 (a) of the Employers' Liability Act.—*Held*, *per* Girouard and Davies, JJ., that, if it was such a defect, it was not the cause of the injury to O. *Dominion Iron and Steel Co.* v. *Oliver*, 25 C. L. T. 54, 35 S. C. R. 517.

Employers' Liability Act — *Foreman's act not in exercise of superintendence.*] — In an action for damages for injuries sustained by the plaintiff while in the employment of the defendants and engaged in loading a ship, the plaintiff alleged: (1) negligence of the defendants at common law because their system of doing the work was defective; and (2) liability under the Employers' Liability Act, s. 3, s.-s. 2, because of the negligence of a person having superintendence intrusted to him, etc. The second ground was not actually pleaded, but the action was tried on the assumption that it was pleaded, and the defendants sought to shew by evidence that the defendants' foreman was not negligent. The evidence shewed that the foreman found the sling-loader absent from his place, and, presumably in order not to retard the work of loading, he voluntarily loaded the sling himself; some sticks slipped out, fell on the plaintiff, and caused the injury complained of. The jury found a general verdict for the plaintiff, after which the defendants contended that, if the injury was caused by the defendants' foreman, it was not caused by him while in the exercise of superintendence:—*Held*, that the defendants were not in a position so to contend; and that there was evidence, both of defective system and of negligence of a person intrusted with superintendence, which could not have been withdrawn from the jury; and, therefore, there should be judgment for the plaintiff. *Boon* v. *Brown & McCabe* (1910), 16 W. L. R. 120, B. C. R.

Employers' Liability Act—*Knowledge of workman — Contributory negligence — Proximate cause of injury — Jury, questions to — Failure of Judge to submit—New trial.*]—The plaintiff, while engaged in replacing on their track some cars which had run off, was struck through a car becoming released on a down grade, and was thrown on a set of exposed cog-wheels, some nine or ten feet to one side of where he was working. He lost the use of his arm in the cogs. His duties did not usually bring him in contact with the machinery which caused his injury, nor had he any control over or concern in its working:—*Held*, that the leaving the cogs unguarded was the decisive cause of the accident, and whether that was negligence in the particular circumstances was properly left to the jury.—The only object in submitting questions to a jury is to ascertain if they apprehend the case; but if the Judge does not submit questions, it is no ground for a new trial, if he has properly instructed the jury on the law. *Snow* v. *Crow's Nest Pass Coal Co.*, 6 W. L. R. 494, 13 B. C. R. 145.

Employers' Liability Act — *Operation of coal mine — Liability of company for negligence of employee — Contributory negligence — Volenti non fit injuria.*]—Under the system of operating the defendant company's coal mine, coal was brought to the surface by means of box cars, and at intervals what was termed a "rake of cars" was sent down to bring up men. In the latter case the rules of the company required the man in charge of the rake to give four raps upon the rope connecting the cars with the hoisting engine at the surface as a signal that men were on board, when the cars were raised at a much slower rate of speed than that employed in raising coal.—The man in charge of the rake in violation of the rules gave only one rap upon the rope (the signal used where coal was being raised), and the cars, being brought up at a great speed, ran off the track, resulting in the death of one man and serious injury to another. In an action under the Employers' Liability Act, R. S. N. S. 1900 c. 179:—*Held*, affirming the judgment of the trial Judge, that the case was within s. 3 (c) of the Act, relating to the negligence of persons in the service of the employer and having "charge or control of any points, signal, upon a railway," etc.—(2) That there was no such contributory negligence on the part of plaintiff in remaining upon the cars (there having been an opportunity of getting off at a stopping place) as would disentitle him to recover.—(3) That the principle *volenti non fit injuria* could not be invoked on behalf of the defendant company. *Bell* v. *Inverness Coal and Rw. Co.*, 42 N. S. R. 265, 4 E. L. R. 405.

Employers' Liability Act — *Proximate cause.*]—D. was engaged in moving cars at a quarry of the company. The cars were loaded at a chute under a crusher and had to be taken past an unused chute about 200 feet away, supported by a post placed seven and a half inches from the track. D., having loaded a car, found that it failed to move as usual after unbraking, and he had to come down to the foot-board and shove back the foot-rod connected with the brake. The car then started, and he climbed up the steps at the side to get to the brake on top but was crushed between the car and the post. He could have got on the rear of the car, instead of using the steps, or jumped down and walked along after the car until it had passed the post. The manager at the quarry had been warned of the danger from the post, but had done nothing to obviate it:—*Held*, reversing the judgment in 36 N. S. R. 113, Davies and Killam, JJ., dissenting, that D.'s own negligence was the cause of his injury, and the company were not liable.—*Held, per* Davies and Killam, JJ., that the position of the post was a defect in the company's works under the Employers' Liability Act, which was evidence of negligence. *Dominion Iron and Steel Co.* v. *Day*, 24 C. L. T. 167, 34 S. C. R. 387.

Employers' Liability Act, B. C. — *Common employment — Former servant's negligence — Trial — Party bound by course of.*]—Where a party frames an action for negligence at common law and also under the Employers' Liability Act, but at the trial attempts to develop a case at common law and fails, he will not be granted a new trial in order to try to establish a case under the Employers' Liability Act. The jury found that the defendants were negligent in not providing proper and accurate working plans of a mine, and that such neglect was the cause of the accident, but they did not specify what person or official was guilty of the negligent act. The plans were prepared by the defendants' engineers, who were competent, and who had left the defendants' employment before the injured person entered their employment:—*Held*, that the defendants were not liable either under the Act or at common law. *Per* Irving, J.—The doctrine of common employment is applicable where the servant because of whose fault the accident happened had left the employer's service before the injured servant entered his service. *Hosking* v. *Le Roi No. 2, Limited*, 23 C. L. T. 300.

Employers' Liability Act, B. C. — *Dangerous place — Duty to warn workmen.*]—G. had been working in the defendants' mine on the floors immediately below the 600-foot level, and on the night of the accident when he was going to work he was told by the shift whom he was relieving that the place was in pretty bad shape, and to look out for it. He proceeded to make an examination, but while thus engaged the mine superintendent directed him to do some blasting, and while doing it a slide occurred, and he was injured. The principal evidences of the likelihood of a slide were two floors beneath the 600-foot level, of which the superintendent was aware, and G. not aware. The jury found that the superintendent was negligent, inasmuch as he did not advise G. of the probable danger:—*Held*, in an action under the Employers' Liability Act, that the defendants were liable. Where a workman is put to work in a place where there is an imminent danger of a kind not necessarily involved in the employment, and of which he is not aware, but of which the employer is aware, it is the employer's duty to warn the workman of the danger. *Gunn* v. *Le Roi*, 23 C. L. T. 291, 10 B. C. R. 59.

Employers' Liability Act, B. C. — *Negligence — Common employment—Mine owner and contractor.*] — H. and M. contracted to sink a winze in defendants' mine at a certain price per foot, and by the terms of the contract the direction and dip of the winze were to be as given by the defendants' engineers; the defendants were to provide all necessary appliances, etc.; H. and M.'s workmen should be subject to the approval and direction of the defendants' superintendent, and any men employed without the consent and approval of or unsatisfactory to such superintendent should be dismissed on request. A hoisting bucket hung on a clevis was supplied to H. and M. by the defendants, and through the negligence of the defendants' superintendent, master mechanic, or shift boss, a hook substituted for the clevis by defendants, at the request of H. and M., got out of repair, in consequence of which the bucket slipped off and in falling injured the plaintiff, who was one of H. and M.'s workmen engaged in sinking the winze:—*Held*, that the plaintiff, being subject to the orders and control of the defendants, was acting as their servant, and the doctrine of fellow-servant applied, and the action was not maintainable. *Hasting* v. *Le Roi No. 2, Limited*, 23 C. L. T. 273, 10 B. C. R. 9.

Employers' Liability Act, B. C. — *Negligence — Findings of fact — Machinery in mine — Defective construction—Proximate cause.*]—An elevator cage was used in defendants' mine for the transportation of workmen and materials through a shaft over eight hundred feet in depth. It was lowered and hoisted by means of a cable, which ran over a sheave-wheel at the top of the shaft, and, to prevent accidents, guide-rails were placed along the elevator shaft, and the cage was fitted with automatic dogs or safety clutches, intended to engage upon these guide-rails and hold the cage in the event of the cable breaking. The guide-rails were continued only to a point about twenty-feet below the sheave-wheel. On one occasion the engineman in charge of the elevator carelessly allowed the cage to ascend higher than the guide-rails and strike the sheave-wheel with such force that the cable broke, and the safety clutches failing to act, the cage fell a distance of over eight hundred feet, smashed through a bulkhead at the eight hundred foot level, and injured the plaintiff, who was engaged at the work for which he was employed by the defendants about fifty feet lower down in the shaft. In an action to recover damages for the injury sustained, the jury found that the proximate cause of the injury was occasioned by the non-continuance of the guide-rails, which, in their opinion, caused the safety-clutches to fail in their action,

and thereby allowed the cage to fall:—*Held*, that the Court ought not, on appeal, to disturb the verdict entered for the plaintiff, as there was sufficient evidence to support the finding of fact by the jury. Judgment in 9 B. C. R. 62 reversed. *McKelvey* v. *Le Roi Mining Co.*, 23 C. L. T. 61, 32 S. C. R. 664.

Employers' Liability Act, B. C. — *Notice of injury — Want of — Reasonable excuse — Prejudice — Evidence.*]—In an action for damages under the Employers' Liability Act for injuries sustained by the plaintiff, it was shewn that the plaintiff was without means and for some weeks after the accident was unable to transact any business; and that the defendants' business manager and representative saw the accident and arranged for the plaintiff's admission into the hospital, where a few days later he discussed with him the cause of the accident:—*Held*, that the circumstances excused the want of notice of injury. At the close of the plaintiff's case a nonsuit was moved for, on the ground that the plaintiff had not proved notice of injury, and the plaintiff then adduced evidence which the Court held shewed a reasonable excuse for the want of notice, and the trial proceeded. Before closing his case the defendants' counsel tendered evidence of being prejudiced by want of notice.—*Held*, excluding the evidence, that the proper time to shew prejudice was while the question of reasonable excuse was still open. *Lever* v. *McArthur*, 9 B. C. R. 417.

Employers' Liability Act, B. C. — *Railway — Contributory negligence — Nonsuit — Jury.*]—The judgment in 22 C. L. T. 244, 8 B. C. R. 393, affirmed. *Fawcett* v. *Canadian Pacific Ry. Co.*, 32 S. C. R. 721.

Employers' Liability Act, Nova Scotia —*Railway — Defect in way — Voluntary incurring of risk — Contributory negligence —Damages — Costs.*]—The plaintiff was employed as a brakesman on cars that were being loaded with stone from a chute on the defendant company's line of railway. At a distance of 150 to 200 feet from the chute where the cars were loaded was a second and unused chute which the cars were required to pass in order to reach the loading point. The track sloped from the point where the empty cars were stationed to the point where they were filled, and as soon as one car was filled it was the duty of the brakesman to release the brakes and allow another car to run down the track and take its place. The gear controlling the brake of a car which the plaintiff was placing in position to be filled failed to work properly, and the plaintiff was obliged to descend for the purpose of releasing it. As he was attempting to regain his position, after the car had started, in order to be in a position to control it, he was caught between the car and one of the posts supporting the unused chute, and was injured. The attention of the manager of the defendant company had previously been called by the plaintiff to the danger of accidents from this cause, and he had promised to have it remedied, but nothing was done till after the accident, when the chute was removed. The plaintiff had been employed by the company for two years prior to the happening of the accident, but had only been engaged in this particular work for some nine days:—*Held*, that the position of the post, coupled with the position from which the empty cars had to be started, constituted a defect, and should have been remedied when the attention of the defendants' manager was called to the danger arising from it. After the plaintiff had notified the manager of the danger, there was nothing in his continuance in the defendants' employ from which to infer that he voluntarily incurred the risk. Notwithstanding evidence that the plaintiff might have got on the car in another way, and thus have avoided the accident, he was, under the circumstances, only called upon to use a reasonable way of doing what he was called upon to do—not the safest way—and that the finding of the jury that the plaintiff was not guilty of contributory negligence should not be disturbed. In the absence of evidence of permanent injury, the damages assessed ($850) were excessive and should be reduced; no costs to either party. *Day* v. *Dominion Iron and Steel Co.*, 36 N. S. R. 113.

Employment in mine — Negligence—Evidence — Damages. *Eustis Mining Co.* v. *Bean*, 5 E. L. R. 257.

Employment of child — *Lease of part of building as factory — Use of elevator — Defective condition — Liability of owners of building — Implied invitation — Liability of employers — Common law — Workmen's Compensation Act — Factories Act—Jury.*]—The plaintiff, a child under fourteen years of age, was injured by the fall of a goods elevator used by his employers in a building, the third floor of which they rented for the purpose of their business of manufacturing check books. By the lease to the employers, the lessors covenanted to give the use, together with the other tenants in the building, to the lessees (the employers), their agents, clerks, and tenants, of the elevator in said building for freight purposes only, in each day, and to keep the same in repair and good working order, with a right of way to and from the elevator, and provided that the lessors should not be liable for any damage or any accident to any member of said lessees or any of their employees through using or interfering with the elevator, but the lessors were to keep the elevator in proper running order, and repair on notice. The plaintiff was "helper" to L., a fellow employee, who told him to bring up a packing case from the basement; the plaintiff placed it on the elevator, which stuck on the way up; he returned to L. and reported, and L. told him to take the case off, and not to use that hoist, but another. The plaintiff went down stairs, and L. heard nothing more of him until he was found lying on the elevator, injured. The evidence did not shew whether the packing case was on or off the elevator when the plaintiff was found. The elevator was out of order, and the inference was that it had fallen:—*Held*, that the plaintiff's rights as against the lessors wholly depended upon implied invitation, and any invitation to use the elevator must be regarded as cancelled when the plaintiff became aware that it was out of

order, and was told not to use it; and the plaintiff's action against the lessors to recover damages for his injuries failed.—*Held*, also, that the plaintiff's action against his employers also failed so far as it was based upon the common law and the Workmen's Compensation for Injuries Act; upon the former, because, upon the undisputed evidence, he was not using the defective elevator as an elevator at the time of his injury, or, if he was, that he was doing so in defiance of the order of L.; and upon the latter, because the jury had not made the necessary findings upon which to base a judgment in respect of the order given by L.—But, by the Ontario Factories Act, R. S. O. 1897 c. 256, s. 3, the plaintiff's employment was wholly unlawful, and a *primâ facie* case under that Act was made simply by proof of his age, the employment and the injury. To such *primâ facie* case no answer was made; there was no finding of contributory negligence; and the employers' premises were, within the meaning of the Act, a factory, of which the elevator formed part. The employers were, therefore, liable under the Factories Act to the extent of $1,500. Meredith, J.A., dissented in part. *Jones* v. *Morton Co. Limited*, 9 O. W. R. 500, 14 O. L. R. 402.

Employment of child in factory — *Factories Act — Misrepresentation as to age — Dangerous machinery — Warning — Negligence — Jury.*]—The plaintiff, a boy of ten, represented his age as fourteen, and was employed by the defendants in their factory. He was not put at dangerous work, but, in going to his work through a room in which there were dangerous machines, he was injured by one of them: — *Held*, Meredith, J., dissenting, that the provision of the Factories Act, R. S. O. 1897 c. 256, s. 3, that no child (as defined by s. 2, s-s. 5) shall be employed in a factory, is to protect young children from dangerous employment. It is not enough to take the statement of a child as to his age; the employer must satisfy himself by reasonable means that the applicant for work is of the requisite age; and it is for the jury to say whether reasonable precautions have been taken. The illegal employment may be evidence of negligence. Upon the facts of this case it was for the jury to say whether sufficient warning had been given by the defendants to protect the plaintiff, having regard to his age and the danger of the place. *Velatosh* v. *Firstbrook Box Co.*, 24 C. L. T. 370, 8 O. L. R. 419, 3 O. W. R. 924. Affirmed 10 O. L. R. 526, 6 O. W. R. 237.

Employment of child in factory — Negligence of foreman — Dangerous machines — Neglect to caution infant—Liability of employers — Superintendence — Workmen's Compensation Act — Factories Act. *Lawson* v. *Packard Electric Co.*, 10 O. W. R. 525.

Employment of child in factory — *Pleading — Declaration — Dismissal of other children — Insurance against accidents.*]—The allegations in the declaration in an action for damages for injury to a child under 14 years of age, that the defendant has admitted liability by dismissing all other employees of the same age, and also that the defendant carries an insurance policy against accidents to employees, are irrelevant and illegal and will be struck out on inscription in law. *Harvey* v. *Dominion Textile Co.*, 8 Que. P. R. 202.

Engagement by contractor—*Control—Defective machinery — Notice — Failure to remedy — Common employment.*] — The sinking of a winze in a mine belonging to the defendants was let to contractors, who used the hoisting apparatus which the defendants maintained and operated by their servants, in the excavation, raising and dumping of materials, in working the mine under the direction of their foreman. The winze was to be sunk according to directions from defendants' engineer, and the contractors' employees were subject to the approval and direction of the defendants' superintendent, who also fixed the employees' wages and hours of labour. The plaintiff, a miner, was employed by the contractors under these conditions, and was paid by them through the defendants. While at his work in the winze the plaintiff was injured by the fall of a hoisting bucket, which happened in consequence of a defect in the hoisting gear, which had been reported to the defendants' master-mechanic and had not been remedied:—*Held*, affirming the judgment in 10 B. C. R. 9, 23 C. L. T. 275, Taschereau, C.J.C., dissenting, that the plaintiff was in common employment with the defendants' servants engaged in the operation of the mine, and that, even if there was a neglect of the duty imposed by statute, in respect to inspection of the machinery, as the accident occurred in consequence of the negligence of one of his fellow-servants, the defendants were excused from liability on the ground of common employment. *Hastings* v. *Le Roi No. 2, Limited*, 24 C. L. T. 116, 34 S. C. R. 177.

Evidence—*Death from electrical shock—Inference as to cause of death — Jury — Negligence — New trial.*]—The plaintiff's son and another labourer were directed to clear up and remove the rubbish caused by their cutting a trench in the concrete floor of an alleyway in the defendants' power house. The alleyway was crossed at right angles by others, on each side of which were electric machines and live wires within arm's length of anyone working in the trench, one of the latter of which was ruptured, perhaps by bending in constant use. The other labourer went into a cross alleyway where the live wires were, although there had been a slat nailed across it when the two were put to work; and he was stepping towards the trench the litter that had been scattered about when he suddenly became unconscious from an electric shock. The bodies of both men were found near a switchboard, plaintiff's son being dead. It was shewn that there was a rupture in the insulation of a loose loop or cable hanging from the switchboard directly over where the survivor was lying and that the insulation of the wires was, with respect to the voltage passing, insufficient for the safety of anyone working among them, and that the hanging loop might easily have been better guarded than it was: — *Held*, that there was evidence which could not be prop-

erly withdrawn from the jury, and a nonsuit was set aside, and a new trial ordered. *Griffiths* v. *Hamilton Electric and Cataract Power Co.*, 23 C. L. T. 263, 6 O. L. R. 286, 2 O. W. R. 594.

Evidence—*Finding of jury—New trial—Verdict — Effect of.*]—The plaintiff claimed damages under Lord Campbell's Act for the loss of his son, who was killed by a fall of stone in the defendants' mine.—The jury, in answer to a question submitted by the trial Judge, found that the specific act of negligence that caused the injury was the failure of the defendants to properly examine the face of the wall from which the rock fell. There was uncontradicted evidence on the part of the defendants that several of the officials of the company, before starting work, went carefully over the banks and walls for the purpose of ascertaining whether they were safe:—*Held*, in view of this evidence, that the finding of the jury was not justified, and that there must be a new trial; also, that, the jury having placed their verdict on this one ground which could not be justified under the evidence, the Court could not give a wider scope to their answer so as to embrace other acts of negligence pointed out, or to rectify the error or misunderstanding of the jury. *McDougall* v. *Aissiic Mining & Ry. Co.* 42 N. S. R. 225, 4 E. L. R. 275.

Evidence — *Long continued user.*]—The fact that for many years an operation has been carried on in the same way and with the same appliances without an accident, while strong evidence in the master's favour, is not conclusive, and if there is evidence that the system is defective the case must be submitted to the jury. Judgment of a Divisional Court affirmed, Osler, J.A., dissenting. *Commanford* v. *Empire Limestone Co.*, 11 O. L. R. 119, 6 O. W. R. 1018.

Evidence — *Negligence of servant cause of disaster.*]—In an action for negligence, brought by a "rapper" in the employ of the defendants, it appeared that a chain connected with some cars of the defendants broke owing to defective welding and the breaking of the chain caused certain cars to jump the rail, one of the cars striking the plaintiff and injuring him. It also appeared, however, that the plaintiff was not required to be where he was, at the time of the accident, and that the duty of "rapping" could easily have been performed by him in another and safer place:—*Held*, that the accident was due to his own negligence. *Boyce* v. *Nova Scotia Steel Co.*, 40 N. S. R. 558.

Explosion—*Verdict of jury — Absence of exact proof of cause of injury—Appeal.*]—A jury having found that an explosion occurred through the neglect of the defendants to supply suitable machinery and to take proper precautions, and that the resulting injury to the plaintiff, a workman in the employment of the defendants, was not in any way due to his negligence, the verdict was upheld by the unanimous judgment of two Courts:—*Held*, reversing the judgment in *Dominion Cartridge Co.* v. *McArthur*, 22 C. L. T. 5, 31 S. C. R. 392, which went upon the ground that there was no exact proof of the fault which certainly caused the injury, that, although proof to that effect may reasonably be required in particular cases, it is not so where the accident is the work of a moment, and its origin and cause incapable of being detected. *McArthur* v. *Dominion Cartridge Co.*, [1905] A. C. 72.

Explosion of boiler in rolling mill—Defective appliances — Reasonable care—Common law liability—Incompetency of fellow servant—Workmen's Compensation Act—Damages. *Woods* v. *Toronto Bolt & Forging Co.*, *Dunsford* v. *Toronto Bolt & Forging Co.*, 6 O. W. R. 937, 11 O. L. R. 216.

Explosion of dynamite — *Carelessness in thawing—Failure to follow directions — Exposure to direct heat without screen.*] — Plaintiff, as administrator for Leone Lanata, who was killed by an explosion of dynamite which he was thawing out while in the employment of defendants, brought action to recover $5,000 damages, alleging negligence on the part of defendants.—Teetzel, J., on the findings of the jury, entered judgment in favour of the plaintiff for $2,000.—Court of Appeal dismissed defendants' appeal with costs. Meredith, J.A., dissenting. *Strati* v. *Toronto Construction Co.* (1911), 19 O. W. R. 88, 2 O. W. N. 1067.

Explosion of furnace—*Absence of defect—Art. 1054, C. C.—Precautions — No negligence or fault of master.*]—The owner of an industrial establishment is not responsible for accidents which may occur to the workmen in the running of the machines, etc., except for such as may occur by reason of his fault and the onus of proof is on the victim who sues for recovery of damages. Therefore, an explosion in a furnace not caused by a defect in it, but which might have resulted from the fault of the workman ordered to stop it up after a leakage, will not render the master liable for the injury suffered by the workman. Art. 1054, C. C., which makes a person responsible for damage caused by the things he has under his care, is not applicable, because the furnace did not cause the explosion. The master cannot be blamed for not having furnished the workman with a mask and spectacles; the particular fact that in the case in question the victim had been injured in the face and eyes was not to be foreseen. This precaution, moreover, could not prevent or diminish the danger of explosion and would only affect its consequences. *Dionet* v. *Shawinigan Carbide Co.*, 35 Que. S. C. 585.

Explosion of tea urn—Damages—Tips to waiter. *Rickelew & Ontario Navigation Co.* v. *Barman*, 3 E. L. R. 128.

Factories Act — Dangerous machine — Want of guard — Impracticability of secure guard—Findings of jury. *Decley* v. *Canadian Westinghouse Co.*, 9 O. W. R. 736.

Factories Act — *Dangerous machine — Want of guard — Notice — Negligence — Liability.*]—The neglect of the owner of a factory to furnish a dangerous machine with a guard as prescribed by the regulations made in virtue of Art. 3022, R. S. Q., especially after notice to conform thereto given by an inspector of factories, is a fault which makes him responsible for acci-

dents which result from the want of a guard. *Belanger* v. *Desjardins Co.*, 29 Que. S. C. 1.

Factories Act, Ontario—*Negligence—Unguarded machinery—Proximate cause.*]—The plaintiff, a workman in a pulp factory, whose duty it was to take the pulp away from a drier, had to climb up a step-ladder to get on a plank in front of the drier. The step-ladder was movable and placed close to a revolving cog-wheel. On returning from the drier on one occasion, another workman, accidentally or intentionally, removed the ladder as the plaintiff was about to step on it, and before he could recover his balance his leg was caught in the cog-wheel and so crushed that it had to be amputated. In an action against the factory owners the jury found that the injured workman was not negligent or careless; that the removal of the ladder would not have caused the accident if the wheel had been properly guarded, and the ladder fastened to the floor; and that the non-guarding and fastening was negligence of the defendants:—*Held*, affirming the judgment of the Court of Appeal, 3 O. L. R. 690, 22 C. L. T. 206, that the evidence justified the findings; and that the proximate cause of the accident was the want of a proper guard on the wheel and fastening of the ladder to the floor, for which the defendants were liable. *Myers* v. *Sault Ste. Marie Pulp Co.*, 23 C. L. T. 81, 33 S. C. R. 23.

Factory—Defective system—Negligence—Jury—Workmen's Compensation Act. *Alexander* v. *Miles*, 2 O. W. R. 305.

Factory — Elevator — Defects — Safeguards—Signals — Negligence—Findings of jury. *Lecder* v. *Toronto Biscuit Co.*, 1 O. W. R. 687.

Factory — Machinery — Guard — Jury —General verdict—Pleading—Notice of accident. *Pearce* v. *Elwell*, 2 O. W. R. 515.

Factory—Negligence—Findings of jury—Finding of Judge—Consent—Notes of evidence. *Walton* v. *Welland Vale Mfg. Co.*, 1 O. W. R. 839.

Fall of scaffold.]—Defective construction — Want of inspection — Contributory negligence. *Day* v. *Miles*, 2 E. L. R. 254.

Fatal injury to workman — *Fellow-servant—Action by widow—Lord Campbell's Act—Trial—Jury—Misdirection—Practice—New trial.*]—The plaintiff's husband while in defendants' employ, was killed by a falling plank. She succeeded at three trials and motion for another trial now dismissed. At the last trial plaintiff's counsel read extracts from judgments of dissenting appellate Judges. Doubt expressed as to right to do so. Fellow-servant doctrine not applicable. *Harris* v. *Jamieson*, 7 E. L. R. 175.

Finding of jury—*Defective apparatus—Absence of test—Misdirection—Evidence — Damages — Excess.*] — When an explosion causing damage to an employee occurred through the defective state of a steam fed coil encased in a metal urn, and therefore not visible, a finding by the jury that the employer was at fault for not having had the apparatus properly tested, is consonant with law.—2. The instruction by the trial Judge to the jury that the defendant could relieve himself from liability by proving that he could not have prevented the explosion and consequent damage, without adding (when he was not specially asked by the defendant to do so) that the evidence established the impossibility of ascertaining the defect in the coil before the explosion, was no misdirection.—3. When damages from an explosion consist of total inability to work and acute suffering during three months, bodily disfigurement, diminished sense of hearing, and permanent impairment of physical strength, to a table-waiter on a steamboat, whose earnings are about $50 a month during the season of navigation, a verdict of $6,000 is not so grossly excessive that it should be set aside. *Richelieu & Ontario Navigation Co.* v. *Dorman*, 16 Que. K. B. 575.

Finding of jury — *Evidence — Contributory negligence — Voluntary acceptance of risk—Practice—Submission of questions to jury.*]—The defendants employed a competent foreman to construct and operate a chute by means of which to deliver saw-logs from a point considerably above the beach down to the sea. In the operation of the chute, it was necessary to use an engine with which to release logs which should stick fast in their descent. The plaintiff, who was employed by the defendants in the operation of the engine, was struck by a log and injured, and, in an action to recover damages for his injuries, the jury found that he received his injuries by reason of the fact that the engine was placed too close to the chute, and awarded him $4,500 damages. The accident happened within a few days after the plant was put in operation, and the foreman was experimenting to ascertain where to place the engine so as to obtain the best results. A day or two before the accident it was moved from a higher position down to that which it occupied when the accident occurred. The verdict was based upon the common law, and not upon the Employers' Liability Act:—*Held*, that there was evidence to support the finding of the jury, and that it amounted to a finding of a defective system, for which the defendants were responsible. — *Kindle Mining and Ry. Co.* v. *McDougall*, 42 S. C. R. 429, followed.—*Per* Macdonald, C.J.A.:—In effect the verdict negatived contributory negligence and voluntary acceptance of the risk, and there was evidence to justify these conclusions. — *Per* Martin, J.A., the established practice, in actions for negligence, of submitting questions to the jury, should have been followed by the trial Judge. *Fakkema* v. *Brooks Scanlon O'Brien Co.* (1910), 15 W. L. R. 493, 15 B. C. R. 161.

Affirmed 44 S. C. R. 412.

Findings of jury—*Evidence*—*Appeal.*]—Although the Court to which an appeal is made from the verdict of a jury in an action brought by a workman against his employer for injuries alleged to have been caused by the employer's negligence, feels grave doubt as to whether the evidence was such as to justify reasonable men in rendering a verdict for the plaintiff upon it, and

whether the jury were not influenced by sympathy irrespective of the weight of evidence, yet in the present state of the law as laid down in the leading cases, the appeal must be dismissed if there was, in support of the verdict, any evidence that the Court could not say the jury ought not to have believed, however slight and however contradicted by apparently more reliable testimony it may have been. *McIntyre* v. *Holliday*, 18 Man. L. R. 535, 10 W. L. R. 558.

Findings of jury—*Fault of foreman of work — Negligence — Workmen's Compensation Act.*]—Deceased, a workman in defendants' employ, was killed, it was alleged, owing to their negligence. A car on which he was making repairs fell and injured him. Action was brought by his widow and infant child for damages under the Ontario Fatal Injuries Act. The jury found defendants negligent in not placing planks under the trestles used to support the car while being repaired. They also found system of trestles defective and awarded damages:—*Held*, on appeal, that damages must be allowed under Workmen's Compensation Act, as deceased was not killed through use of a defective trestle system, but because of a leg of a trestle giving way from insufficient foundation. The limit is not three years' wages of deceased, but the estimated earnings of one in the same grade, and employed in like employment. Judgment reduced to $2,000. *Lappage* v. *Canadian Pacific*, 13 O. W. R. 118.

Findings of jury—*New trial.*]—In constructing the bins for an elevator, a staging had to be raised as the work progressed by ropes held by men standing on the top until it could be secured with dogs placed underneath. When secured, workmen stood on the staging and nailed planks to the sides of the bin. The planks were run along a tramway at the side of the bins by rollers and thrown off to the side of the bin farthest from the tramway. While two men on the top of a bin were holding up the staging until it could be secured, a plank being thrown struck another on top of the adjoining pile and knocked it off. In falling it hit the men on top of the bin, and they were precipitated to the bottom and one of them killed. In an action by his widow against the contractor for building the elevator, 25 questions were submitted to the jury, and on their answers a verdict was entered for the plaintiff:—*Held*, Idington, J., dissenting, that, while the falling of the plank caused the accident, there was no finding that the same was due to negligence of the defendant, nor any that the death of the deceased was due to negligence for which, under the evidence, the defendant was responsible. Therefore, and because many of the questions submitted were irrelevant to the issue and may have confused the jury, there should be a new trial. *Jamieson* v. *Harris*, 25 C. L. T. 79, 35 S. C. R. 625.

Findings of jury—*Workmen's Compensation Act—Damages — Negligence.*] — The Court of Appeal held that the accident in question, according to the evidence and the jury's findings, was due to defects in an iron bar not remedied as they should have been owing to negligence of a person entrusted by defendants with that duty. Damages therefore must be awarded under the Workmen's Compensation Act, not at common law, and they were reduced from $4,500 to $1,500. *Bagnall* v. *Dunham*, 13 O. W. R. 164.

Fire in building—*Death of servant—Order of foreman — Damages — Appeal.*]—A fire having broken out in a tobacco factory in which children were employed, the foreman on the highest floor of the building ordered the work-people, who had commenced to descend, to return to their places, crying out that there was no danger—in which he was mistaken. The smoke from the fire afterwards reaching this floor, the children there at work became alarmed and ran to a window. The respondents' daughter, one of these children, whether through fright or being pushed by her companions, threw herself out of the window and was killed. Those who remained easily escaped by the stairs or the lifts:—*Held*, that the primary cause of the child's death was the fact of the foreman hindering the work-people from descending, which they could easily have done, and, although the foreman had acted in good faith, he had committed an imprudence for which the appellant, the master, was liable.—That the foreman having thus placed the child in a perilous position, in which fright took away from her the use of her reason, or at least made her believe that she could save herself only by throwing herself out of the window, the appellant was liable.—The judgment of the Judge of first instance fixing the amount of damages cannot be set aside except for reasons which would justify the setting aside of the verdict of a jury. *Levi* v. *Reed*, 6 S. C. R. 432, followed. *Macdonald* v. *Thibaudeau*, 8 Que. Q. B. 449.

Foreman of mine — *Contributory negligence — Voluntary assumption of risk — Findings of jury — Inconclusiveness — New trial—Costs.*]—Action for damages for injuries sustained by plaintiff, while working for defendants, in their mine. Evidence shewed that plaintiff was injured by water rushing through the mine, and that he had been warned that when a rush of water occurred he should lie on the side of the flume in the tunnel, instead of which he endeavoured to get out of the tunnel at its mouth when he heard the rush of the water, but was overtaken and so injured. The following questions were left to the jury, who made the following answers: (1) Have the defendants or their servants done anything which persons of ordinary care and skill, under the circumstances, would not have done, or have they or their servants omitted to do anything which persons of ordinary care and skill, under the circumstances, would have done; if so, what was it? A. We agree that the foreman might have explained the danger more fully to the men. (2) Have the defendants or their servants by any such act or commission or omission caused injury to the plaintiff? A. To a certain extent they have. (3) If you find . . . that the defendants or their servants are guilty of any act or omission, who was the person, if any, who committed such act or made such omission? A. The foreman F. (4) Did the plaintiff do anything which a person of ordinary care and skill would not have done, under the circumstances, or omit to do anything which a person of ordinary care and skill would have done, under the circumstances, and thereby contribute to the accident? A. We

think the plaintiff might have used better judgment. (5) Did the plaintiff, knowing the nature and condition of the works, and fully appreciating the risk of accident he ran by working in the tunnel referred to, under the circumstances voluntarily assume to take such risk upon himself? A. We agree that the plaintiff did to a certain extent appreciate his danger, but not fully under the circumstances. (6) If the plaintiff is entitled to recover, what is a fair sum to allow by way of damages? A. We think that the plaintiff is entitled to $900 damages. Judgment was entered for the plaintiff upon these findings, and the defendants appealed:—*Held*, that the answers of the jury were neither conclusive nor satisfactory, and there should be a new trial; no costs of the former trial; but costs of the appeal to the defendants.—*Per* Dugas, J.:—The main point was not whether F. had sufficiently explained the danger to the men, including the plaintiff, or whether the plaintiff himself might have used better judgment, realising to a certain extent to what danger he was exposed, but whether the men should have been exposed to that danger by F. Although the plaintiff knew of the danger, there was no implication of law against him by reason of such knowledge (s. 6 of the Employers' Liability Ordinance, 1908); and the question whether he was in fact *volens* should have been answered by the jury. And the indefinite answer of the jury to the 4th question was not properly a finding of contributory negligence.—*Per curiam*:—Section 515 of the Judicature Ordinance having been amended in 1907 by restricting the powers of the Court, the Court can now only find facts which are not inconsistent with the findings of the jury.—*Per* Craig, J.:—There was no finding of negligence on the part of the defendants causing the injury. Even if the jury had that negligence in mind, finding "to a certain extent" is not a finding of negligence which would warrant a verdict for damages. There must be a finding that there was negligence which was the proximate cause of the injury. The whole of the findings, boiled down, meant that both parties might have used better judgment. There was no finding of contributory negligence, though the evidence might sustain one. The question whether the plaintiff was or was not *volens* should have been decided by the jury. The jury might have brought in a general verdict; they were not bound to answer the questions; the trial Judge was wrong in telling them that they must answer the questions; the answer to the last question, however, was not intended as a general verdict, but as a fixing of the *quantum* of damages.—Review of the authorities.—Judgment of Macaulay, J., 15 W. L. R. 83, reversed. *Skoropata* v. *Yukon Gold Co.* (Yuk. 1911), 16 W. L. R. 178.

Impairing fitness of servant to do work—*Injury resulting from — Infant — Claim of parent for expenses and loss of time.*]—An employer who keeps his servant continuously at work for an undue number of hours, makes himself liable for the result in damages of an accident to such servant in the ordinary discharge of his duty, caused by his inability from fatigue to use the skill and care required.—2. The father of the servant under age, in the above circumstances, has a right of action against the employer to recover his expense and loss of time in caring for his son, and for the medical attendance for which he has made himself responsible, but not for loss resulting from the diminished earning capacity of his son in the future. *Great Northern Ry. Co.* v. *Couture*, 14 Que. K. B. 316.

Inconclusive verdict — *Course of trial —Parties bound by—Effect of s. 66 of Supreme Court Act, 1904—Practice.*]—In an action for damages for personal injuries sustained by a workman engaged in decking logs, caused by the alleged negligence of the defendants in supplying a team of horses unfit for the work, the jury found that the team was unfit; that the accident was caused by reason of such unfitness; and that the plaintiff did not have a full knowledge and appreciation of the danger:—*Held*, affirming a judgment in the plaintiff's favour, that, although the findings, read alone, did not establish any legal liability on the part of the defendants, yet, as the issues for the jury were limited to the questions submitted to them, and as the defendants' negligence was treated by all parties as an inference arising from the defect charged, a finding of the existence of the defect involved a finding of negligence. The provisions of s. 66 of the Supreme Court Act, 1904, are applicable to an appeal in an action tried and decided before the provisions were enacted. The said section has not wholly repealed the rule that a litigant is bound by the way in which he conducts his case. The proviso of that section giving a party the privilege of having his right to have the issues for trial submitted to the jury, enforced by appeal, without any exception having been taken at the trial, does not give a right of new trial in cases where counsel settle by express stipulation the issues of fact for the jury, or where the issues submitted are accepted on both sides as the only issues on which the jury should be asked to pass. *Scott* v. *Fernie Lumber Co.*, 25 C. L. T. 51, 11 B. C. R. 91.

Independent contractor — *Fellow-servant—Combined negligence.*] — While, as a general rule, the negligence of a contractor prudently selected is not the negligence of those who employ him, this principle is subject to two exceptions: (1) where by the terms of the contract, control or supervision, with power to direct changes in its execution, is reserved to the employer so that the work may be regarded in a sense as the joint operation of both; (2) where the other principle applies whereby the employer is obliged both by common law and statute to have his works suitable for the operations to be carried on in them with reasonable safety. — Where the negligence of a master combines with that of a fellow-servant and both contribute to the accident, the servant injured may recover from the master. — Where a contractor, through his men, did certain shoring, not upon any plan or method of his own, nor because any term of his contract obliged him, but in conformity with the directions of an agent of his employer:—*Held*, that he did not do the work as an "independent contractor." *Daniel* v. *Metropolitan Ry. Co.*, L. R. 5 H. L. 61, *Hoare* v. *Finch*, 17 Q. B. D. 187, and *Moore* v. *Gimson*, 5 Times L. R. 177, distinguished. *McKeegan* v. *Cape Breton Coal, etc., Co.*, 40 N. S. R. 566.

Independent contractor — *Jury.*] — An employer is liable for the consequences, not of danger, but of negligence. He per-

forms his duty when he furnishes machinery of ordinary and reasonable safety. Reasonable safety means safety according to the usages, habits, and ordinary risks of the business. No jury can be permitted to say that the usual and ordinary way commonly adopted by those in the same business is a negligent way for which liability shall be imposed. It is only so far as a duty arises on the part of the employer to provide proper means or precautions so as to make the service reasonably safe, and when a breach of that duty is a cause of injury, that a right of action accrues to the person injured. K. entered into an agreement with the defendant company to draw the coal and debris produced in the mine from the places at which the miners worked to the pit bottom, and to carry from the pit bottom to the workmen certain things required in their work, and K. agreed to provide competent and efficient drivers. The vehicles used were cars running on a railway track and drawn by a horse. The plaintiff was employed by K. as a driver, and while so employed was injured. On the evidence set out in the case, notwithstanding certain adverse answers to questions submitted to the jury, and the trial Judge's judgment thereon for the plaintiff: —*Held*, that the plaintiff had failed to prove negligence on the part of the defendants. (2) That if the evidence established negligence on the part of K., resulting in the injury to the plaintiff, as was the inferential finding of the jury, K. was an independent contractor, for whose conduct the defendants were not liable. The judgment for the plaintiff was set aside and a judgment directed to be entered for the defendants. *Patton* v. *Alberta Railway and Coal Co.*, 2 Terr. L. R. 438.

They are further bound to see that none but trained workmen are made to work at, or operate, dangerous machinery, or, at least, that the inexperienced be only allowed to do so under the supervision of skilled foremen. *Allis-Chambers-Bullock Co.* v. *Boldue*, 6 E. L. R. 185, 18 Que. K. B. 392.

Infant — *Dangerous machine — Negligence—Duty to warn — Superintendence — Workmen's Compensation Act.*]—The plaintiff, a boy under fifteen, was engaged by the foreman of the defendants' factory to help any one who needed help on a certain floor, except one man who was doing piecework. He had been helping a man who was operating a stamping machine, to put plates through the machine, and the former leaving for a few minutes, he took hold of the press and endeavoured to get a plate out, and, apparently through his inadvertently touching the foot press, the die came down upon his hand, and he lost three fingers. It was admitted that the machine was a dangerous machine: —*Held* (Clute, J., dissenting), that the defendants were liable under s. 3, s.-s. 2, of the Workmen's Compensation Act, R. S. O. 1897, c. 160, inasmuch as the foreman, whilst exercising superintendence, was negligent in not pointing out to the plaintiff which of the machines were dangerous, and cautioning and instructing him as to them, and, if it was intended that he should not attempt to operate any of them, expressly forbidding him to do so. *Lawson* v. *Packard Electric Co.*, 16 O. L. R. 1, 11 O. W. R. 72.

Infant — *Factory — Dangerous hole — Guard—Report of inspector — Contributory negligence—Reduction of damages.*] — The sixteen year old son of the plaintiff was employed by the defendant in his mill to throw out the waste made by a machine called an "edger." During his moments of leisure—and without having been requested to do so—he helped a man who was working a "butter" or machine for trimming the end of planks. At a time when he was not occupied, he went to look out of the mill, and, in passing near the saw of the butter, which was placed above a hole from two feet to one and a half deep, he fell into this hole, and one of his arms was mutilated by the saw. It was proved that he knew this hole, which was afterwards covered by the employer:—*Held*, that there was contributory negligence on the part of the boy, and that the damages awarded by the Court of first instance should be reduced. 2. That the fact that the report of the inspector of factories stated that the mill was fitted up in accordance with the law did not relieve the employer from liability, seeing that the law requires that openings in the floor should be, as far as possible, surrounded with protecting apparatus. *Nault* v. *O'Shaughnessy*, 19 Que. S. C. 448.

Infant—*Imprudence.*]—The owner of a factory who employs children in it should take all necessary precautions to protect them against the consequences of acts which, although in the case of adults they would be imprudent, are such as might be expected in the case of children, but he is not responsible for accidents which the limited prudence to be expected from a child would have prevented. *Robitaille* v. *White*, 19 Que. S. C. 431.

Infant—Machinery—Negligence of foreman. *Holman* v. *Times Printing Co.*, 3 W. W. R. 7, 338, 756.

Injured chopping hay — *New machine —Lack of evidence of knowledge of defendant of any defects—Carelessness of plaintiff.*] Plaintiff was injured while chopping hay with a machine provided by defendant, by reason of alleged defects in the machine:—*Held*, that the evidence showed that the machine was nearly new and was made by a reputable manufacturer, and if there were any defects in the machine such defects were not brought to the knowledge of defendant; that the accident was attributable to plaintiff's own want of care in feeding the machine by unnecessarily placing his fingers too near to the rollers, whereby his hand was drawn into the knives. Action dismissed. *Brent* v. *Verrall* (1909), 14 O. W. R. 1005, 1 W. N. 222.

Injury by explosion — *Res ipsa loquitur—Dangerous substance stored on premises of manufacturers of explosives — Damages.*] —Action for damages for personal injury received by plaintiff owing to an explosion in defendants' works, occurring as alleged by defendants' negligence:—*Held*, on the evidence that there was no negligence, *Res ipsa loquitur* not applicable. *Fletcher* v. *Rylands*, L. R. 3 H. L. 330, cannot apply to the carrying on of the manufacture of explosives. Action dismissed. *Clarkson* v. *Hamilton*, 10 W. L. R. 102.

Injury caused by things — *Who has the keeping of a thing?—Tool in a shop— Workmen's superior—Proof—Presumption of*

negligence—New and dangerous machines — Duties of superiors—Lack of precaution to protect the workmen.]—It is not necessarily the owner who is responsible for the injury done by it (Art. 1055, C. C.), but the one who has it under his keeping, who takes advantage of it and makes use of it. A tool in a factory is not under the keeping of the workmen who use it, but of the overseer, the owner or the tenant, or the keeper for himself, under whatsoever title, of the establishment. The liability for keeping the thing depends on a presumption of negligence, and hence the claimant of indemnity is not bound to bring forward proof of it. The overseer of a factory where dangerous machines are used is bound to furnish for the workmen means of protection against accidents, and in the case of new machines whose working is still in the experimental stage, ought to take the minutest precautions to this end. His failure to do so is negligence which renders him liable for accidents arising therefrom. *Doucet* v. *Carbide Co.*, 18 Que. K. B. 271.

Injury to and consequent death of servant — *Negligence — Servant not acting in course of duty — Voluntary incurring of risk — No duty owing by master — Contributory negligence.*]—Action by widow of deceased for damages for his death caused, as alleged, by defendant's negligence. Deceased was suffocated in trying to save life in a tunnel fire:—*Held*, that deceased, having no duty at the fire, nor the defendants any duty to keep fire from that section of the tunnel, the deceased not being employed where the fire occurred, and being a volunteer, acting deliberately, the defendants are not liable. *Kimball* v. *Butler* (1909), 14 O. R. 399.

Injury to and death of servant — Action by widow for damages—Findings of jury—Accident—Cause of. *Markle* v. *Simpson Brick Co.*, 9 O. W. R. 436, 10 O. W. R. 9.

Injury to servant — *Absence of negligence—Dangerous work — Voluntary exposure.*]—Action for damages for personal injuries sustained by plaintiff while in defendant's service owing to latter's negligence:—*Held*, there was no breach of duty in the first claim and that the second was an accident. *Hogan* v. *Butler* (1909), 14 O. W. R. 341.

Injury to servant — *Negligence of both master and servant — Common fault.*]—A verdict by a jury that injuries sustained by the plaintiff were caused by the fault and negligence of both parties to the suit—of the plaintiff, by remaining in a position of danger after having been warned off, and of the defendants by inadequate supervision of the work carried on—is a proper finding of common fault (*faute commune*); the Court is bound by it; and the defendants are not entitled to a nonsuit thereunder on the ground that the plaintiff's fault was not merely contributory negligence, "but the principal and immediate cause of the accident." Cf. *Tooke* v. *Bergeron*, 27 S. C. R. 567. *Bisval* v. *Clinton Fireproofing Co. of Canada*, 29 Que. S. C. 481.

Injury to volunteer — Machinery — Defects—Duty—Delegation. *Pimperton* v. *MacKenzie*, 1 O. W. R. 335.

Intercolonial Railway — *Injury to person—Liability of Crown in tort.*]—Action for damages for death of plaintiff's husband, an employee of the Intercolonial Railway. The trial Judge gave judgment for plaintiff. Appeal to Supreme Court of Canada dismissed, following *Armstrong* v. *The King*, 40 S. C. R. 220. The cause of the action arose during the lifetime of the late Queen Victoria:—*Held*, that it did not abate. "*Actio personalis moritur cum persona*" does not apply. *Rex* v. *Dexrosiers*, 6 E. L. R. 119.

Jury — *Apparatus causing injury—New trial.*]—To entitle plaintiff to judgment in an action under the Employers' Liability Act, the jury's findings must shew that it was reasonably and practically necessary for him to use the apparatus causing the injury. Where the facts proved shew absence of such necessity, a new trial will not be granted. *Davies* v. *Le Roi Mining and Smelting Co.* 7 Brit. Col. L. R. 6.

Killed by derrick—*Duty of master—Findings of jury — Damages, $1,000.*] — Plaintiff brought action to recover damages for the death of their husband and father, who was killed by the fall of a derrick in defendant's quarry, where deceased was employed, alleged to have been caused by the negligence of defendant. The jury found in plaintiffs' favour and assessed their damages at $1,000.—Mulock, C.J.Ex.D., entered judgment accordingly.—Divisional Court dismissed defendant's appeal with costs. *McDonald* v. *Murphy* (1910), 17 O. W. R. 988, 2 O. W. N. 475.

Knowledge of danger — *Warning.*] — Plaintiff was employed in defendants' planing mill from 1st Oct. to 18th Dec., 1908, and on last-named date, when operating a machine known as a joiner, had 3 fingers of his right hand injured so as to necessitate amputation. Plaintiff, to the knowledge of defendants, was inexperienced in operating such a machine. He received some instruction from the foreman, by whom he was put to work at this particular machine on day of his injury, he having previously worked at other machines. This was a dangerous machine:—*Held*, upon evidence, Beck, J., dissenting, that judgment of Harvey, C.J., dismissing the action, on ground that no negligence was shewn, should, be affirmed.—That the danger was one of which plaintiff could judge as well as defendants; there was nothing latent or concealed, and no increased danger was shewn which would require a warning, under the principle which lays that duty upon the master. — *Per* Beck, J.:—Evidence shewed a dangerous machine, known to defendants to be so; an inexperienced workman; dangers obvious, even to an inexperienced man, so long as the tables were level; dangers much increased when the tables were so adjusted as to be out of level; the machine so adjusted; that, though the method of adjustment was explained, the increased danger was not explained; and an accident happening to the workman while the conditions increasing the dangers existed. Upon these facts, there was a *prima facie* case of negligence which should have been submitted to the jury, if there had been a jury; and there was a reasonable probability that plaintiff would not have suffered the injury but for negligence, that is,

the want of warning and instructions on the part of defendants, and that the consequent inference should be drawn, in the absence of evidence to rebut it.—*Young* v. *Hoffman Manufacturing Co.*, [1907] 2 K. B. 646, and *Dominion Natural Gas Co.* v. *Collins*, [1909] A. C. 640, specially referred to. *Williams* v. *Western Planing Mills Co.* (1910), 16 W. L. R. 13. Alta. L. R.

Liability for tort—*Art. 1054 C. C.*]—One who contracts with an electric company "to erect such poles," including wires, crossarms, trimming of trees, etc., as shall be ordered "by its chief engineer, and in a manner satisfactory to him," is not a person under control of the company, nor its servant or workman, within the meaning of Art. 1054 C. C. Hence, the company is not liable in damages to the owner of trees, of which the contractor cuts branches, so as to spoil their beauty or expose them to decay. *Gagon* v. *Saraguay Electric Light and Power Co.* (1909), 36 Que. S. C. 227.

Liability for tort — *Employers' liability for injuries to workmen — Duty of employer—Instructions, warnings and orders to workmen against dangers of employment —Duty to insure compliance with orders.*]—An employer who instructs his workmen in a manner of operating his machinery, warns them of the danger of using their hands to it, and gives orders forbidding them to do so, is further bound to see that his orders are carried out, and, if he becomes aware that they are disregarded, notwithstanding repeated warnings, he must resort to some other means, such as fine or dismissal, to insure compliance with them, otherwise he will be liable, as participator in a common fault, for the damages caused by accidents. *Karavokiris* v. *Canadian Rubber Co.* (1909), 36 Que. S. C. 425.

Liability of master for medical attendance — Contract — Privity — Implied authority — Hospital fund." *Struthers* v. *Canadian Copper Co.*, 2 O. W. R. 748, 6 O. L. R. 324.

Liability of master for negligence of servant—*Injury to third person—Want of skill.*]—The defendants were engaged by M. T. & Co., to remove furniture from one place to another. It became necessary to lower some tables from an upper window, and the plaintiff, who was not in the employment of the defendants, but was employed by M. T. & Co., was directed to stand below, and, by the use of a long board, keep the tables clear of the windows below. While he was so engaged a table, which was badly tied by defendants' men, fell down and the plaintiff's legs were fractured:—*Held*, that as the defendants alone had charge of the removal, so far as the actual performance and mode of operation were concerned, responsibility for their employee's want of skill in not properly securing the tables, attached to the defendants, and they were, therefore, liable for the result of the accident. *Williams* v. *Cunningham*, 23 Que. S. C. 263.

Liability of person charged as employer—Failure of evidence to establish relationship—Findings of jury—Nonsuit—Evidence of defendants. *Miller* v. *Woods*, 3 O. W. R. 809.

Lineman working on telegraph pole —Injury by live wire—Jury — Evidence — Findings—Liability—Third parties — Relief over. *Wright* v. *Port Hope Electric Co.*, 11 O. W. R. 518.

Machinery — *Defective appliances.*]—Action by servant against master for damages for personal injury sustained in defendant's saw mill. While operating a saw plaintiff was struck in the eye with sawdust or bark:—*Held*, that defendant is liable, plaintiff having told defendant that he was afraid of the sawdust box and offered to remodel it, and that injury was caused by dust or wood thrown from the box. Appeal dismissed. The jury had given plaintiff damages. *McIntyre* v. *Holliday*, 10 W. L. R. 558.

Machinery — *Protection — Contributory negligence — Common fault — Proportionate liability.*]—When an injury by machinery to an employee is the result both of his carelessness and of the negligence of his employer by not providing proper means of protection, the case is one of common fault and liability, and the employer will be condemned to pay no more than his due proportion of the damages sustained.—Employers are bound to provide the necessary protection to make the use of their machinery by their employees as safe as possible. *Wire and Cable Co.* v. *McAllindon*, 16 Que. K. B. 273.

Machinery — Want of guard—Opinion evidence—Jury—Defect in way—Workmen's Compensation Act. *McCaugherty* v. *Ontta Percha and Rubber Co.*, 2 O. W. R. 204.

Member of benefit society — Bar to claim against railway company—Rules of society. *Harris* v. *Grand Trunk Ry. Co.*, 3 O. W. R. 211, 550, 561.

Mill — *Dangerous machinery — Want of guard—Factories Act—Workmen's Compensation Act.*]—The plaintiff, a boy between fourteen and fifteen years of age, was employed by the defendants in cleaning up about a machine—called a dove-tailing machine, consisting of rapidly-revolving knives—carrying pieces of board therefor; and on one occasion he had cleaned it. He had carried some boards and laid them down by the machine and was going for another load when he was directed by the operator to straighten them out. On his proceeding to do so, and not observing that the machine was in motion, he put out his hand to remove some dust on it, when his arm was caught in the machine and cut off. The machine was of a very dangerous character, and the knives, when revolving, had the appearance of a solid stationary cylinder. There was no guard or protection around it, and no one at the time in actual charge of it, the operator having left it and standing some fifteen feet away looking out of a window. The jury found that the cause of the accident was the negligence of the defendants in not having the machinery properly guarded, and the inattention of the operator, and they negatived contributory negligence on the part of the plaintiff:—*Held*, that the defendants were liable. *Moore* v. *J. D. Moore Co.*, 22 C. L. T. 283, 4 O. L. R. 167, 1 O. W. R. 230.

Mill—*Dangerous work — Precautions — Liability.*]—In order to free himself from

responsibility, an employer must, either personally or through his foreman, not only order his employees to discontinue work considered dangerous, but must also either personally or through his foreman, see that the orders are respected and carried out, and if he does not do so, he is responsible for accidents which happen as a result of the non-observance of these orders. Judgment in 21 Que. S. C. 32 reversed. *Fournier* v. *Lamoureux*, 21 Que. S. C. 99.

Mill — *Opening in floor—Fencing—Contributory negligence.*]—T. was working in a saw-mill at a time when the saws were stopped in order to change any saws requiring to be replaced. One only, the butting saw, was left running, being near the end of a board 12 feet long used to measure the planks before they were cut. While the saws were stopped several of the workmen sat on this table, and T., going towards the end to find a seat, slipped and fell into an opening in the floor where the deal ends were dropped on being cut off. On slipping he threw out his left arm, which came against the saw in motion, and was cut off.:—*Held*, that the want of protection of the opening was negligence for which the owner was responsible.—*Held*, also, Strong, C.J., *haesitante*, that if T. was guilty of contributory negligence, he was sufficiently punished by a division of the damages at the trial.—*Held*, *per* Sedgewick, Davies, and Mills, JJ., that negligence could not be attributed to the owner from the fact that the butting saw was not stopped with the others. *Price* v. *Talon*, 22 C. L. T. 195, 32 S. C. R. 125.

Mill—*Unguarded machinery — Fellow servant—Findings of jury — Damages.*] — A workman employed by the defendants, in order to do his work, had to climb a step ladder and step over the unguarded rim of a cog wheel, to a plank on which he did his work. In coming from his work a trackman removed the ladder as he was stepping on it, and in recovering himself his leg went through the spokes of the wheel and he was injured. At the trial the jury in answer to questions found that the injury to plaintiff was caused by the negligence of the defendants, and not by his own negligence or want of proper care; that it was only to a certain extent caused by the negligence of a fellow-servant, for, if the wheel had been properly guarded and the ladder properly fastened to the floor, the accident would not have happened; that the negligence of the defendants consisted in not guarding the wheel and fastening the ladder; that the wheel was a dangerous part of the mill gearing, and was not, as far as practicable, securely guarded; that he would not have received the injury if it had been so securely guarded:—*Held*, that the findings of the jury as to negligence were amply supported by the evidence, and could not be interfered with; that the defendants were bound by the common law to take all reasonable precautions for the safety of their workmen, and it was for the jury to say what were such reasonable precautions; that the defendants were also bound by the Factories Act to securely guard, as far as practicable, all dangerous parts of their machinery; that the jury having so found, and their finding being supported by the evidence, the intervention of the truckman in wrongfully taking away the ladder did not relieve the defendants from the consequences of their negligence, for their negligence still remained an operative cause of the workman's injury. *Mann* v. *Ward*, 8 Times L. R. 699, not regarded as an authority. As the damages were excessive, a new trial was granted unless the plaintiffs would consent to reduce them. *Myers* v. *Sault Ste. Marie Pulp and Paper Co.*, 22 C. L. T. 263, 3 O. L. R. 600, 1 O. W. R. 280.

Mill—*Use of dangerous materials—Proximate cause of accident — Presumptions — Findings of jury—Appeal.*]—As there can be no responsibility on the part of an employer for injuries sustained by an employee in the course of his employment, unless there be positive testimony, or presumptions weighty, precise, and consistent, that the employer is chargeable with negligence which was the immediate necessary and direct cause of the accident which led to the injuries suffered, it is the duty of an appellate Court to relieve the employer of liability in a case where there is want of evidence as to the immediate cause of an explosion of dangerous material which caused the injuries, notwithstanding that the findings of a jury in favour of the plaintiff had been sustained by two Courts below. Taschereau, J., dissented, taking a different view of the evidence, and being of opinion that the findings of the jury, concurred in by both Courts below, were based upon reasonable presumptions drawn from the evidence, and that, following *George Matthews Co.* v. *Bouchard*, 28 S. C. R. 580, and *Metropolitan Ry. Co.* v. *Wright*, 11 App. Cas. 152, those findings ought not to be reversed on appeal. *Asbestos and Asbestic Co.* v. *Durand*, 30 S. C. R. 285, discussed and approved. *Dominion Cartridge Co.* v. *McArthur*, 22 C. L. T. 5, 31 S. C. R. 392.

Mine — *Defective system—Risks—Findings of jury.*]—In an action by a miner against the mine owners for damages for injuries caused him by being precipitated to the bottom of a shaft when at work in the mine, the jury found *inter alia* that the system adopted for lowering the kibs was faulty and that the plaintiff did not comply with the printed rules of the mine:—*Held*, that the plaintiff was entitled to judgment, although adherence by him to the rules would have prevented the accident. *Warmington* v. *Palmer*, 7 B. C. R. 414.

Mines—*Common employment—Employers' Liability Act.*]—The provisions of s. 3 of the Inspection of Metalliferous Mines Act, 1897, of British Columbia, do not impose upon an absent mine-owner the absolute duty of ascertaining that the plans for the working of the mines are accurate and sufficient and, unless the mine-owner is actually aware of inaccuracy or imperfections in such plans, he cannot be held responsible for the result of an accident occurring in consequence of the neglect of the proper officials to plat the plans up to date according to surveys. The defendant company acquired a mine which had been previously worked by another company, and provided a proper system of surveys and operation, and employed competent superintendents and surveyors for the efficient carrying out of their system. An accident occurred in consequence of neglect to plat the working plans, according to surveys made up to date, the inaccurate plans mis-

leading the superintendent so that he ordered works to be carried out without sufficient information as to the situation of openings made, or taking the necessary precautions to secure the safety of the men in the working places. The engineers who had made the surveys and omitted plotting the information, on the plans, had left the employment of the company prior to the engagement of the deceased, who was killed in the accident:—*Held*, that the employers, not being charged with knowledge of the neglect of their officers to carry out the efficient system provided for the operation of their mine, could not be held responsible for the consequences of failure to provide complete and accurate plans of the mine:—*Held*, also, that negligence of the superintendent would be negligence of a co-employee of the person injured for which the employers would not be liable at common law, although there might be liability under the British Columbia Employers' Liability Act, R. S. B. C. c. 69, s. 3, for negligence on the part of the superintendent. Judgment in 23 C. L. T. 360, 9 B. C. R. 551, reversed and a new trial ordered. *Hosking* v. *Le Roi No. 2, Limited*, 24 C. L. T. 117, 34 S. C. R. 244.

Mines—Explosion — Breach of statutory duty—Jury—Contributory negligence — Misdirection—Evidence—Insurance by employers against risk to workmen—New trial—Costs. *Davies* v. *Canadian-American Coal and Coke Co.* (N.W.T.), 1 W. L. R. 55, 97.

Mines—*Inspection Act — Statutory duty —Protection from falling cage.*]—Action for damages for personal injuries sustained by plaintiff, a miner, while working at the bottom of shaft in the LeRoi mine. The cage or skip used for lowering and hoisting men fell and broke through the bulkhead of cage platform at the 800-foot level, and struck the plaintiff while working a few feet below:—*Held*, affirming the decision of McColl, C.J., that the cage or skip used for lowering and hoisting men is not "falling material," within the meaning of that term as used in Rule 20 of s. 25 of the Metalliferous Mines Inspection Act, and amendment of 1899 (c. 49, s. 12) does not create any duty on the owner to provide protection from a falling cage. *Re Kelsey* v. *LeRoi Mining Co.*, 22 C. L. T. 246, 9 B. C. R. 62.

Mines—*Non-observance of rules — Mines Act.*]—A master is entitled to make and insist on the observance of reasonable rules for the conduct of his business, and if, in consequence of the non-observance of these rules by a servant, that servant is injured, the master is not liable. It was held that the master was not liable in damages for the death of a servant resulting from the servant using, in direct violation of rules, the cage instead of the ladders to ascend from a mine, although the ladders did not in some particulars conform to the requirements of the Mines Act. *Anderson* v. *Mikado Gold Mining Co.*, 22 C. L. T. 175, 3 O. L. R. 581, 1 O. W. R. 276.

Mines—*Shaft — Signals — Disregard of rules—Negligence — Contributory negligence —Damages—Employers' Liability Act, B. C.*]—A miner was getting into a bucket by which he was to be lowered into the mine when, owing to the chain not being checked, his weight carried him rapidly down and he was badly hurt. In an action for damages against the mine owners, the jury found that the system of lowering the men was faulty, the men in charge of it negligent, and the engine and brake by which the bucket was lowered not fit and proper for the purpose. Printed rules were posted near the mouth of the pit providing, among other things, that signals, should be given by any miner wishing to go down the mine or be brought up, by means of bells, the number telling the engineer and pitman what was required. The jury found that it was not usual, in descending, to signal with the bells, and that the injured miner knew of the rules, but had not complied with them on the occasion of the accident. On appeal to the Supreme Court of Canada from a judgment setting aside the verdict for the plaintiff:—*Held*, reversing that judgment, 22 C. L. T. 126, 8 B. C. L. R. 344, and restoring the judgment of the trial Judge, 7 B. C. R. 414, that there was ample evidence to support the findings of the jury that the defendants were negligent; that there was no contributory negligence by non-use of the signals, the rules having, with consent of the employers and of the persons in charge of the men, been disregarded, which indicated their abrogation; the new trial should, therefore, not have been granted:—*Held*, further, that, as the negligence causing the accident was not that of the employers themselves, but that of the persons having control of those going down the mine, it was not a case of negligence at common law, with no limit to the amount of damages, but the latter must be assessed under the Employers' Liability Act, R. S. B. C. 1897, c. 69. *Warmington* v. *Palmer*, 22 C. L. T. 199, 32 S. C. R. 126.

Mines — *Statutory mining regulations — Fault of fellow workmen.*] — The defendant company employed competent officials for the superintendence of their mine, and required that the statutory regulations should be observed. A labourer was sent to work in an unused balance which had not been fenced or inspected, and an explosion of gas occurred, from the effects of which he died.—In an action for damages by the widow:—*Held*, reversing the judgment below, 34 N. S. Reps. 319, Taschereau and Sedgewick, JJ., dissenting, that, as the company had failed to maintain the mine in a condition suitable for carrying on their works with reasonable safety, they were liable for the injuries sustained by the employee, although the explosion may have been attributable to neglect of duty by fellow-workmen. *Grant* v. *Acadia Coal Co.*, 22 C. L. T. 359, 32 S. C. R. 427.

Necessary protection—*Burden of proof —Voluntary exposure to danger.*]—Judgment of the Court of King's Bench, 15 Que. K. B. 5, affirmed. *Shawinigan Carbide Co.* v. *St. Onge*, 37 S. C. R. 688.

Neglect of company's rules—*Non-suit.*]—Divisional Court *held*, that no action for negligence will lie where death is occasioned by the unfortunate neglect of the company's rules by deceased. *Pettigrew* v. *Grand Trunk Ry. Co.* (1911), 18 O. W. R. 531, 2 O. W. N. 709.

Negligence — *Cause of accident—Common employment.*]—To permit an unnecessary quantity of dynamite to accumulate in dangerous proximity to employees of a min-

ing company, in a situation where opportunity for damage might occur from the nature of the substance or through carelessness or otherwise, is such negligence on the part of the company as will render it liable in damages for the death of an employee from an explosion of the dynamite, though the direct cause of such explosion may be unknown; Gwynne, J., dissenting. *Held*, further, that, as the doctrine of common employment does not prevail in the Province of Quebec, acts of omissions by fellow servants of the deceased could not exonerate the employers from liability for the negligence of a servant which may have led to the injury. *Regina* v. *Filion*, 24 S. C. R. 482, and *Regina* v. *Grenier*, 30 S. C. R. 42, followed. *Asbestos and Asbestic Co.* v. *Durand*, 29 C. L. T. 195, 30 S. C. R. 285.

Negligence — *Damages — Death of child — Railway.*]—The omission to have a lock at a railway switch, not otherwise securely guarded, situate near a much travelled highway, is such negligence as to make those having control of the railway liable in damages for the death of their servants resulting from the switch becoming misplaced. In an action by a parent to recover damages for the death of his child there need not be evidence of pecuniary advantage derived from the deceased; it is sufficient if there is evidence to justify the conclusion that there is a reasonable expectation of pecuniary benefit to the parent in the future, capable of being estimated. *Rombough* v. *Balch—Green* v. *New York and Ottawa Ry. Co.*, 29 C. L. T. 99, 27 A. R. 32.

Negligence — Dangerous place—"Way" —Contributory negligence. *Birmingham* v. *Larkin*, 2 O. W. R. 536, 3 O. W. R. 407, 5 O. W. R. 549

Negligence — *Dangerous process—Want of warning.*]—The plaintiff, while employed in removing the cut pieces from a pair of shears worked by steam power, was struck by a flying piece of metal and severely injured. The machine was perfect of its kind, and it was not shewn that a screen or guard could have been used, and the plaintiff was aware that there was danger. The danger when steel was being cut was greater than when iron was being cut, and the accident happened when steel was being cut:—*Held*, that there should have been some warning that steel was about to be cut, and that this means of reducing the possible danger not having been adopted, the defendants were liable in damages as at common law:—*Held*, also, per Maclennan, J.A.A., that, as the foreman had been in the habit of warning the workmen when steel was to be cut, and had neglected to do so on this occasion, there was liability under the Workmen's Compensation Act. *Choate* v. *Ontario Rolling Mill Co.*, 29 C. L. T. 200, 27 A. R. 155.

Negligence—*Death — Action by widow —Employment of competent persons—Damages — Pecuniary loss—Benefit of heirship.*] —The plaintiff's husband was suffocated by a fire which broke out suddenly in the defendants' distributing station. The evidence, in the opinion of the Court, justified the conclusion that if competent persons had been in charge of the work proceeding when the fire broke out, it might have been extinguished in time to prevent any injury to the deceased:—*Held*, that it is the duty of the employer to have competent persons in charge while work of a dangerous character is being performed, and he is responsible for an injury to a workman which might have been prevented if the persons in charge had been sufficiently on the alert to give timely warning. The fact that the deceased might have adopted a safer and more prudent method of attempting to escape from the danger did not relieve the employer from responsibility. 2. The "damage occasioned by the death" of the person injured, under Art. 1056, C. C., is limited to pecuniary loss, and where the widow claimant under that article is heir to the deceased, the pecuniary benefit accruing to her as such heir must be deducted from the loss occasioned by the death. 3. It is for the defendant, in such action, to establish to what extent the claimant, as heir, has benefited by the death, after liquidation of the liabilities of the estate. The Court may, however, under art. 371, C. C. P., in the absence of such proof, order the plaintiff to appear and answer on oath, in order to complete the proof necessary for the determination of the amount for which judgment should be rendered. *Warboys* v. *Lachine Rapids Hydraulic and Land Co.*, 22 Que. S. C. 531.

Negligence — *Defect in machinery — Want of notice of accident.*]—A machine perfect in itself is, if applied to some purpose for which it is unfitted, defective within the meaning of s. 3 (1) of the Workmen's Compensation for Injuries Act, R. S. O. c. 160. To state in the defence that notice of the accident has not been given, and that the defendants intend to rely on that defence, is not sufficient. Formal notice must be given in accordance with the provisions of s. 14. *Cavanagh* v. *Park*, 23 A. R. 715, applied. *Hamilton* v. *Grocebeck*, 19 O. R. 76, is not now law, owing to statutory changes. *Wilson* v. *Owen Sound Portland Cement Co.*, 29 C. L. T. 299, 27 A. R. 328.

Negligence—*Defect in plant—Contractor —Owner.*]—Where the plaintiff, a workman, undertook to do certain work for the defendant by contract at a price agreed upon, and subsequently borrowed a ladder from the defendant to aid him in the performance of the work:—*Held*, that the defendant was not responsible for injury resulting to the plaintiff from the weakness of a screw in the ladder, it being the duty of the plaintiff, who was skilled in such matters, to examine the ladder and ascertain whether it was sufficiently strong for the purpose, before making use of it. *Larose* v. *Laforest*, 17 Que S. C. 231.

Negligence—*Degree of care necessary.*] —The application of the principle that the responsibility of the employer is that of a *bon père de famille* requires at his hands care and protection against even the mistakes and thoughtlessness of the servant, in the performance of acts in the ordinary discharge of his duties. While the employer may not be responsible for the consequences of unusual or unnecessary acts of the workman, and while certainly he is not responsible for acts committed in violation of orders or in defiance of ordinary rules of self protection, a greater degree of prudence may be enforced against an employer in protecting his workman against possible dangers, than can be

exacted from the workman. From the employer is expected the prudence of experienced judgment; from the workman, obedience only to express orders and general principles of safety and self protection. In the present case, therefore, where the wedge of a screw on a revolving shaft was left projecting near where the workman was employed, and his clothing caught thereon, the employer was held responsible although the accident might have been avoided by greater care on the part of the workman. *Matthews* v. *Rouchard*, 8 Que. K. B. 550. Affirmed, 28 S. C. R. 580.

Negligence — *Evidence* — *Finding of jury.*]—An appeal by the defendant from the judgment in 32 O. R. 8, 20 C. L. T. 304, reversing the judgment in 31 O. R. 521, 20 C. L. T. 121, was dismissed with costs, the Court agreeing that there was some evidence to support the finding of negligence. *Kelly* v. *Davidson*, 21 C. L. T. 13, 27 A. R. 657.

Negligence — *Excessive damages.*] — In an action under the Employers' Liability Act the jury found that the defendants were guilty of negligence in not having a platform so fixed as to prevent drills which were thrown down from bounding into the tunnel, and that the plaintiff was unaware that drills were being thrown down when he was about to pass through the tunnel; and the jury assessed the damages at $3,000:—*Held*, that the defendants were liable, but that the damages should be reduced to $700. *Pender* v. *War Eagle Consolidated Mining and Development Co.*, 7 Brit. Col. L. R. 162.

Negligence — *Foreman* — *Evidence* — *Finding of jury.*]—The plaintiff, while working for some contractors who were building a house, was injured through a fall caused by the giving way of part of the scaffolding of the house. The scaffold he was standing on consisted of a single plank about fifteen feet long, one end of which rested on a trestle, and the other on a stay formed of a plank nailed to two upright posts, forming a part of the main structure. The stay as originally fastened to the posts was perfectly secure, as the plank forming the stay rested on its edge on a cleat securely fastened to the posts by spikes, the stay itself being securely fastened to the posts by large spikes. The general superintendent of the defendants' works had been very explicit in directing the workmen that the stays should be put up and secured as this one had been. Two workmen however removed the stay for purposes of their own convenience about three o'clock on the 7th September, and raised it about a foot above the cleat and nailed it to the posts in a manner which rendered it dangerous. On the following morning, between eight and nine o'clock, the plaintiff and another being directed by the foreman to cut off the ends of two beams at the top of the third storey, the plank referred to was thrown across from the trestle to the stay; and the plaintiff mounting it the stay gave way and the injury happened:—*Held*, by the trial Judge, that there was no evidence of negligence on the part of the foreman. An appeal by the plaintiff from this decision was allowed with costs, and judgment ordered for the plaintiff for $500, the damages assessed by the jury, with costs, the Court holding that there was evidence sufficient to support the finding of the jury in answer to the third question, and the finding could not be interfered with or disregarded. *Kelly* v. *Davidson*, 20 C. L. T. 121, 304, 31 O. R. 521, 32 O. R. 8.

Negligence.] — Plaintiff, while working for defendant, fell from a scaffold and broke his ankle:—*Held*, that defendant's foreman was negligent in not taking proper precautions to insure safety of plaintiff and other workmen, but that plaintiff himself was to a certain extent in fault, fault on each side being about equal. Plaintiff given judgment for $650 damages. *Pageau* v. *Quebec, Montreal and Southern Ry. Co.* (Que.), 6 E. L. R. 309.

Negligence — *Street railway—Control.*] —The motorman of a car running on an electric system is a "person who has the charge or control" thereof within the meaning of s.-s. 5 of s. 3 of the Workmen's Compensation for Injuries Act, R. S. O. c. 160, and his employers are liable in damages to a fellow servant for injuries sustained while in discharge of his duty, owing to the motorman's negligence in passing too close to a waggon which is moving out of the way of the car. *Snell* v. *Toronto Ry. Co.*, 20 C. L. T. 224, 27 A. R. 151.

Negligence — *Superintendence* — *Defect in ways.*]—The plaintiff was a labourer employed by the defendants to carry mortar to masons, also employed by them, who were building a wall on the defendants' land. The work was being done under the superintendence of a foreman, who, after the wall had been built, directed the plaintiff and one mason to do the tuck-pointing next day. In order to enable the plaintiff to take the mortar to the mason at the front of the outer face of the wall, the mason and the plaintiff made a gangway of planks which had been used in the scaffolding, from the top of the wall to an adjacent building and thence to the ground, and, while the plaintiff was walking on the gangway with a load of mortar, an insecurely fastened plank gave way and he was injured:—*Held*, that the defendants were not liable at common law, the mason and the plaintiff being fellow workmen exercising their own judgment as to the proper means of accomplishing their object, and the planks being strong and sufficient for the purpose required if properly fastened:—*Held*, also, that there was no liability under the Workmen's Compensation for Injuries Act, the mason not being a person to whose orders the plaintiff, in respect of the mode of carrying the mortar, was bound to conform, and the gangway not being a "way" within the meaning of the Act, or constructed by a person having, in regard to it, superintendence intrusted to him. *Ferguson* v. *Galt Public School Board*, 20 C. L. T. 397, 27 A. R. 480.

Negligence — *Unskilled workman—Dangerous work* — *Reasonable precautions.*]— Although an employer is not liable, as a general rule, for the result of accidents which happen to employees from dangers essentially inherent in the work which is being performed, he nevertheless becomes liable when reasonable precautions have not been taken by him to reduce the danger to the lowest point or remove it altogether. And so, when work which is not especially unsafe for a

skilled workman, such as the driving of spikes on a railway, is intrusted to an unskilled person, the employer is responsible for an accident to the workman resulting from his inexperience, reasonable precautions to avoid it not having been adopted. *Sparano* v. *Canadian Pacific Rw. Co.*, 22 Que. S. C. 282.

Negligence.]—While plaintiff was putting together two parts of a locomotive tender tank, latter dropped and broke his arm. He claimed that the accident arose from lack of proper appliances, that is, blocks to support the tank:—*Held*, that the method adopted by defendants was the one invariably used by all railway companies, and that the manner in which it was proposed that blocks should have been used was farcical. The accident would have been avoided if plaintiff had been careful. Appeal allowed and action dismissed. *Braimard* v. *Michigan Central*, 13 O. W. R. 112.

Negligence of fellow servant — *Common employment.*]—Negligence of a track-master of a railway company causing an injury to a man employed as one of the crew engaged in removing gravel from a ballasting train working on a section of the road under the control of the track-master, is the negligence of a fellow-servant engaged in a common employment, and the company is not liable in an action for damages resulting therefrom. *Day* v. *Canadian Pacific Rw. Co.*, 36 N. B. R. 323.

Negligence of fellow servant—Course of employment—Railway servants returning from work in hand-car—Findings of jury—Common law liability—Superintendence — "Train," meaning of—Section 3, s.-s. 5 of Workmen's Compensation Act — Railway Act. *Vaccaro* v. *Kingston and Pembroke Rw. Co.*, 11 O. W. R. 836.

Negligence of fellow servant — *Factories Act—Elevator—Mechanical device.*]—The plaintiff was employed as a dressmaker in the defendants' departmental store, and, while descending in their elevator after her day's work was done, was injured by the fall of the elevator, owing to the failure of the person in charge to properly manage it:—*Held*, that the defendants were not answerable at common law for such neglect, which was that of the plaintiff's fellow-servant, nor under the Workmen's Compensation for Injuries Act, R. S. O. 1897 c. 160, for the fellow-servant was not a person having any superintendence intrusted to him, within ss. 2 (1) and 3 (2):—*Held*, that the defendants' store was a factory within the meaning of the Act, and the onus of proving that the brake and "dogs" in use in connection with the elevator were sufficient was upon the defendants; but it was not necessary for them to shew that the device in its concrete form as part of the elevator had been approved by the inspector in accordance with s. 20, s.-s. 1 (d), of the Ontario Factories Act, R. S. O. c. 256; it was sufficient that the kind of device used had been approved.—*Held*, also, that in order to render the employer liable to a civil action it was incumbent on the plaintiff to make out the casual connection between the omission to provide the statutory safeguards and the injury complained of; and that she had not done. *Carnahan* v. *Robert Simpson Co.*, 21 C. L. T. 74, 32 O. R. 328.

Negligence of fellow servant—Workmen's Compensation Act—Finding of jury—Pleading — Amendment—Application for at trial—Entirely new case sought to be made —New trial. *Pascal* v. *Nicholson*, 11 O. W. R. 394.

Negligence of fellow servant in same grade of employment — Defective system—Proximate cause of injury — Evidence. *Simpson* v. *Webb*, 12 O. W. R. 782, 1189.

Negligence of foreman — Jury. *Bawman* v. *Imperial Cotton Co.*, 1 O. W. R. 450.

Negligence of foreman — *Liability of master — Contributory negligence—Damages —Finding of trial Judge—Appeal.*]—A foreman who causes a heavy body to be canted by means of a crane, and orders the cranecable to be attached for a rolling hitch to a headless spike projecting from the body, so that the cable must slip when the spike is raised to a certain angle, is guilty of negligence and makes his employer liable for an injury caused thereby to one of the workmen.—2. When the injury is aggravated by the negligence of the workman, and it is impossible to determine the proportion of the damage attributable thereto, the finding of the trial Judge will not be disturbed in appeal, if not excessive. *Locomotive and Machine Co. of Montreal* v. *Lemay dit Delorme*, 17 Que. K. B. 328, 4 E. L. R. 354.

Negligence of foreman — Superintendence—Findings of jury. *Condon* v. *Hamilton Steel and Iron Co.*, 11 O. W. R. 49.

Negligence of master — Dangerous employment—Volunteer. *Blanquist* v. *Hogan*, 1 O. W. R. 15.

Negligence of master — Foreman — Secretary of company — Knowledge — Evidence. *Wilson* v. *Botsford-Jenks Co.*, 1 O. W. R. 101.

Negligence of master—*Precautions.*]—The master is in the wrong if it can be shewn that the accident to the servant could have been avoided, however costly and useless he may have thought the necessary precautions to attain this result.—2. Every act of imprudence or negligence on the part of the master puts him in the wrong and makes him liable. *Durand* v. *Asbestos and Asbestic Co.*, 19 Que. S. C. 259. (Affirmed by the Court of Review and by the Supreme Court of Canada, 30 S. C. R. 285.)

Negligence of master — Question for jury — *Res ipsa loquitur. Brotherson* v. *Corry*, 1 O. W. R. 34.

Negligence of servant—*Injury to third person—Scope of employment — Railway—Sectionmen — Piling ties on railway near crossings—Nuisance—New trial.*]—Plaintiff was a carpenter and contractor. On 24th August, 1903, he was driving across defendants' track in the township of Oxford when his horse became frightened, apparently by a pile of old railway ties upon the highway.

and, by reason of the horse swerving, the buggy wheel went into the ditch, and plaintiff was thrown out and very severely injured. A section man, called by plaintiff, deposed that the ties were placed on the highway by himself and another section man, and the section foreman, the others acting under the direction of the latter. "It was laid down in Lord Hale's time and repeatedly since, that wherever the master intrusts a horse, or carriage or anything which may readily be made an implement of mischief, to his servant to be used by him in furtherance of his master's business or for the execution of his orders, the master will be responsible for the negligent management of the thing intrusted to the servant, so long as the latter is using it or dealing with it in the ordinary course of his employment. Within these definitions, there was evidence that defendants' servants placed the ties in question on the highway in the course of their employment. This was purely a question of fact, and I think there was reasonable evidence from which a jury might so infer. Their employment or duty at that time was to get rid of the no longer useful and now incumbering ties, and to do so two modes are suggested, both of which had previously been adopted—one to burn them on the defendant's own lands, the other to permit their workmen to take them home for firewood. By either method the defendants' purpose would have been accomplished. But the ties were the property of defendants, and there was no evidence to shew that they had ceased to be their property when placed on the highway, even assuming what was certainly not proved, that the section foreman, who was not called, intended to afterwards remove them to his own house. The work was done by defendants' workmen during their ordinary working hours, and under the superintendence of the section boss. Under these circumstances, I think plaintiff made out a *prima facie*, and the issue was properly for the jury. But there was no specific finding of fact upon the vital question of nuisance or no nuisance, which was essentially plaintiff's cause of action. A nuisance such as the one in question was not necessarily created by placing an object or doing an act causing one horse to be frightened, but by doing something upon or near the highway which is calculated to frighten horses generally in ordinary circumstances. See *Rex* v. *Lucknow*, 21 A. R. L. On referring to the charge it appears that the jury were not told that the question of nuisance or no nuisance depended not so much on the particular result to the plaintiff's horse, but as they should have been, on the larger and more general result, to horses generally, as before indicated. The damages awarded are so large as to appear excessive. The appeal allowed and a new trial directed. *Forsythe* v. *Canadian Pacific Ry. Co.*, 6 O. W. R. 242, 10 O. L. R. 74.

Negligence of servant — *Scope of authority—Forbidden act.*]—A master is liable for an injury caused by the wrongful act of his servant within the scope of his authority, although the master has expressly forbidden the servant to do the act from which the injury resulted. *Read* v. *McGiveney*, 36 N. B. R. 513.

Negligence of servant — *Scope of employment — Railway — Watchman.*]—Defendants employed a watchman to lower the bars across the highway as a train was approaching, and to raise them as soon as it had passed. This duty carried with it that of warning persons who were obstructing the raising or lowering of the bars, and thereby preventing him from using them for the purpose for which they were required. The infant plaintiff was obstructing the raising of the bars, and the watchman threw a cinder at him, and put out his eye:—*Held*, the jury had found for plaintiff, and they must be taken to have found, as they might properly do upon the evidence, that the act done by Jarman was done in the course of his employment, not simply to gratify some spiteful feeling of his own against the boy. *Hamwood* v. *Grand Trunk Ry. Co.*, 4 O. W. R. 530, 25 C. L. T. 35, 9 O. L. R. 64.

Not in superintendence.]—An action for damages by an administrator and next of kin under the Workmen's Compensation Act, and at common law. The deceased was killed while assisting one Carrol to adjust the hood of the cage in the shaft of defendants' mine by the cage being hoisted past him, thus crushing his head between the cage and the timbers of the shaft.—Teetzel, J., *held*, that the cage was hoisted owing to Carrol, the man in charge of the cage, having improperly given the signal to do so while the deceased was in a position in which he might be injured by the cage in its upward course; That there was no defect in the equipment of the shaft and cage, and that defendants were not guilty of negligence in employing Carrol to operate the cage; That the defendants not being liable for Carrol's negligence, the action must be dismissed, but under the circumstances without costs. —*McLaughlin* v. *Ont. Iron & Steel Co.*, 15 O. W. R. 284, 20 O. L. R. 335, 1 O. W. N. 408, approved. *Davies* v. *Badger Mines Co.* (1911), 18 O. W. R. 348, 2 O. W. N. 559.

Not in superintendence—Servant injured—Action for damages—Evidence—Finding of jury—Appeal allowed and action dismissed—No costs. *Davidson* v. *Toronto Ry. Co.* (1910), 17 O. W. R. 844, 2 O. W. N. 382.

Notice of injury—*Excuse for want of—Evidence—Statement of deceased — Negligence—Cause of injury—Jury.*]—The knowledge of the defendants of the injury and the cause of it, at the time it occurs, is (in case of death) a reasonable excuse for the want of the notice of injury required by s. 9 of the Workmen's Compensation for Injuries Act, R. S. O. 1897 c. 160, where there is no evidence that they were in any way prejudiced in their defence by the want of it. Where the deceased received the injuries from which he died by being run over by a train of cars, a statement made by him immediately after he was run over, in answer to a question as to how it happened, "I slipped and it hit me," was held admissible in evidence. *Thompson* v. *Trevanion*, Skin. 402, *Aveson* v. *Kinnaird*, 6 East 188, 193, and *Rex* v. *Foster*, 6 C. & P. 325, followed. Upon that evidence and evidence of the slippery condition, by reason of snow and ice, of the place where the deceased slipped, a question should have been submitted to the jury whether he slipped by reason of such condition, and whether such condition was

due to the negligence of the defendants. *Armstrong* v. *Canada Atlantic Ry. Co.*, 21 C. L. T. 497, 2 O. L. R. 219.

Parent and child — *Negligence.*]—The doctrine of the liability of a master for his servant's negligence applies in the case of the implied relationship of master and servant sometimes existing between parent and child, but as in the case of master and servant so in that of parent and child there is no liability if at the time the negligent act is committed the child is engaged in his own affairs and not on the parent's behalf. The father of a lad of twenty, living at home, was held not liable, therefore, for an accident caused by the lad's negligence while driving, with the father's implied permission, the father's horses and carriage home from a shop to which the lad had gone to purchase, with money earned by himself, articles of clothing for himself. *Fife* v. *Unger*, 29 C. L. T. 348, 27 A. R. 488.

Person to whose orders servants bound to conform—Right to give order—Servant voluntarily incurring risk—Findings of jury. *Parker* v. *Lake Erie and Detroit River Ry. Co.*, 5 O. W. R. 634.

Personal injuries — Accident to miner caused by falling rock—Defect in works — [1908] Ont. Mining Act, s. 164, s.-s. 17 and 31—Argument based on finding of jury—Definition of "pentice." — Falconbridge, C.J. K.B., gave judgment for plaintiff for $2,500 and costs. *Siren* v. *Temiskaming Mining Co.* (1911), 19 O. W. R. 436, 2 O. W. N. 1245.

Personal injuries to servant through negligence of master—*Permanent injury —Partial disability—Earning power—Incurable disease — Death after first trial—New trial for assessment of damages—Elements of damage—Hastening of death—Physical suffering.*]—See *sub nom. Tinsley* v. *Canada*, 9 W. L. R. 706. The original plaintiff died after the first trial and the action was revived in the present plaintiff. On new trial judgment for plaintiff. Damages should not be confined strictly to loss of earning power during a certain period.—*Held*, that the accident had to do with hastening the cancer, of which he died. He is entitled to compensation for being left with a deformed and weakened leg. *McGarry* v. *Canada*, 11 W. L. R. 597.

Personal negligence of master — No evidence to support finding — Workmen's Compensation Act—Negligence of foreman—Findings of jury — Damages — Proof of amount of servant's earnings — Evidence. *Williams* v. *Piggott*, 11 O. W. R. 28.

Plaintiff crushed between cars — *Sufficiency of questions put and answered—Voluntarily accepting risk.*] — If there is negligence of a superior, while in the exercise of his superintendence, and the workman is bound to conform to his orders, the case is brought within the Workmen's Compensation for Injuries Act: sec. 3, sub-sec. 2. —In a personal injury action the plaintiff admitted knowledge of the extreme danger, also of the lack of and the necessity for the usual and proper safeguards. The defendants admitted superintendence of the foreman.—The jury, in answer to questions put, found: (1) negligence due to foreman neglecting to place flags for protection; (2) that the injured party was bound to conform to the orders; (3) no contributory negligence; (4) no duty of plaintiff to place the flags.—Falconbridge, C.J.K.B., after addresses of counsel, refused to submit an additional question, and entered verdict for the plaintiff.—Court of Appeal, Meredith, J.A., dissenting, *held* that the questions of (*a*) whether persuading conversation amounted to a direction, (*b*) knowledge constituted contributory negligence, (*c*) and the question of the duties devolving, were rightly put to the jury;—That the appeal should be dismissed as there was no finding that the workman voluntarily accepted the risk;—That the other question raised by the defendants was involved in and answered by the findings by necessary implication and under all the circumstances the defendants were not entitled to have the additional question put to the jury. *Bruiott* v. *Grand Trunk Pac. Ry. Co.* (1911), 19 O. W. R. 514, 2 O. W. N. 1277.

Pleading — *Damages—Factories Act.*]—In an action for damages for physical injuries, the age of the victim, and his personal condition as to means are relevant, but not the number of his children or the fact that he has to support them.—2. The statutory duties prescribed by the Factories Act do not affect the civil responsibility of employers towards their employees. *Riendeau* v. *Pacific Rolling Co.*, 6 Que. P. R. 143.

Pleading — *Declaration — Damages — Plaintiff's loss by inability to support family.*]—In an action for damages by reason of an injury to a person in the service of the defendant, an allegation in the declaration that the plaintiff is the father of a family, and the sole support of his wife and children, is useful to assist the Court in fixing the damages suffered, and will not be struck out on inscription in law. *Sauvé* v. *Lyall*, 10 Que. P. R. 91.

Pleading "*Not guilty by statute*" — *Denial — Contributory negligence — Common employment—Statutes — Retrospectivity — New cause of action.*]—In an action by a brakeman in the defendants' employment to recover damages for injuries sustained by him by reason of the negligence of the defendants, the defendants proposed to plead other defences along with "not guilty by statute":—*Held*, that it was not necessary to plead contributory negligence specially, for it could be raised under "not guilty by statute," by Rule 12, J. O., N. W. T.—2. That a denial of "each and every material allegation contained in the statement of claim" was too general in form and was contrary to Rule 118, having regard to Rule 114; the defendants must specify the particular allegations which they denied, and must in some cases shew by affidavit that they had good grounds for the denial.—3. That the defendants should be allowed to set up the defence that the injury was caused by the negligence of the plaintiff's fellow servants in the common employment of the defendants; for s. 13 of the Ordinances of 1900, taking away the right to set up this defence, was not retroactive as applying to a mere matter of procedure, but gave a substantial right.—4. That the defendants might raise a question of law by pleading that the statement of

claim disclosed no cause of action, but they must give the grounds. *Smith* v. *Canadian Pacific Ry. Co.*, 21 C. L. T. 193.

Pleading — *Onus* — *Contributory negligence — Employer's Liability Act, N.S.*]— The statement of claim alleged that while the plaintiff was in the defendant's employ, and engaged in filling a car with dolomite from a chute, a car was suddenly dumped into the chute above, and came down with great force, and struck and injured the plaintiff, and that such injury was caused by the defendants, his engineers, etc., not warning the plaintiff that the car of dolomite was about to be dumped into the chute, thus giving him notice to avoid danger:—*Held*, that upon the pleading, the onus was on the plaintiff to prove that that injury was caused by the negligence of defendant; and that, in the absence of evidence to satisfy the burden resting upon him, he could not recover. The evidence showed that it was the plaintiff's duty to place the car to be loaded below the chute, and to remain in a place of safety until the car was loaded, and the gates of the chute closed, and then to remove the car to the crusher; that, at the request of a fellow-workman, he attempted to pull out the car before it was loaded, and before the gates were closed, with the result that he sustained the injury complained of:—*Held*, that there was contributory negligence on the part of the plaintiff which prevented his recovery. *MacPherson* v. *MacLachlan*, 36 N. S. R. 435.

Pleading—*Workmen's Compensation Act —Particulars — Name of fellow-servant.*]— The requirements of s. 9 of the Workmen's Compensation for Injuries Act are directory rather than imperative, and the omission to give the name and description of the person in the defendants' service by whose negligence the accident which gave rise to the action occurred, is a matter to be dealt with by an application for particulars, and not by demurrer. *Makarsky* v. *Canadian Pacific Ry. Co.*, 15 Man. L. R. 53.

Precautions — *Warnings.*] — It is the duty of an employer to use means as safe as are practicable in the performance of his work. He has no right to use means which offer a constant danger to his employees, when other means, perhaps a little more expensive and a little slower in operation, would have avoided the danger. The employer is not relieved from responsibility by the fact that the workman did not comply with warnings, unless it be shewn at the same time that such compliance would have avoided the danger. *Scanlan* v. *Detroit Bridge and Iron Works*, 16 Que. S. C. 264.

Proximate cause — Contributory negligence—Findings of jury. *Lennon* v. *Canadian Niagara Power Co.*, 6 O. W. R. 885.

Proximate cause — *Finding of jury — Evidence.*]—T., an engineer, was scalded by steam escaping when the front of a valve was blown out by the pressure on it. In an action for damages against his employers, the jury found that the bursting was caused by strain on the valve; that the employers were guilty of negligence in allowing the engine to run on an improper bed, and that they did not supply proper appliances and keep them in proper condition for the work to be done by T., the engine-bed and room all being in bad condition; they also found that the valve was not defective:—*Held*, that, in the absence of a finding that the negligence imputed to the employers was the proximate cause of the injury to T., and of evidence to justify such a finding, the action must fail. Judgment of the Court of Appeal, 11 O. W. R. 32, affirmed. *Thompson* v. *Ontario Sewer Pipe Co.*, 40 S. C. R. 396.

Quebec Industrial Establishment Act — *Regulations—Failure to comply with —Factory—Dangerous machinery.*]—Failure by the owner of an industrial establishment to comply with the regulations made by the Lieutenant-Governor in council, under the authority of the Quebec Industrial Establishment Act, 1894, is a fault which makes him liable for injuries to an employee caused thereby.—Independently of such regulations, when machinery, including a revolving shaft, is used in a factory where the employees are exposed to contact with it, ordinary prudence requires that, after a stoppage, the putting of it in motion again should be signalled, and the omission to do so is a fault that makes the employer liable for an injury caused thereby.—In like manner, to allow girls and women in the factory to wear their hair loose and flowing on their backs, so that it can be caught in the machinery, is a fault that makes their employer liable for injuries caused thereby.—It is not enough that rules and regulations for the prevention of accidents be posted in factories; they must further be drawn to the attention of the employees. *Caron* v. *Standard Shirt Co.*, 28 Que. S. C. 211.

Questions for jury—New trial. *Sorenson* v. *Smith*, 5 O. W. R. 576.

Railway — *Collision — Duty of engineman — Orders of conductor — Rules—Contributory negligence.*]—By Rule 222 of the defendants, "conductors and enginemen will be held equally responsible for the violation of any of the rules governing their trains, and they must take every precaution for the protection of their trains, even if not provided for by the rules." By Rule 52, enginemen must obey the conductor's orders as to starting their trains, unless such orders involve violation of the rules or endanger the train's safety; and Rule 65 forbids them to leave the engine, except in a case of necessity. Another rule provides that a train must not pass from one double or single track until it is ascertained that all trains due which have the right of way have arrived or left. M. was engineman on a special train which was about to pass from a double to a single track, and when the time for starting arrived he asked the conductor if it was all right to go, knowing that the regular train passed over the single tracks about that time. He received from the conductor the usual signal to start, and did so. After proceeding about two miles his train collided with the regular train, and he was injured. In an action against the company for damages in consequence of such injury:—*Held*, affirming the judgment of the Court of Appeal (31st December, 1901), that M. was not obliged, before starting, to examine the register and ascertain for himself if the regular train had passed, that duty being imposed by the

rules on the conductor alone; that he was bound to obey the conductor's order to start the train, having no reason to question its propriety; and he was, therefore, not guilty of contributory negligence in starting as he did. *Miller* v. *Grand Trunk Ry. Co.*, 22 C. L. T. 353, 32 S. C. R. 454.

Railway — Collision — Engine-driver—Disobedience to rules—Cause of collision—Negligence — Defects — Evidence — Negligence of fellow-servants. *Ruddick* v. *Canadian Pacific Ry. Co.*, 11 O. W. R. 139, 8 Can. Ry. Cas. 484.

Railway — *Contributory negligence — Nonsuit—Jury — Employers' Liability Act.*]—F., a conductor and brakesman in the employ of the defendant company, while turning the brake wheel, fell from his train and was run over and killed. The nut which fastens the brake wheel to the brake mast, and which should have been on, was not on, and so the wheel came off and the accident resulted. It was the duty of the deceased to examine the cars of the train and see that they were in good order before leaving the station which the train was just leaving:—*Held*, in an action by F.'s personal representatives to recover damages in respect of his death, that it was F.'s own neglect in not seeing that the brake was in a secure condition, and that there was therefore no case for the jury. *Fawcett* v. *Canadian Pacific Ry. Co.*, 22 C. L. T. 244, 8 B. C. R. 393.

Railway—*Collision of train with yard engine—Death of engine-driver—Liability at common law — Workmen's Compensation Act.*]—Action for damages for death of deceased, an engine-driver, killed in a collision between his train and a yard engine. The jury found that the system by which the control of the yard engine was under the yard master, not the despatching office, was defective. The trial Judge held that the yard master and superintendent were competent officials, that the system used was deliberately adopted in preference to what jury found was the proper one. Judgment given for plaintiff under Workmen's Compensation Act, not at common law. *Frelick* v. *Grand Trunk*, 13 O. W. R. 462.

Appeal to the Court of Appeal dismissed, 15 O. W. R. 55.

Railway — *Employers' liability—Excessive damages.*]—In the defendants' coal mine the haulage slope, which was necessarily used as a travelling road by the workmen, was not provided with man-holes at intervals of not more than twenty yards, as required by the Coal Mines Regulation Act, and on account of this lack of sufficient manholes it was the custom of the defendants not to run the trip during the time the workmen were going to and coming from work. The plaintiff while coming from work was run into and injured by the trip, which had been started off during a prohibited time. The trip was a train of cars, operated by a stationary engine on the outside, and used for hauling coal out of the mine. The jury found that the accident was caused by the defendants' negligence in letting the trip down, and on the verdict judgment was entered for the plaintiff for $1,424 and costs. An appeal to the full Court was dismissed, the Court refusing to reverse the findings of fact or to interfere with the damages as excessive:—*Held*, also, that the place in question was a "railway" within the meaning of the Employers' Liability Act. *Booker* v. *Wellington Colliery Co.*, 22 C. L. T. 436, 9 B. C. R. 265.

Railway — Engine-driver — Bursting of glass tube—Failure to supply shield—Voluntary incurring of risk—Findings of jury—Judge's charge. *Fulton* v. *Michigan Central Ry. Co.*, 11 O. W. R. 52.

Railway — *Explosion—Defective condition of boiler—Necessity for inspection—Failure of company to discharge duty of master — Liability at common law — Negligence.*]—Plaintiff, a car inspector for defendants, going into a boiler-room to get a saw he required to use, was severely injured by the boiler exploding. The defendants had no boiler inspector nor had the boiler ever been inspected:—*Held*, defendants liable at common law. $3,000 damages given plaintiff. *Waddell* v. *Pere Marquette*, 13 O. W. R. 817, R. 260.

Railway — Fault of fellow-servant — Workmen's Compensation Act — Evidence—Findings of jury—Questions and answers—New trial. *Curtis* v. *Michigan Central Ry. Co.*, 12 O. W. R. 445.

Railway — *Lights on trains.*]— A conductor in the defendants' employment, while performing the duty for which he was engaged at the Windsor station of the Canadian Pacific Railway in Montreal, was killed by a train which was being moved backwards in the station yard. There was no light on the rear end of the last car of the train, nor was there any person stationed there to give warning of the movement of the train:—*Held*, that, by omitting to have a light on the rear end of the train, the railway company failed in their duty, and this constituted *prima facie* evidence of negligence. Judgment in 11 Que. K. B. 394, affirmed. *Boisseau* v. *Canadian Pacific Ry. Co.*, 22 C. L. T. 358, 32 S. C. R. 424.

Railway — Person in charge — Open switch—Control of railway — Contractor—Workmen's Compensation Act—Common law liability—Findings of jury. *Warren* v. *Macdonnell*, 12 O. W. R. 493.

Railway — *Servant carried by train — —Failure to stop train—Injury by jumping —Contract—Tort.*] — The defendants hired the plaintiff to work on the construction of a railway, and, as part of their contract, the plaintiff was to be carried on their train to and from a certain crossing near his home to the place of work. One night the train did not stop at this crossing, but slowed down and was passing it at a dangerous rate of speed, when the plaintiff, finding that the train was not stopping, jumped off and was severely injured:—*Held*, that if it were a breach of contract by the defendants not to have stopped at this crossing, the plaintiff was not justified in jumping from the train while it was in dangerous motion:—*Held*, further, that, if the action was considered as one in tort, the plaintiff must fail, as the injury was the direct result of his own conduct. *Kennedy* v. *Isbester*, 40 N. S. R. 116.

Railway—Signals — Warning—Findings of jury. *Basso* v. *Grand Trunk Rw. Co.*, 6 O. W. R. 172, 893.

Railway — *Stipulation in contract of service for non-liability of master—Assurance fund—Constitution of aid society.*] — A master may validly stipulate with his servant that, in consideration of a contribution which he makes to the funds of a society of aid and assurance formed for the purpose of assisting workmen and their families in case of injury or death by accident, he shall not be responsible for the consequences of an accident sustained by the servant, caused by the fault of his fellow servants. *Regina* v. *Grenier*, 30 S. C. R. 42, followed—2. In this case the society of aid and assurance had been legally constituted. *Ferguson* v. *Grand Trunk Rw. Co.*, 29 Que. S. C. 54.

Railway — Unpacked frog — Construction work — Horse tramway — Sub-contractors — Independent contractor — Employment of workmen — Liability of principal contractor — Damages — Workmen's Compensation Act. *Amendola* v. *Dokeng*, 7 O. W. R. 32.

Railway—*Workmen's Compensation Act —Notice of injury—Absence of—Reasonable excuse — Meaning of—Cause of injury.*]—While the notice of injury required by s. 9 of the Workmen's Compensation for Injuries Act, R. S. O. 1897, c. 160, is for the employer's protection against stale or imaginary claims, and to enable him, while the facts are recent, to make enquiry, the injured workman, however, is the primary object of the legislative consideration; and therefore under that section of ss. 13 and 14, notice may be dispensed with where there is reasonable excuse for the want thereof, the employer not being prejudiced thereby. What constitutes reasonable excuse must depend upon the circumstances of each particular case, and a reasonable excuse will be inferred where, as here, there is the notoriety of the accident, the knowledge of the employers of the injury which resulted in death, and its cause, and of a claim having been made on them by the deceased's representative, which they had stated they would take into their consideration, but to which no final answer had ever been given. In an action against a railway company for alleged negligence, it appeared that the deceased was killed by being run over while shunting cars. The evidence shewed that the space between two sets of tracks in the defendants' yard was dangerous by reason of an accumulation of snow and ice thereon, but that the tracks themselves were in good condition, and it was merely a matter of conjecture, whether, at the time of the accident, the deceased was on the tracks themselves, or in the space between them:—*Held*, that, under these circumstances, the accident could not be said to be due to the defendants' negligence, and the plaintiff's action failed. Judgment in 2 O. L. R. 219, 21 C. L. T. 497, reversed. *Armstrong* v. *Canada Atlantic Rw. Co.*, 22 C. L. T. 379, 4 O. L. R. 560.

Railway company is liable for the death of an engine driver in a collision shewn to have been caused by the insufficiency of brakes on train, or by their not having been properly applied by other servants. *Johnson* v. *Can. Northern Que. Rw. Co.* (1910), 39 Que. S. C. 263, 17 R. de J. 182, appealed.

Ship — *Bursting of capstan — Defect — Notice — Superintendent — Competence — Aggravation of injury by subsequent conduct —Master of ship—Scope of authority.*] — The mate of a steamer was injured by the bursting of a capstan, and brought a common law action against the owners for damages for his injuries, and also for aggravation of his injuries owing to his unauthorised detention on the steamer after the accident:—*Held*, that, in the absence of evidence of a defective system, the defendants were not liable for the negligence, if any, of a competent engineer, who was a fellow-servant of the plaintiff and not the representative of defendants. If there was any negligence on the part of the captain in keeping the plaintiff on the steamer, the defendants were not liable for it, as such interference was not within the scope of his employment. *Morgan* v. *British Yukon Navigation Co.*, 11 B. C. R. 316, 4 W. L. R. 294.

Ship—Deck-hand on lake steamer—Seaman — Negligence of mate — Findings of jury—Workmen's Compensation Act. *Frawley* v. *Hamilton Steamboat Co.*, 10 O. W. R. 308.

Street railway — *Negligence — Motorman.*]—The motorman of an electric car may be a "person who has charge or control," within the meaning of s. 3 of the Workmen's Compensation Act, R. S. O. 1897, c. 160, and, if he negligently allows an open car to come in contact with a passing vehicle, whereby the conductor, who is standing on the side in discharge of his duty, is struck and injured, the electric company are liable in damages for such injury. Judgment in 27 A. R. 151, 20 C. L. T. 224, affirmed. *Snell* v. *Toronto Rw. Co.*, 21 C. L. T. 327, 31 S. C. R. 241.

Subsidence of soil — Inevitable accident—Jury. *Sangallo* v. *Laurin*, 5 E. L. R. 239.

Superintendence within s-s. 2 of s. 3 of Workmen's Compensation Act—*Notice of accident—Damages.*] — An action under the Workmen's Compensation for Injuries Act for damages because of injury sustained by plaintiff when in defendants' employment.—Mulock, C.J., *held*, upon the evidence, that 1, No contributory negligence: 2, that the accident was due to lack of scaffolding: 3, that the superintendent was guilty of gross negligence in requiring the plaintiff to work on top of 6-inch timber which had become wet and icy, without having supplied hob-nailed boots. Damages for the injury, including pain and suffering, also arrears of wages and costs of action allowed. *Quaste* v. *Bishop* (1911), 19 O. W. R. 313, 2 O. W. N. 1152.

Superintendent of works—*Workmen's* Compensation Act—Findings of jury—Inconsistency—New trial. *Higgins* v. *Hamilton Electric Light and Cataract Power Co.*, 5 O. W. R. 136.

Superintendent of works—Workmen's Compensation Act—Place of danger—Warn-

ing—Findings of jury. *Higgins* v. *Hamilton Electric Light and Cataract Power Co.*, 7 O. W. R. 505.

Tort—*Law of country where committed—Contract of hiring and domicil of servant in another country—Common employment—Presumption.*]—The liability of a master to his servant for an accident in the course of his work does not arise from the contract of hiring between them; it arises out of tort, and is governed by the law of the country where the tort is committed.—Where the law of the place recognises the liability, the Court should not be bound by an exception which it makes, drawn from a presumption that the circumstances take it out of the rule. Thus the law of New Brunswick (which is the common law of England) rendering the master responsible for the acts of his servant, except in the case of damages caused by a fellow-workman (common employment), because workmen in the same employment are presumed to accept the risk of each other's faults, such exception does not apply to a servant domiciled and engaged at Montreal to work in New Brunswick. That engagement, interpreted according to the law of the place where it was made, excludes the presumption that the employee has accepted the risk of the common employment. Therefore, the master who has engaged the workman is responsible, according to the law of New Brunswick, for damages caused to him by the fault of his fellow-servants in the course of their employment in that province. *Lee* v. *Logan*, 31 Que. S. C. 469, 3 E. L. R. 152; *Logan* v. *Lee*, 27 C. L. T. 781, 39 S. C. R. 311.

Trial—Findings of jury—Verdict — Failure to establish cause of injury—Dismissal of action—Appeal—New trial. *Ede* v. *Canada Foundry Co.*, *Lynn* v. *Canada Foundry Co.*, 11 O. W. R. 332, 12 O. W. R. 809.

Trial by jury — *Verdict against the weight of evidence — Verdict "reasonably given" in the sense of Art. 591 C. P.—Liability—Accident to workman—Negligence of the master—Orders made by his substitute, the boss, to the workmen, and permitting them to disregard the orders.*]—In an action to recover damages caused by an accident to a workman, the verdict of the jury, finding the master guilty of negligence, because his substitute, the boss, permitted the victim to interfere with machines with which he had no business, may have been reasonably rendered in the sense of Art. 591 C. P. Although the boss, on examination, declared that he had told the plaintiff "not to meddle with this machine as he had no business to as it was dangerous to touch," but he had taken no steps to prevent him from doing so. *Baker* v. *Can. Rubber Co.*, 1909, 18 Que. K. B. 481.

Unguarded machinery in mill — *Contributory negligence.*]—While deceased was bringing a bag of grain out of the mill, he passed near a moving vertical shaft in which his overcoat was caught and he was killed. The jury's findings negatived all negligence in the defendant. The deceased had not taken reasonable care and with proper care he could have avoided the accident. Judgment for defendant. New trial refused. *Berthelot* v. *Salaces*, 6 E. L. R. 462, 39 N. B. R. 144.

Unprecedented occurrence — Duty to guard against — Question for jury — Evidence — Findings — Contract of service — Obligatory contract—Condition of hiring—Validity of contract—Payments made to injured servant—Acceptance with knowledge —R. S. O. 1897 c. 160, s. 10—Consideration — Adequacy — Improvidence — Just and reasonable contract—Release—Bar to action —Costs. *Fisher* v. *International Harvester Co. of Canada*, 12 O. W. R. 1126.

Unprecedented occurrence — *Negligence of master—Contract of service — Release.*]—While plaintiff was cutting off rivet heads with a cold chisel and hammer, a piece of steel striking a board rebounded, destroying the sight of his left eye. The jury found defendants negligent in not guarding against such an accident, and assessed damages at $1,000. Under a special personal service contract, the trial Judge held that as plaintiff had taken benefits under that contract he could not now recover. *Fisher* v. *International Harvester Co.*, 12 O. W. R. 1129.

Appeal from above judgment allowed and judgment entered for $1,000. *Ibid.*, 13 O. W. R. 381.

Unskilful use of tool — Unsuitability of tool—Unsuitability of tool supplied for workman's use — Contributory negligence. *Great Northern Ry. Co. of Canada* v. *Turcot*, 4 E. L. R. 361.

Use of explosives—Cause of accident—Conjecture—Nonsuit—New trial—Discovery of fresh evidence. *Lundy* v. *Dawson*, 3 O. W. R. 720.

Verdict — *Inconsistent findings — Construction.*]—In an action for damages for personal injuries received by the plaintiff while in the employ of the defendant:—*Held*, that in construing a jury's verdict, consisting of a number of questions and answers, the whole verdict must be taken together and construed reasonably, regard being had to the course of the trial. The injuries were caused by the plaintiff's failure to withdraw himself from danger in response to a signal. The jury found that the defendant was negligent and that the signal was given prematurely, and that the plaintiff should have heard the signal, but being busy might not have heard it. The answer to the question as to contributory negligence, to which the jury's attention was directed by the Judge, was, "We do not consider that plaintiff was doing anything but his regular work." Judgment was entered for the plaintiff:—*Held*, that the judgment must be affirmed. *Marshall* v. *Cates*, 24 C. L. T. 38, 10 B. C. R. 153.

Verdict for plaintiff — Motion to set aside findings of the jury in favour of plaintiff, and for a new trial, in an action by plaintiff claiming damages for injuries received owing to negligence alleged on the part of defendant in the operation of defendants' quarry — Evidence — Contribu-

tory negligence. *McDowell* v. *Wentworth Gypsum Co.* (N. S. 1910), 9 E. L. R. 245.

Volenti non fit injuria — *Question for jury.*]—In an action for compensation for personal injuries caused by negligence, the defendant who invokes the doctrine of *volenti non fit injuria* must have a finding by the jury that the person injured voluntarily incurred the risk, unless it so plainly appears by the plaintiff's evidence as to justify the trial Judge in withdrawing it from the jury and dismissing the action. Judgment of the Court of Appeal, *Mitchell* v. *Canada Foundry Co.*, 3 O. W. R. 907, in an action by the widow and children of a workman to recover damages for his death by the negligence of his employers, affirmed. *Canada Foundry Co.* v. *Mitchell*, 25 C. L. T. 27, 35 S. C. R. 452.

Voluntary exposure.]—The Court of Appeal held that the evidence shews that defendant, a contractor for building a subway, had conducted his business negligently in omitting to take a simple and effective as well as a usual precaution for safety of his workmen, and that there was no voluntary exposure to danger on the part of the plaintiff. Defendant sought a new trial, the supporting affidavits stating discovery of further evidence, but this was refused to a Divisional Court had already refused to interfere, and no sufficient case had been made out. Appeal was dismissed. *Dagg* v. *McLaughlin*, 13 O. W. R. 150.

Want of proper protection — *Voluntary exposure—Findings of jury—Charge of Judge—Appeal—Master and servant.*]—An experienced master mechanic, who was familiar with the machinery in his charge, and had instructions to take the necessary precautions for the protection of dangerous places, in attempting to perform some necessary work, lost his balance and fell upon an unprotected gearing, which crushed him to death. In an action by his widow for damages, questions were submitted to the jury without objection by the parties, and no objection was raised to the Judge's charge, at the trial. The jury were not asked to specify the particular negligence which caused the injury, and, by their answers, found that deceased was acting under the instructions and guidance of the company's officers who were his superiors, at the time of the accident; that he had control of the work to be done, but had not full charge, control, and management of the machinery generally; that there was fault on the part of the company; and that he had not unnecessarily or negligently assumed any risk:—*Held*, Davies, J., dissenting, that, as there was evidence from which the jury could reasonably draw inferences and come to these conclusions as to the facts, and as no objection was made to the questions put to them and to the charge of the Judge, at the trial, their findings ought not to be interfered with on appeal. *Royal Paper Mills Co.* v. *Cameron*, 39 S. C. R. 365.

Wheeling concrete over runway — *Fell off platform to highway below—Killed—Action for damages by mother—Defect in platform—Findings of jury—Inference—Contributory negligence.*]—Plaintiff, mother of deceased, brought action to recover damages for death of her son, alleging negligence on part of defendants in the construction of a platform from which deceased fell while wheeling concrete from the mixer. Evidence was received as to the construction of the platform, and that it was not guarded nor protected. The jury found in plaintiff's favour and Magee, J., entered judgment for $1,200 on their findings.—Divisional Court (16 O. W. R. 664, 1 O. W. N. 1059), dismissed defendants' appeal with costs.—Court of Appeal dismissed defendants' appeal with costs. Meredith, J.A., and Riddell, J., dissenting. *McKeand* v. *Can. Pac. Ry. Co.* (1911), 18 O. W. R. 309, 2 O. W. N. 812.

Work or employment dangerous to life — *Negligence of the master in employing therein an inexperienced workman.*]—A work or an employment where there is danger to life ought not to be entrusted to those whose age and experience offers no guarantee of protection. There is negligence in entrusting it to a young man and a labourer as inexperienced as himself. The master in such a case is responsible for the damages arising out of his death. *Lucignan* v. *Nicholls Chem. Co.*, O. R. 35 S. C. 543.

Workmen's Compensation Act — "*Accident.*"] — While engaged in chipping the burs from a steel plate with a cold-chisel, the plaintiff was injured by a piece of the steel so chipped off, striking him in the eye and destroying its sight:—*Held*, that the injury was an accident within the meaning of the Workmen's Compensation Act, 1902. *Neville* v. *Kelly Brothers and Mitchell, Ltd.*, 5 W. L. R. 427, 13 B. C. R. 125.

Workmen's Compensation Act — Canal works—Dangerous place—"Way"—Negligence of superintendent — Workmen conforming to orders—Contributory negligence. *Birmingham* v. *Larkin*, 3 O. W. R. 607.

Workmen's Compensation Act — Claim for compensation—Infant—Misrepresentation as to age—"Serious and wilful misconduct" — Release — Validity. *Re Darnley and Canadian Pacific Ry. Co.*, 9 W. L. R. 20.

Workmen's Compensation Act — Defect in engine—Repair—Inspection — Reasonable care—Person intrusted by master with duty of providing proper appliances—Evidence for jury—New trial. *Schwenk* v. *Michigan Central Ry. Co.*, 6 O. W. R. 639, 10 O. L. R. 647.

Workmen's Compensation Act — Defect in machine—Jury—Finding — New trial. *Glasgow* v. *Toronto Paper Manufacturing Co.*, 2 O. W. R. 772.

Workmen's Compensation Act — Defect in machinery—Proximate cause of accident—Knowledge of defect—Evidence—Jury—Damages. *Crosby* v. *Dawson*, 4 O. W. R. 487.

Workmen's Compensation Act — *Defect in ways, works, etc—Person intrusted with duty of seeing that condition proper — Fellow-servant — Negligence.*]—*Held*, that a cleat upon the roof of a building upon which the plaintiff was working, was a

part of "the ways, works, machinery, plant, buildings or premises connected with, intended for or used in the business of the employer," within the meaning of s.-s. 1 of s. 3 of the Workmen's Compensation for Injuries Act, R. S. O. 1897 c. 160; and, there being evidence upon which a jury might find that the cleat was defective in that it was not securely fastened, that the defective condition was the proximate cause of the injury, and that it was due to the negligence of the defendants' workmen who put on the cleats, the defendants would be answerable for the negligence (if found) as being negligence of persons intrusted by them with the duty of seeing that the condition or arrangement of the ways, etc., was proper, within the meaning of s.-s. 1 of s. 6. Differences between s.-s. 1 of s. 6 and the corresponding provisions of the English Act pointed out. Under s.-s. 1 of s. 6 of the Ontario Act the employer is answerable, so far as the condition or arrangement of the ways, etc., is concerned, for the negligence of any person, whether in his service of not, to whom he intrusts the duty mentioned in the subsection, in the performance of that duty, in the same way and to the same extent as he would have been answerable at the common law had he taken upon himself personally the performance of the duty, and where an appliance necessary for the safety of the workman is required in the course of the work, and the employer directs any one to provide it ready for the use of the workman, that person is one intrusted with the duty of seeing that the appliance is proper. *Giles* v. *Thames Ironworks Shipbuilding Co.*, 1 Times L. R. 469, and *Ferguson* v. *Galt Public School Board*, 27 A. R. 488, followed. *Markle* v. *Donaldson*, 2 L. R. 218, 391, 7 O. L. R. 376, 8 O. L. R. 682, 3 O. W. R. 147, 4 O. W. R. 377.

Workmen's Compensation Act — Defective implement — Orders of foreman — Findings of jury — Negligence — Judge's charge. *Henry* v. *Hamilton Brass Manufacturing Co.*, 3 O. W. R. 448.

Workmen's Compensation Act — *Defects—Private railway—Unpacked frog—Negligence.*] — The defendants, manufacturers, had on their premises a private line of railway, with switches, turnouts, etc., connected with one of the public railway lines, and over which ordinary freight cars and steam locomotives used for the purposes of the defendants' business, were drawn or propelled in the usual manner. The plaintiff, a switchman employed by the defendants, while engaged in coupling cars, had his foot caught in an unpacked frog, or an unpacked space between the wing rail and the frog, or between the rail guard and the other rail, whereby he was severely injured:—*Held*, that the omission of the packing was a defect in the condition of arrangements of the defendants' works, machinery, or plant, within the meaning of s. 3 (1) of the Workmen's Compensation Act, as well as of s. 5 (2), (3), which applied to the defendants' railway, and that it was for the jury to say on the evidence whether the plaintiff had knowledge and the defendants were ignorant of such defect. Order of Divisional Court for a new trial affirmed. *Cooper* v. *Hamilton Steel and Iron Co.*, 8 O. L. R. 553, 3 O. W. R. 808.

Workmen's Compensation Act — Defects in machinery — Contributory negligence. *Taylor* v. *Canlon*, 2 O. W. R. 714.

Workmen's Compensation Act — *Disobedience to orders—Railway—Death of engine-driver — Negligence — Contributory negligence — Signals.*]—The defendants were erecting an interlocking apparatus at a point of their main line where there was a siding, whereby the switch could be worked and a signal shewn to indicate how it was set, by lowering the upper or lower arm of the signal as the case might be. The plaintiff's husband, an experienced engine-driver in the defendants' employment, having been informed before starting with his train that the apparatus was in working order, and that all trains were to be governed by the rules applicable in such cases, approaching the spot saw the signal with both arms down, intimating that the interlocker was out of order, but nevertheless proceeded, and, the switch not being fastened in any way, the train was derailed and he was killed. As a matter of fact, the apparatus was not in working order, a switchman of the defendants being at the spot with flag signals to use in case of necessity, but he failed to warn the deceased. The defendants' rules governing engine-drivers provided that they should stop when in doubt as to the meaning of a signal, also that a signal imperfectly displayed must be regarded as a danger signal, and that in case of doubt they were to take the safe course and run no risk. Employees were also specially instructed that if any interlocker was out of order trains were to be flagged through. The plaintiff brought this action for damages under R. S. O. 1897 c. 160:—*Held*, that, although there was a plain defect in the condition of the way which was the cause of the derailment of the engine, the plaintiff was properly nonsuited, in that her husband, had he survived, could not have maintained an action, having negligently disobeyed his orders as contained in the rules by proceeding in spite of the signals. *Holden* v. *Grand Trunk Rw. Co.*, 23 C. L. T. 104, 5 O. L. R. 391.

Workmen's Compensation Act — *Employment obtained by infant misrepresenting his age—"Serious and wilful misconduct"—Release—Validity.*]—The making of a false representation by an infant to the effect that he is of full age in order to secure employment is not such "serious and wilful misconduct or serious neglect" as disentitles the applicant to recover under the Workmen's Compensation Act 1902, it not appearing that the accident in question was "attributable solely" to such misrepresentation.—An infant injured in the course of employment so obtained signed a release, but subsequently tendered repayment of the consideration for the release:—*Held*, that the release was not a bar to his recovering. *Dursley* v. *Canadian Pacific Rw. Co.*, 14 B. C. R. 15, 9 W. L. R. 20.

Workmen's Compensation Act — Evidence — Findings of jury — Damages — Earnings of deceased — Apportionment of damages. *Parker* v. *Michigan Central Rw. Co.*, 11 O. W. R. 860.

Workmen's Compensation Act — *Injury affecting claimant's earning power—Estimating compensation — Injury partial,*

though permanent.] — In estimating compensation under the Workmen's Compensation Act for the loss of a thumb, consideration must be given to the fact that while the claimant is not thereby entirely prevented from carrying on his occupation, his chances of employment in competition with others are lessened, and his earning power consequently reduced. *Roylance* v. *Canadian Pacific Ry. Co.*, 14 B. C. R. 20, 9 W. L. R. 239.

Workmen's Compensation Act — *Injury caused "solely" by servant's "serious neglect."*]—An application by the parents of a brakesman who was killed in the services of the defendants, under s.-s. 4 of s. 2 of the Workmen's Compensation Act, to recover compensation for his death, was refused because the evidence shewed the injury to the deceased to have been caused "solely by his serious neglect." Misconduct is not "serious" merely because the actual consequences in the particular case are serious; the misconduct must be serious in itself. Any neglect is "serious neglect" within the meaning of the Act which in the view of reasonable persons in a position to judge, exposes anybody, including the person guilty of it, to the risk of serious injury. If the danger to be apprehended is a danger of serious injury, or if the injury to be feared is of such a character that it may be described as serious, then the case is within the language of the Act. *Hill* v. *Granby Consolidated Mines Limited*, 12 B. C. R. 118, 4 W. L. R. 104.

Workmen's Compensation Act — Liability at common law—Personal negligence—Employment of competent foreman. *Belmont* v. *Smart Manufacturing Co.*, 6 O. W. R. 942.

Workmen's Compensation Act — Limitation of time—Waiver—Correspondence —Common law liability—Findings of jury— Nonsuit—Cause of injury—No connection with negligence found. *Thompson* v. *Ontario Sewer Pipe Co.*, 9 O. W. R. 132, 11 O. W. R. 32.

Workmen's Compensation Act — Negligence—Defect in machinery — Knowledge of master—Knowledge of servant — Contributory negligence — Jury — Nonsuit. *Gordanier* v. *John Dick Co.*, 2 O. W. R. 1051, 3 O. W. R. 372, 599.

Workmen's Compensation Act — *Negligence — Elevator — Warning —Accident arising out of and in the course of employment — "Serious and wilful misconduct."*]—Action by widow of workman killed in defendants' factory. Deceased was temporarily employed, could speak and understand, but not read and write English, and while so employed, although directed not to touch the elevator, was caught therein and was killed:—*Held*, that the accident arose out of and in the course of the employment, but that deceased was guilty of wilful and serious misconduct. Action dismissed. *Granick* v. *British Columbia Sugar Refinery Co.* (B.C.), 10 W. L. R. 256.

Workmen's Compensation Act — Negligence of fellow-servant — Superintendence—Jury. *Webb* v. *Canadian General Electric Co.*, 322, 865, 1113, 2 O. W. R. 322, 865, 1113.

Workmen's Compensation Act — Negligence of foreman of works—Questions for jury— New trial—Small verdict. *Aillo* v. *Fauquier, Gallio* v. *Fauquier*, 1 O. W. R. 833.

Workmen's Compensation Act — —Notice of accident — Reasonable excuse for failure to give — Release of cause of action — Inadequacy of payment—Surrounding circumstances—Invalidity. *Smith* v. *McIntosh*, 8 O. W. R. 472.

Workmen's Compensation Act — *—Notice of accident — Reasonable excuse for not giving — Release.*]—The plaintiff, in the employment of the defendants, was, owing to their negligence, injured by the bursting of a blow pipe attached to a boiler in their mill. The defendants' manager knew of the accident the day it happened, and informed the chief engineer of a boiler insurance company in which the defendants had an insurance policy. That official visited the plaintiff during the third week of his confinement to bed, and in a friendly way told him he would pay him $30 to cover 3 weeks' wages, but did not do so. The plaintiff was confined to his bed for 8 weeks, and his doctor's bill was $125. During his illness he complained to the defendants' manager that the $30 had not been sent to him, and the latter, acting apparently as a friend, said he would look into it. Subsequently the plaintiff returned to work with the defendants, and while with them the insurance company sent $30 to the defendants' manager, who paid it over to the plaintiff, and got him to sign a release of all claims. No notice was given by the plaintiff to the defendants as required by s. 13, s.-s. 5, R. S. O. c. 160, but the defendants were not prejudiced thereby:—*Held*, that by the conduct of the defendants, the plaintiff was thrown off his guard as to seeking legal advice, and he had reasonable excuse for not giving notice as required.—*Held*, also, on the evidence, that the plaintiff did not understand the situation and did not intend to release the defendants from all liability; and judgment was entered for the plaintiff for the amount assessed by the jury, less the $30. Judgment of Anglin, J., at the trial reversed. *Smith* v. *McIntosh*, 8 O. W. R. 472, 13 O. L. R. 118.

Workmen's Compensation Act — Notice of action—Negligence — Superintendent—Contributory negligence — Conflicting evidence—Findings of jury. *Webb* v. *Canadian General Electric Co.*, 3 O. W. R. 853.

Workmen's Compensation Act — *—Notice of injury given too late—Notice by defendants as to—"Hearing of the action"—When said to begin — R. S. O. c. 160, ss. 9, 14.*]—In an action under the Workmen's Compensation for Injuries Act (R. S. O. 1897 c. 160), the notice of the injury required by s. 9 of the Act was given ten days too late, and the want of notice was pleaded by the defendant. The case first came up for trial on the 22nd January, 1908, when it was put at the foot of the list, by direction of the Court, and on the same day the defendant served notice, under s. 14 of the Act, that he intended to rely for a defence on the want of notice. The case came on again for hearing in due course on

the 27th January, when it was again postponed, on payment of costs of the day by the defendant, who was not ready to proceed, and the case was ultimately tried on the 14th February:—*Held*, that in this particular case the "seven days" required by the statute were to be reckoned backwards from the 27th January, when the plaintiff was ready to go on with the trial, and that the notice served on the 23rd January was, therefore, too late.—*Semble*, that the statutory phrase, "seven days before the hearing of the action," is to be read as referring to the day originally fixed for the trial, and not to any adjourned day or to the day of actual hearing, and that therefore the hearing of the action began on the 23rd January, when the parties appeared, and the case was put at the foot of the list. *Potter* v. *McCann*, 16 O. L. R. 535, 11 O. W. R. 417.

Workmen's Compensation Act — Notice prescribed by s. 9—Reasonable excuse for failure to give—Administrator suing under Fatal Accidents Act—Letters of administration—Ignorance of law—Reasonable promptitude—Actionable negligence—Workman run over by train in railway yard — Findings of jury—Licensee—Statutory duty —Defective system. *Giorinazzo* v. *Canadian Pacific Ry. Co.*, 13 O. W. R. 24.

Appeal allowed and action dismissed. *Ibid.*, 13 O. W. R. 1200.

Workmen's Compensation Act — Person intrusted with superintendence — Evidence—Case for jury. *Randall* v. *Sheir*, 6 O. W. R. 394.

Workmen's Compensation Act — *Quarryman—Amount of compensation.*] — Making a rock cutting in the construction of a railway road bed is not quarrying within the meaning of the Workmen's Compensation for Injuries Act, C. S. N. B. 1903 c. 146, even though the rock removed is used to build the road bed.—Under s. 6 of the Act damages may be assessed to an amount equal to the estimated earnings of the workman for three years preceding the injury, although that amount should exceed $1,500. This section fixes a limit, but not a measure of damages. *Henry* v. *Malcolm*, 39 N. B. R. 74.

Workmen's Compensation Act — Railway contractors — Sub-contractors — Question of liability—Ruling of trial Judge —Questions for jury—New trial. *Bertudato* v. *Fauquier*, 1 O. W. R. 802.

Workmen's Compensation Act — Rolling mills—Dangerous place—Absence of guard—Factories Act—Defect in ways and premises—Evidence for jury. *Colbourne* v. *Hamilton Steel and Iron Co.*, 3 O. W. R. 619.

Workmen's Compensation Act — *Superintendence — Negligence — Damages.*] —The infant plaintiff, a lad of 18, was engaged with two men in riveting the plates of a boiler. It was the duty of one of the three to heat the rivets, of the second to place them in position, and of the third to fasten them by means of a hydraulic hammer, which he put in operation by a lever. This man directed the infant plaintiff to go inside the boiler to hold back a loose stay which was coming in the way of the rivets, and the infant plaintiff while in the boiler was injured.—*Held*, affirming the decision of a Divisional Court, 11 O. L. R. 124, 6 O. W. R. 1022, that the man who was using the hydraulic hammer was in effect necessarily instructed with the superintendence of the whole operation, that to his orders the infant plaintiff was bound to conform, and that the accident having happened, as was found, owing to this man's negligence, the infant plaintiff was entitled to damages: —*Held*, however, that the damages must be reduced by the $400 which the jury evidently intended for the adult plaintiff, as there was no evidence to support the verdict in this respect. *Shea* v. *John Inglis Co., Limited*, 12 O. L. R. 80, 8 O. W. R. 208.

Workmen's Compensation for Injuries Act, N. B. Con. Stat. 1903, c. 146— Acts of New Brunswick, 1907, c. 26, s. 2, s.-s. 1 — Accident — Facts — Negligence — Contributory negligence—Compensation where injury caused by reason of defect in the condition or arrangement of ways, works, machinery, gear, appliances, plant, etc., used in business of the employer—Acts of New Brunswick (1908), c. 31, s. 2—"Defect"—Review of authorities—Comparison of English and New Brunswick Compensation Acts. *Amos* v. *Clark & Adams* (N. B. 1910), 9 E. L. R. 156.

"Young girl" — *Negligence — Breach —Damages—New trial.*]—Employing a girl under eighteen years of age to work at a self-acting machine in breach of the provisions of s. 14 of the Ontario Factories Act, R. S. O. 1897 c. 256, is in itself sufficient to render the master *prima facie* liable in damages for an accident which happens in the course of such employment, and negligence on his part directly conducing to the accident need not be shewn. *Roberts* v. *Taylor*, 31 O. R. 19, overruled. Judgment of Street, J., 1 O. L. R. 18, 21 C. L. T. 143, reversed. The Court, being of opinion, however, that the damages awarded by the jury were excessive, directed that there should be a new trial unless the damages were reduced. *Fahey* v. *Jephcott*, 21 C. L. T. 556.

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17. Ships, Management of.

Collision of ships—*See* Ships.

Damage to grain elevator—*By steam barge—Breaking moorings—Caused by another vessel—Damages — Loss of profit.*]—Plaintiffs were owners of a grain elevator at Meaford, Defendant Plant was owner of a steam barge "Mount Stephen," and defendants, Montreal Transportation Co., were owners of steam barge "Kinmount." The barge "Mount Stephen" was moored to plaintiff's dock unloading wheat into plaintiff's elevator, when barge "Kinmount" in passing "Mount Stephen," to moor bow to bow at the dock, used her propeller, thus throwing a great force of water against bow of "Mount Stephen," causing the "Mount Stephen" to surge rapidly aft, with the result that the marine leg of the elevator at the time in No. 6 hatch of "Mount Stephen," was pulled out of the elevator and so seriously damaged that it could not be repaired

during that year's season of navigation. Plaintiffs brought action against both defendants to recover damages for negligence in causing injury to plaintiff's elevator and for loss of profits.—Trotzel, J., *held*, that both defendants were guilty of negligence, and that plaintiffs' servants were not guilty of contributory negligence. Judgment for plaintiffs for $700 for injury to the elevator leg and $5,000 for loss of profit, with costs. *Meaford Elevator Co.* v. *Playfair* (1911), 18 O. W. R. 773, 2 O. W. N. 863.

Dangerous condition — *Cause of death—Evidence—Onus of proof.*]—In an action to recover damages for death caused by alleged negligence, the onus is on the plaintiff to prove not only that the defendant was guilty of actionable negligence, but also, either directly or by reasonable inference, that such negligence was the cause of the death. Where, therefore, a man employed on the defendant's tug was drowned, and it was shewn that wood had been piled upon the tug's deck in such a way as to make it dangerous to pass along the deck, but it was also shewn that there was a safe passage-way on a scow lashed to the tug, and there was no evidence whatever as to the manner of the accident, the action was dismissed. *Young* v. *Owen Sound Dredge & Construction Co.*, 21 C. L. T. 15, 27 A. R. 649.

Defective appliances in ship — *Injury to passenger—Duty of owners—Proximate cause.*]—The plaintiff, a boy of four years of age, with his parents, was being carried as a passenger on a steamboat of the defendants. The child and his mother were in a house on the boat's deck, leading from which out on to the deck were doors fitted with appliances intended to keep them fastened back, when they should happen to be flung wide open. While the plaintiff was in the act of passing through one of the doorways, the door swung to and jammed his fingers, so that the tips of some of them had to be amputated. The plaintiff's father and elder brother swore that the fastening of the door was out of order, and would not hold it back. There was evidence to shew that the doors of the house were frequently being opened and shut by passengers and others, and that a very few minutes before the accident a passenger had gone through the doorway in question, leaving the door on the swing. It was also proved that the fastenings had been put on the doors in order to hold them open in warm weather for the purposes of ventilation:—*Held*, that there was no duty cast upon the defendants to provide the doors with the appliances mentioned or to maintain them in good working order; and, even if there were, the evidence went to shew that the proximate cause of the accident was the act of the passenger in leaving the door on the swing, for which the defendants could not be held liable. *Cormier* v. *Dominion Atlantic Ry. Co.*, 36 N. B. R. 10.

Destruction of nets — *Navigable river—Tow-boat—Navigation.*]—A net set by the plaintiff in a public tidal navigable river, for the purpose of catching fish, was carried away by the negligent navigation of the defendants' tow-boat, or a tow which she had in charge, by going unnecessarily near the side of the river where the net was set:—*Held*, even assuming that the net extended further out from the shore than the law allowed, that the defendants had, nevertheless, no right to run into and destroy it, either through wantonness or neglect; also, that the course of navigation being directed from the tow-boat, the defendants would be liable for the consequences, even though the actual carrying away of the net was caused by the tow coming in contact with it. *Hubbard* v. *Dickie*, 1 E. L. R. 218, 39 N. S. R. 506.

Discharging freight from steamer to scow — Carelessness of employees — Sinking of scow—Responsibility for accident. *Canadian Pacific Ry. Co.* v. *Dominion Bridge Co.*, 4 E. L. R. 358.

Ferry boat wharf — *Dangerous way—Precautions for preventing accidents—Contributory negligence—Findings of jury.*] — A passenger who arrived on the pontoon wharf as a ferry boat was swinging out, and when it was a few feet away from the wharf, with the gangways withdrawn, attempted to jump aboard over the stern bulwarks, and was drowned. In an action by her representatives to recover damages from the ferry company on account of negligence in failing to provide proper means to prevent accidents at their wharf, the jury found that the drowning was caused by the fault of the company, "in not having proper gates at the gangway openings leading from the pontoon to the boat," and that deceased was herself negligent "by her imprudence in attempting to board the boat after the gangway had been raised and the boat was swinging preparatory to leaving the pontoon," but that she "was not then aware that the boat had left the wharf:"—*Held*, reversing the judgment appealed from (Drummond, J., dissenting, on a different appreciation of the facts), that, as there was no proof of any negligence on the part of the company which proximately and effectively contributed to the accident, but, on the contrary, it appeared that the sole, direct, proximate and effective cause of the accident was the wilful and rash act of the deceased in attempting to jump aboard the ferry boat over the bulwarks, after the gangways had been withdrawn and the boat had got under way, the company could not be held responsible in damages. *Tooke* v. *Bergeron*, 27 S. C. R. 567, and *George Matthews Co.* v. *Bouchard*, 28 S. C. R. 585, followed. *Quebec and Levis Ferry Co.* v. *Jess*, 35 S. C. R. 633.

Injury to person — *Licensee — Invitation — Evidence — Findings of jury.*] — The plaintiff, who was the agent of an express company, and travelled on the defendants' steamer in charge of the company's express parcels, by direction of the steamer's officers went down on a twin freight elevator to look for some missing parcels in the steamer hold. The elevator stopped at the "between decks," and the plaintiff stepped off into the other elevator shaft and was injured. He was not warned of the danger, the light was bad, and though he was given a ship's lantern it did not cast any light at his feet. The jury found that he fell as a result of the defendants' negligence in not properly protecting the elevator, and that he was not guilty of contributory negligence:—*Held*, that the plaintiff was entitled to require that the defendants' premises

should be rendered reasonably safe for him, and that the verdict for the plaintiff should stand. *Indermaur* v. *Dames*, L. R. 2 C. P. 311, followed. *McBeath* v. *Eastern Steamship Co.*, 39 N. B. R. 77, 6 E. L. R. 543.

Injury to ship — Navigable river — Erection of bridge — County corporation —Leaving sunken piles in river — Injury to ship — Contributory negligence — Conflicting evidence — Findings of trial Judge. *McAuliffe* v. *Welland*, 8 O. W. R. 522.

Injury to vessel on marine slip—Evidence—Inference of negligence from facts proved—Notice limiting liability—Effect of. *Canton-Pew Fisheries Co.* v. *North Sydney Marine Rw. Co.* (N. S. 1910), 9 E. L. R. 151.

Navigable river — Erection of bridge —County corporation—Leaving sunken piles in river—Injury to ship—Contributory negligence—Conflicting evidence — Findings of trial Judge. *McAuliffe* v. *Welland*, 6 O. W. R. 819.

Open hatchway on deck of steamer —*Injury from fall into it.*]—It is negligence to leave a hatchway open on the deck of a steamer, when large appliances for unloading it are being moved about, and the owners are liable in damages for the injury to a party, either by the moving appliance shoving him into it, or by his stepping aside into it, to avoid the appliance. *Mason* v. *Ulster Steamship Co.*, 35 Que. S. C. 153.

Seaman — Unworthy vessel — Loss of life — Damages. *Grenier* v. *Connolly*, 5 E. L. R. 232.

Ship lying at her dock caught fire during the night and was destroyed. Officers of the ship failed to arouse passengers in time to permit them to escape in safety and, in an action to recover damages for injuries sustained in consequence by a passenger, the owners adduced no evidence to explain the origin of the fire:—*Held*, affirming 19 Man. R. 430, that, in the circumstances, the only inference to be drawn was that owners were grossly negligent. In such an action owners of the ship cannot invoke the limitation provided by s. 921 of "Canada Shipping Act," R. S. C., 1906, c. 113. *The* "*Orcell*," 13 P. D. 80, and *Roche* v. *London & S. W. Rw. Co.*, [1899] 2 Q. B. 502, referred to. *Dom. Fish Co.* v. *Ibbester* (1910), 43 S. C. R. 637; 31 C. L. T. 198.

Steamboat Inspection Act — *Fishing tug—Dominion rules and regulations—Life-saving apparatus.*] — The Steamboat Inspection Act, 1898, 61 V. c. 46, s. 3 (D.), enacts: "No steamboat used exclusively for fishing purposes and under 150 tons gross tonnage . . . shall be subject to the requirements of this Act . . . except as to the obligation to carry one life-buoy . . . and to carry a life-preserver for each person on board." Section 11 of Part VIII. of the Dominion rules and regulations respecting the inspection of boats, etc., purporting to have been passed under the Act, provides that "every steamboat not employed in the carriage of passengers . . . shall at all times when the crew thereon is on board . . . have on board . . . a good, suitable and sufficient boat or . . . boats, in good condition, etc.; and another regulation provides that "every steamboat not employed in the carriage of passengers . . . shall . . . have on board . . . a number in due proportion to that of the crew of . . . fire buckets . . . and of axes and lanterns, to the satisfaction of the inspectors:"—*Held*, that the above Act, except as to life-buoys and life-preservers, did not apply to a fishing tug of the defendants of some 12 1-2 tons, and that if the rules and regulations were intended to carry the provision beyond the terms of the statute, they were without authority, but that it was preferable to read them as not intended to apply to steamboats excepted from the operation of s. 3 of the Act; and that therefore the plaintiff could not recover in an action brought under the Fatal Accidents Act against the defendants in respect to a death alleged to have been caused by the negligence of the defendant company in failing to comply with the provisions of the above Act and regulations as to life-saving apparatus other than life-buoys and life-preservers. *Sturgeon* v. *Port Burwell Fish Co.*, 12 O. L. R. 154.

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18. Vehicles—Reckless Driving, Etc.

Automobile—*Sent out for repairs—Accident—Liability of owner.*]—Two essential conditions must exist to make the owner of a thing liable, as such, for damages from an injury, (1) the injury must have been caused by the thing, and (2) the thing must have been in his care at the time. Hence, when the owner of an automobile sends it for repairs to a company that carries on the business, and the company, after doing the work, sends out the machine, in the care of one of its own chauffeurs, to test it, and an accident occurs through the fault of the chauffeur, the owner is not liable for the consequences. The fact that his own chauffeur was in the automobile at the time is immaterial. *McCabe* v. *Allan* (1910), 39 Que. S. C. 29.

Automobile left standing on side of road — *Injury to person driving by horse shying — Motor Vehicles Act — Evidence —Onus — Unreasonable use of highway — Contributory negligence—Findings of jury.*] —Under s. 18 of the Motor Vehicles Act, 6 Edw. VII. c. 46 (O.), where any loss or damage is incurred or sustained by a person by reason of a motor vehicle on a highway, the onus is imposed on the owner or driver of proving that the loss or damage did not arise through his negligence. The defendant, the owner of an automobile—a bright red one—was driving to a village intending to stop at an hotel there and have dinner. On arriving at the foot of a hill, the road over which led to the hotel, he found that, owing to the condition of the road, it was impracticable to drive the car up the hill, so he drew it up at the side of the road about two feet from the travelled part, locking it, as required by the Act, and taking the key with him, and then went to the hotel and had dinner, remaining there some three hours. While the car was in this position, the plaintiff was in the act of driv-

ing down the hill, and, when he was about twenty rods from the car, his horse caught sight of it and shewed signs of fright. The plaintiff, notwithstanding, drove him on about a rod, when he again shewed fright; the plaintiff still urged him on, and when within a rod and a half of the car he shewed an inclination to leave the road, and, on the plaintiff pulling him back, he wheeled round and upset the carriage, whereby the plaintiff and the horse and carriage were injured. It appeared that the car could have been driven to a yard of another hotel some 600 feet away.—*Held*, that there was evidence of negligence to submit to the jury as to there being an unreasonable user of the highway, and an unauthorised obstruction thereof, and therefore, a finding in favour of the plaintiff should not be disturbed. Meredith, C.J.C.P., dissenting. *Per* Meredith, C.J.C.P.:—Apart from s. 18, there was no evidence of negligence to submit to the jury; in view of the requirements of that section, it would be difficult to direct judgment to be entered for the defendant; but there should be a new trial, and the jury should be directed to find whether the automobile, in the place where it was, was an object likely to frighten horses of ordinary gentleness, and also whether there was contributory negligence on the plaintiff's part. Judgment of the County Court of Elgin affirmed. *McIntyre* v. *Coote* (1909), 19 O. L. R. 9, 13 O. W. R. 1098.

Child alone and unaccompanied *on public street — Liability.*] — Liability for an accident whereby a child, three years of age, is killed by a vehicle on a public street must be borne by the child's parents, when the evidence shews that the driver of the vehicle was not guilty of any negligence, imprudence or want of skill, and when the accident is clearly the result of the fact that the child was allowed on the street alone and unaccompanied. *Lafortune* v. *Dupis* (1911), 17 R. de J. 194.

Collision of vehicles — *Bicycle — Rule of the road.*]—The plaintiff, while riding a bicycle on St. Lawrence street in the city of Montreal, was injured by the defendants' horse and wagon, which were being driven in the opposite direction, and on the wrong side of the road, but it was shewn that there was ample room for the plaintiff to pass with his bicycle between the conveyance and the sidewalk.—*Held*, that, although the accident might not have happened had the defendants been driving on the right side of the street, the plaintiff could not recover, he having lost his balance while approaching or passing the defendants' wagon, and this being the immediate cause of the injuries sustained. *Brawastein* v. *Imperial Electric Light Co.*, 17 Que. S. C. 292.

Collision of vehicles — *Loss of horse —Inevitable accident — Liability.*] — The plaintiff's horse and carriage came into collision with the defendant's horse and carriage upon a highway, and the plaintiff's horse was killed. The plaintiff sued for damages, alleging negligence, the defendant being on the wrong side of the highway.—*Held*, on the evidence, that this being so was the result of inevitable accident; that the defendant was not guilty of negligence and was not liable to the plaintiff.—Review of the authorities. *Parkinson* v. *Dolsen* (1911), 16 W. L. R. 383, B. C. R.

Collision of vehicles — *Rule of road — Runaway.*]—In an action on the case for negligence in driving the defendant's horse whereby his waggon came into collision with and damaged that of the plaintiff, it is not sufficient to prove merely that the defendant was driving on the wrong side of the road, especially as it was shewn that the defendant just before the collision had crossed from the left side of the road for the purpose of speaking to a man sitting on a doorstep on the other side, and that the plaintiff's horse at the time of the accident was running away, and beyond control. *Stout* v. *Adams*, 35 N. B. R. 118.

Collision on highway — Improper driving—Contributory negligence—Damages. *Lelacheur* v. *Manuel*, 5 E. L. R. 150.

Highway — Horse — Presumption — Onus. *Doughty* v. *Dobbs*, 3 O. W. R. 19.

Horse and carriage — *Damages for injuries arising from being struck by horse and carriage.*] — Plaintiff brought action to recover damages for alleged negligence in being struck by defendant's horse and carriage while being driven along College street, Toronto, at an excessive speed. Defendant alleged negligence on plaintiff's part, in view of his age, to ride a bicycle on a street like College when the street is overrun with cars, motors and other vehicles. Plaintiff denied his alleged condition prior to the accident, and declared that though he was 67 years of age he had been in regular employment earning $3.50 a day almost up to the day of the accident. At the trial before Clute, J., the jury awarded plaintiff $1,000 damages. The Court of Appeal affirmed the above judgment. *Leslie* v. *McKeown* (1909), 14 O. W. R. 846, 1 O. W. N. 106.

Horses running away—Injury to person lawfully on highway—Liability of owner of horses — Extraordinary occurrence—Absence of evidence to shew want of proper care. *Moore* v. *Crosland* (Man.), 6 W. L. R. 199.

Horses running away — *Injury to plaintiffs.*]—Defendant, drawing a load of hay along a country road, had to get off his wagon to adjust the load, leaving the reins lying on the ground. While loosening the binder the team ran away and injured the plaintiff.—*Held*, upon the evidence, that defendant was not guilty of negligence. *Ryan* v. *McIntosh* (1909), 14 O. W. R. 482; affirmed, 14 O. W. R. 1125, 1 O. W. N. 229.

Injuries caused by tally-ho overturning upon plaintiffs — *Negligence of defendant railway company in causing the tally-ho to overturn.*]—Plaintiffs while standing on the sidewalk were injured by the overturning of a tally-ho coach, the property of defendant Verral, upon them. The tally-ho was struck and overturned by a street car.—*Held*, upon the evidence, that the injuries to the plaintiffs were caused by the negligence of the defendant railway company only. There was no negligence proved against the defendant Verral, and the action was dis-

missed as against him with costs which, when paid to him, to be recovered by plaintiffs from the defendant railway company. Judgment given against the defendant railway company, to plaintiff John McBain for $500 and to plaintiff Elizabeth McBain for $400, with costs on High Court scale. *McBain* v. *Toronto Ry. Co. & Verral* (1909), 14 O. W. R. 982, 1 O. W. N. 185.

Injury to bicyclist by motor car — Evidence for jury—Setting aside nonsuit—New trial. *Harcastick* v. *Emory*, 7 O. W. R. 799, 8 O. W. R. 528.

Injury to child — Carelessness of driver of wagon—Finding of jury—Evidence—Resolution of defendant company's directors. *Cork* v. *Canada Ice Co.*, 3 O. W. R. 106.

Injury to infant in highway—*Careless driving—Evidence for jury—Damages—Right of infant's father to recover for expenses—Objection not taken at trial.*]—The infant plaintiff, while playing in a city street, was run over by a dray of the defendants, which, according to some of the evidence, was being driven at a great rate of speed, at a corner which the dray turned, taking the left side of the roadway:—*Held*, that there was evidence of negligence which could not be withdrawn from the jury.—The infant plaintiff's father was joined with him as a plaintiff claiming to recover the expenses which he had incurred on account of the infant's injuries. The infant was six years old and lived at home with and under the charge of the father.—*Held*, that the father was obliged to supply the infant with necessaries of life, including medical attendance, and if the burden of that duty was increased by the wrongful acts of the defendants, the father was entitled to recover as damages the amount of such increase; Meredith, J.A., dissenting. *Wilson* v. *Boulter*, 26 A. R. 184, distinguished.—No objection was taken by the defendants to the right of the father to recover until the argument before the Court of Appeal.—*Held*, *per* Osler, J.A., that the objection was open, unless it was possible for the plaintiff's case to have been bettered by the introduction of further evidence at the trial, which did not appear to be the case; but, *per* Garrow, J.A., that it was too late to take the objection.—Judgment of a Divisional Court affirmed. *Banks* v. *Sheddon Forwarding Co.*, 11 O. L. R. 483, 7 O. W. R. 88.

Injury to person by fault of driver of vehicle in highway — *Liability of owner—Relation between owner and driver—Master and servant or bailor and bailee—Inference from facts — Duty of appellate court.*]—The defendant, an hotel keeper, being the possessor of an omnibus and horses, made an agreement with M. whereby, in consideration of M. driving the defendant's guests free to and from the railway stations, and paying the defendant 70 cents a day for the board of the horses at the defendant's stables, M. should be entitled to the use of the omnibus and horses, and to take for his own use all sums which he could earn by conveying passengers other than the defendant's guests, and by carrying luggage. The plaintiff was injured upon the highway owing to the negligence of M., who was driving the omnibus empty to one of the stations to meet an incoming train:—*Held*, that the question whether the relation between the defendant and M. was that of master and servant or that of bailor and bailee was a question of fact, and the test was the existence of the right of control as to anything not necessarily involved in the proper performance of the work undertaken by M. for the defendant: and (Clute, J., dissenting), that the proper inference from the above facts and other facts in evidence (set out in the judgments) was that the relationship between the defendant and M. was that of bailor and bailee, and therefore the defendant was not responsible for the negligence of M. *Saunders* v. *Toronto*, 26 A. R. 265, followed.—There was no conflict of evidence, and the trial Judge drew inferences from the undisputed facts.—*Held*, that an appellate court was at liberty (and *per* Anglin, J., was bound) to review the inferences of the trial Judge. *Fleaty* v. *Orr*, 10 O. L. R. 59, 8 O. W. R. 795.

Injury to person driving — *Collision — Contributory negligence — Immoderate speed.*]—In an action for damages for injuries received by the plaintiff in consequence of negligent driving by the defendant, to which the principal defence was contributory negligence on the part of the plaintiff, the trial Judge found in the plaintiff's favour, and assessed the damages at $850, giving the plaintiff costs. On appeal, the Supreme Court *en banc* was equally divided on the question of contributory negligence, and the defendant's appeal was dismissed without costs. *Nass* v. *Manning*, 39 N. S. R. 133, 1 E. L. R. 35.

Leaving carriage in highway — *Injury to traveller—Liability.*]—A person who leaves a carriage all night in the street upon the pavement, even when it leaves a sufficient space for foot passengers or other vehicles, is guilty of negligence and responsible for accidents which result from it. *Cartmael* v. *Peck Rolling Mills Co.*, 32 Que. S. C. 419.

Motor car running into bicycle — *Injury to bicyclist—Cause of injury—Damages.*]—Action for damages for injuries received. Plaintiff, while riding on his bicycle, was overtaken and run into by defendant's motor car:—*Held*, that defendant responsible for injury. Judgment for $700. *Russell* v. *Knapp* (1909), 14 O. W. R. 98.

Trespass — *Horse racing — Intruder upon race track—Carelessness.*]—After the first heat of a trotting match in which N. had been a competitor, he was seated on his sleigh and walking his horse upon his proper side of one of the tracks, laid out by the ploughing away of the snow on the ice of a public harbour, while waiting to be called for the next heat. M., who had not been a competitor in that race, came along the same track, from an opposite direction to that in which N. was going, driving his vehicle at excessive speed, and, in attempting to pass in a narrow space between the ridge formed by the snow and N.'s sleigh, collided with it, causing injuries to N. and damaging his sleigh and harness:—*Held*, affirming the judgment in 39 N. S. R. 133, that, even if M. was lawfully upon the track in question, he was responsible for damages, as the acci-

dent was solely attributable to his improvident carelessness and want of judgment. *Manning* v. *Naas*, 38 S. C. R. 226.

Vehicle driven by policeman — *Injury to foot-passenger—Liability of police commissioners.*]—A constable in charge of a patrol wagon is not a servant of a board of commissioners of police constituted under s. 481 of the Municipal Act, R. S. O. 1897 c. 223, as amended by 62 V. c. 26, s. 28, so as to make them liable for his negligence in performance of his duties, whereby a person walking in the street was knocked down and injured. *Winterbottom* v. *London Police Commissioners*, 21 C. L. T. 200, 431, 1 O. L. R. 549, 2 O. L. R. 105.

19. Work of Independent Contractors.

Joint tortfeasors — *Judgment against one of several persons responsible for damages.*]—A proprietor or principal contractor undertaking works in the circumstances inherently dangerous cannot delegate the duty of providing against such danger so as to escape personal responsibility if that duty be neglected.—Failure to discharge such duty makes the proprietor and his contractor, or the contractor and his sub-contractor, as the case may be, equally liable as joint tortfeasors for resultant injury.—A judgment for damages sustained in consequence of any such injury against one of such joint tortfeasors is a bar to a subsequent action therefor against another.—Judgment appealed from, 19 Man. R. 641, affirmed. *Longmore* v. *McArthur Co.* (1910), 43 S. C. R. 640, 31 C. L. T. 197.

Municipal corporation — *Injury to servant of contractor—Negligent manner of doing work — Superintendence.*] — Where work is done for a municipal corporation under a contract, the corporation are not responsible for damages for the death of an employee of the contractor from the negligent manner of doing the work, though the corporation employ their own engineer to superintend the work. *Dooley* v. *St. John*, 38 N. B. R. 455, 5 E. L. R. 319.

NEGOTIABLE INSTRUMENTS.

See Bills of Exchange and Promissory Notes.

NEW BRUNSWICK ELECTIONS ACT.

See Elections.

NEW TRIAL.

See Trial.

NEWSPAPER.

See Contempt of Court — Costs — Courts — Defamation — Execution — Judicial Sale — Limitation of Actions—Particulars — Penalty — Pleading — Prescription — Trade Mark—Venue.

NEXT FRIEND.

See Costs — Discovery — Executors and Administrators—Husband and Wife —Infant—Practice.

NEXT OF KIN.

See Distribution of Estates—Will.

NOLLE PROSEQUI.

See Costs.

NON-DIRECTION.

See Banks and Banking—Criminal Law —Ship.

NON-FEASANCE.

See Crown — Municipal Corporations—Way.

NON-REPAIR OF HIGHWAY.

See Way.

NONSUIT.

See Courts — Defamation—Malicious Procedure — Medicine and Surgery — Municipal Corporations — Negligence—Pleading — Railway — Street Railways —Trusts and Trustees.

NORTH-WEST IRRIGATION ACT.

See Municipal Corporations.

NORTH-WEST MOUNTED POLICE.

Constable — *Discharge — Revocation—Authority of superintendent — Desertion—Trial by officers of force — Jurisdiction — Prohibition.*]—A constable in the North-West Mounted Police, whose term of service would expire in six days, applied to the superintendent commanding the post for six days' leave of absence. The superintendent approved of the application, and appointed a board to verify and record the service of the constable, who delivered up his kit and signed a receipt in which it was stated that he had been settled with to the end of his term of service. The board made a favourable report, post-dating it six days, to the ordinary form of which were added the words, under the head of "Remarks of Board and Commissioner:" "term of service having expired he is discharged." The pass for the six days' leave of absence was issued but not delivered

to the constable, and a cheque for the balance of the pay was being prepared, when the superintendent revoked the pass and ordered the constable to be notified that his pass had been revoked, the board's report cancelled, and the issue of the cheque for the balance of his pay refused; and he was ordered to continue in duty for the remaining six days of his term of service. The constable refused to obey the order to continue on duty, and absented himself from his quarters and duty, remaining absent without further leave. Proceedings for his arrest and trial under s. 18 of the Mounted Police Act, 1894, being about to be taken, a summons for a writ of prohibition was taken out:—*Held*, that the pass was revocable. (2) That the superintendent had authority to cancel proceedings of the board, and that such pass and proceedings having been cancelled, the constable was still a member of the force, — *Held*, also, that, as the officers mentioned in s. 18 of the Mounted Police Act, 1894, had jurisdiction to try a constable on a charge of desertion, and it had not been established that they were disqualified by interest or bias, the writ of prohibition should not have been granted. *Re Nettleship*, 4 Terr. L. R. 148.

See CONSTITUTIONAL LAW — MINES AND MINERALS.

NOTARIAL ACT.

See DEED.

NOTARIAL DEED.

See EVIDENCE.

NOTARIAL NOTICE.

See DEFAMATION.

NOTARIAL WILL.

See WILL.

NOTARY.

Affidavit — *Foreign country.*] — Seeing that the notary public mentioned in Art. 30, C. P., refers to a notary public in England, an affidavit sworn before a notary public in a foreign country, not in England, cannot be used in the Courts of Quebec, and will be rejected on motion. *Laurendeau* v. *Montlord*, 7 Que. P. R. 37.

Authentic acts — *Signatures—Conventional hypothec.*]—Notaries are appointed to take all the acts to which parties ought or wish to give authenticity, and therefore they must be present during the whole of the execution of the Act. 2. An act which is not signed in the presence of a notary, or the signature to which is not acknowledged before him, is not an authentic act, and has not the effect of creating a conventional hypothec. *Lavoille* v. *Kountz*, 4 Que. P. R. 258.

Notice of action—*Letter.*]—A notary public is a public officer, and as such cannot be sued for damages arising from an act done by him in the exercise of his functions unless a month's previous notice has been given to him.—2. This notice is a special proceeding in the cause which should be served upon the defendant by means of a bailiff.—3. A simple letter, of which the plaintiff does not keep a copy, is not a notice of action within the meaning of the Code, and the contents of such a letter cannot be shewn orally.—4. Such a notice would not be necessary in a case where bad faith on the part of the defendant had been shewn. *Gerrais* v. *Nadeau*, 3 Que. P. R. 18.

Partnership — *Investment of money — Misappropriation — Liability of partner.*]—The members of a firm of notaries, practising as such in partnership, but also, by their sign, business cards, and advertisements, holding themselves out as real estate, insurance, and investment agents, are jointly and severally liable in respect of their transactions, and joint and several liability exists to account for a sum of money which was intrusted to one member of the firm for investment, and, when repaid by the debtor, was not returned to the owner thereof. *Baron* v. *Archambault*, 19 Que. S. C. 1.

Witness — *Production of draft deed — Costs.*]—A notary when called as a witness may be ordered to produce for inspection a draft of an instrument prepared by him, and cannot exact, in advance, payment of costs due him for the preparation of such draft. *Soriguet* v. *Henry*, 5 Que. P. R. 95.

See AFFIDAVIT — ALIENS — BILLS OF EXCHANGE AND PROMISSORY NOTES — CHOSE IN ACTION, ASSIGNMENT OF — COSTS — COURTS — DEED — DISTRIBUTION OF ESTATES — EVIDENCE—INTERDICTION — OATHS — OPPOSITION—PRINCIPAL AND AGENT—WILL.

NOTICE OF

Accident. *See* NEGLIGENCE—WAY.

Appeal. *See* APPEAL—ELECTION—INDIAN.

Appearance. *See* APPEARANCE.

Assignment. *See* CHOSE IN ACTION, ASSIGNMENT OF.

Cancellation. *See* VENDOR AND PURCHASER.

Claim. *See* MINES AND MINERALS—WAY.

Complaint. *See* ELECTIONS.

Contestation. *See* OPPOSITION.

Cross Appeal. *See* APPEAL — PRIVY COUNCIL.

Defence. *See* PLEADING.

Deposit. *See* PLEADING.

Discontinuance. *See* ACTION—PARTIES.

Dishonour. *See* BILLS OF EXCHANGE AND PROMISSORY NOTES.

Injury. *See* NEGLIGENCE—WAY.

Payment into Court. *See* PLEADING.

Proceed. *See* CERTIORARI.

Protest. *See* BILLS OF EXCHANGE AND PROMISSORY NOTES.

Return. *See* OPPOSITION.

Sale. *See* DISTRESS—MORTGAGE—OPPOSITION.

To Produce. *See* DISCOVERY—EVIDENCE.

To Quit. *See* LANDLORD AND TENANT.

To Surety. *See* PRINCIPAL AND SURETY.

Trial. *See* COURTS—TRIAL.

NOTICE OF ACTION.

Bailiff—*Sale of goods under execution—Public officer — Act of omission.*]—A bailiff in selling goods seized under an execution, is fulfilling public functions, and if he is sued for damages for what he has done in these circumstances, he has a right to the notice mentioned in Art. 88, C. P. C. 2. A public officer has a right to this notice as well when he is sued for an act of omission as for an act of commission. *Dion* v. *Richard*, 23 Que. S. C. 403.

Charter of city — *Condition precedent —Plea of want of notice.*]—Notice of an action for damages against the city of Montreal, such as required by Art. 536 of the city charter, is a condition *sine qua non* to the right of action, and the absence of it may be pleaded by defence *au fond*. *Valiquette* v. *Montreal*, 9 Que. P. R. 65; *Thornber* v. *Montreal*, 9 Que. P. R. 129.

Churchwarden — *Public officer—Money illegally spent — Damages.*]—In this action the respondent was a churchwarden, and, therefore, a public officer within the meaning of Art. 88, C. P. 2. The action, although it claimed from the respondent the repayment of certain sums which he had illegally spent in his capacity of churchwarden, was in fact an action for damages, and, therefore, the respondent had a right to the notice required by Art. 88 C. P. Default of notice rendered the action premature. *Belanger* v. *Mercier*, 12 Que. K. B. 428.

Defamation—*Summary dismissal of action.*]—There were several defendants to the action, and different causes of action were alleged. As against one defendant, a company, the allegation was that it had maliciously published and circulated a printed newspaper containing statements describing the goods manufactured by the plaintiffs as inferior, etc. A Judge in Chambers considered that the action as against the company was for libel, and dismissed it summarily because the notice of action required by s. 6 (2) of R. S. O. 1897 c. 68 was not given. A Divisional Court reversed this order, thinking it better to have the whole case disposed of at the trial, and allowed the plaintiffs to amend if they desired and the defendants to plead the want of notice. *Gurney Foundry Co.* v. *Emmett*, 7 O. L. R. 694, 3 O. W. R. 382, 554, 630.

Dominion constable — *Provincial Government detective — Malice—Public officer.*]—A Government detective in the province of Quebec, appointed to that office under an order in council, who is at the same time a Dominion constable, having jurisdiction throughout the whole of Canada, is a public officer, and has a right to the month's notice mentioned in Art. 88, C. P., of an action against him for damages on account of something done by him in the exercise of his public functions, unless it be alleged and proved that he has acted maliciously and in bad faith. *McDonald* v. *McCaskill*, 5 Que. P. R. 266.

False imprisonment — *Peace officer — Honest belief.*]—In an action for false imprisonment the defendant, acting as a peace officer under the Criminal Code, is entitled to notice of action under s. 976, if he honestly believed the plaintiff had committed a felony. The *bona fides* of the defendant's belief is a question of fact, and must be submitted to the jury, if any facts exist which could give rise to an honest belief. The reasonableness of the belief is not material. *White* v. *Hamm*, 36 N. B. R. 237.

Malicious arrest — *Municipal officers.*]—An action for damages for unlawfully entering a man's house and maliciously arresting him, brought against a municipality and its constables, must be preceded by notice of action to the latter. *Milton* v. *Coté St. Paul*, 6 Que. P. R. 407.

Municipal corporation—*City of Montreal — Charter — Condition precedent — Pleading — Defence on merits.*]—No right of action against the corporation of the city of Montreal exists until a notice of action has been given to the corporation in the manner prescribed by the charter; and the want of notice may be set up by way of defence to the merits. *Aumais* v. *Montreal*, 9 Que. P. R. 270.

Municipal corporation — *Municipal Code, Art. 7931 — Imperative enactment—Action for injury caused by non-repair of highway — Condition precedent — Objection — Exception to the form.*]—The notice of action required by Art. 7931 of the Municipal Code in respect of an action for damages for injuries resulting from the bad condition of a road under the control of a municipal corporation, is a formality preceding the action upon which the right of action depends and which is imperative; without such notice, the action becomes irregular and illegal.—Such default of notice constitutes an informality which may be objected to by way of exception to the form; that is the method indicated by the Code of Procedure. *Bédard* v. *Quebec*, 33 Que. S. C. 188.

Municipal corporation — *Obstruction of highway.*]—When damages are claimed from a municipal corporation because the highway in front of the plaintiff's residence is obstructed by logs and lumber, the action

must be preceded by the notice mentioned in Art. 793, M. C. *Pageau* v. *St. Ambroise*, 9 Que. P. R. 407.

Municipal corporation — *Pleading — Declaration — Absence of allegation that notice given.*]—Where the plaintiff makes proof that he has given the notice required by Art. 793 of the Municipal Code, the default to allege such notice is not a cause of prejudice to the defendant, and is not a ground for an exception to the form. *Pageot* v. *St. Ambroise la Jeune Lorette*, 10 Que. P. R. 79.

Objection to absence of—*How raised —Malice — Mala fides — Defence on merits.*]—In general, the objection of want of notice of action must be raised by preliminary motion.—Such notice of action is not necessary in a case in which the Court if of opinion, upon the merits, that the defendant has acted maliciously and in bad faith, as alleged in a part of the declaration; but if the defendant shews his good faith, the notice of action becomes necessary to allow the action to proceed and to authorise the Court to maintain it. In that case the question may be raised by the defence to the action. *Grossman* v. *Morisvette*, 8 Que. P. R. 344.

Pleading — *Declaration — Requisites.*]—In the case of suits against public bodies, the want of allegation that the required notice has been given is no ground for the dismissal of the action. *Vary* v. *Bordeaux*, 8 Que. P. R. 284.

Pleading — *Failure to allege — Right of action.*]—An inscription in law based upon the fact that the declaration does not allege that a notice of action was given to the defendants, the corporation of the city of Montreal, will be struck out, the omission of such allegation not constituting an absolute forfeiture of the right of action. *Cloutier* v. *Montreal*, 7 Que. P. R. 385.

Police officer—*False arrest.*]—A police officer, sued for false arrest, is entitled to the notice of action prescribed by Art. 88, C. P., where he made the arrest under instructions. *Lefebvre* v. *Verdun*, 6 Que. P. R. 437.

Public officer — *Exemption to form — Malice — Mala fides — Preuve avant faire droit — Costs.*]—An exception to the form alleging that the defendant to an action for damages is a public officer, and that the notice required by Art. 88, C. P., has not been given to him, cannot be granted, when there is in the declaration an allegation of malice and bad faith.—Upon such a motion, *preuve avant faire droit* will be ordered; the costs to follow the event of the action. *Roy* v. *Roy*, 8 Que. P. R. 278.

Public officer — *Official wrongdoing — Particulars — Insufficiency — Dismissal of action.*]—When a public officer is charged with various acts of official wrongdoing, individual and combined, the notice of action must set forth said acts of wrongdoing, and the dates, times, and circumstances connected therewith, in a manner sufficient to enable the defendant to make tender and amends in respect of one or more or all of the specific acts complained of; otherwise the action will be dismissed on exception to the form. *Trudel* v. *Montreal*, 8 Que. P. R. 45.

Public officer — *Penalty—Mala fides.*]—A month's notice to a public officer is not required of an action for a penalty, unless some special statute requires it, Art. 88, C. C. P., requiring such a notice only in actions for damages. Even in an action for damages, such a notice is not required if it is alleged that the defendant has acted in bad faith. *Boulay* v. *Sawcier*, 7 Que. P. R. 344.

School commissioner — *Public officer.*]—A school commissioner is a public officer, who has a right to notice of action under Art. 88, C. P., and the absence of such notice is fatal to an action against him. *Carrere* v. *Jobin*, 5 Que. P. R. 305.

Special statute—*Montreal Street Railway Company — Absence of notice — Preliminary exception — Delay — Offer of settlement — Bar to action.*]—The object of the statute requiring notice of action to be given to the Montreal Street Railway Company is to give the company time to make inquiries and see whether they should make offers of settlement; the statute does not make the notice an essential condition of the existence of a right of action.—The want of notice can only be invoked by way of preliminary exception as a ground of delay to give the company the time granted by the statute to inquire into the facts, to take a position with regard to the claim, or to make an offer of compensation without costs, in view of such want of notice. *Montreal St. Ry. Co.* v. *Patenaude*, 9 Que. P. R. 1, 4 E. L. R. 62.

Street railway company — *Statute—Condition precedent.*] — The obligation imposed upon creditors of the Montreal Street Railway Company to give notice of action, as required by the charter of the company, is not a prejudicial obligation suspending only the right of action of a plaintiff; but it is an obligation prejudicial to the right of action itself, and a creditor cannot begin an action for damages without having given such a notice. *Bourguignon* v. *Montreal St. Ry. Co.*, 6 Que. P. R. 232.

Street railway company — *Statutory requirement — Consequence of failure to give — Costs.*]—A statute which requires those who have claims for damages against a tramway company to give the company a written notice a month before beginning an action, does not make the right of action dependent upon the accomplishment of this formality. The notice is required only for the purpose of making it less difficult for the company to settle claims by reason of accidents for which they are responsible. Therefore, the omission to give notice does not afford the company a defence, and has no other consequence than the imposition of costs upon the party in default. *Montreal St. Ry. Co.* v. *Patenaude*, 16 Que. K. B. 541.

See Admiralty — Canada Temperance Act — Defamation — False Arrest and Imprisonment — Intoxicating Liquors — Penalty — Pleading — Trespass—Warranty—Way.

NOTICE OF INSCRIPTION.

Time for — *Demand of abandonment — Contestation.*]—The time for giving notice of inscription for hearing upon the merits of a contestation of a demand for an abandonment, is regulated by Art. 34, C. P. *Lemay* v. *Parizeau*, 5 Que. P. R. 427.

NOTICE OF MOTION.

Leave to serve short notice.]—Where a party applies for special leave to serve short notice of motion, he must distinctly state to the Court that the notice applied for is short; and the same fact must distinctly appear on the face of the notice served on the other party. *Can. Pac. Ry. Co.* v. *Vancouver, Westminster & Yukon Ry. Co.*, 24 C. L. T. 161, 10 B. C. R. 228.

Statutory requirements — *Typewritten notice.*]—The Court refused to hear a motion where the applicant had not complied with 60 V. c. 24, s. 396 (N.B.), by printing his notice of motion, which was more than five folios in length. A typewritten notice does not comply with the statute. Time was given to print the notice. *Wilmot* v. *Macpherson*, 36 N. B. R. 327.

See ACTION — BANKRUPTCY AND INSOLVENCY — EVIDENCE — INTERPLEADER — MANDAMUS — PEREMPTION — TRIAL — VENDOR AND PURCHASER.

NOVA SCOTIA PROVINCIAL EXHIBITION.

Expropriation of land—Power to proceed by analogy to Halifax city charter — Conditions precedent — Interlocutory injunction. *Monaghan* v. *Provincial Exhibition Commission*, 1 E. L. R. 177.

NOVATION.

See ATTACHMENT OF DEBTS—COMPANY — CONTRACT—JUDGMENT—LIMITATION OF ACTIONS—SALE OF GOODS—VENDOR AND PURCHASER.

NUISANCE.

Clauging of heavy gate—Jarring house adjoining — Disturbance of inmates — Damages—Obstruction of highway—Erection of fence—Disputed boundary—Plan—Evidence —Possession—Counterclaim—House leaning over upon adjoining land—Injury to fence and gate — Projecting eaves — Easement — Prescription—Conflicting evidence—Findings of Judge—Appeal. *Foster* v. *Toronto Electric Light Co.*, 9 O. W. R. 590, 10 O. W. R. 185.

Construction of artificial ponds—Injury to neighbour's property — Evidence of damage. *Rupert* v. *Staley*, 153, 2 O. W. R. 153.

Damages—*Refusal to accept conditional renunciation — Costs on appeal to Court below — Costs of enquête—Statutory powers — Negligence.*]—In an action for $15,000 damages occasioned by a nuisance to neighbouring property, the plaintiff recovered $3,000, assessed *en bloc* by the trial Court, without distinguishing between special damages suffered up to the date of action and damages claimed for permanent depreciation of the property. Before any appeal was instituted, the plaintiff filed a written offer to accept a reduction of $2,500, persisting merely in $410 for special damages to date of action, with costs, and reserving the right to claim all subsequent damages, including damages for permanent depreciation, but without admitting that the damages suffered up to the time of the action did not exceed the whole amount actually recovered. This offer was refused by the defendants, as it did not afford the costs and contained reservations, and an appeal was taken by them, on which the Court of King's Bench, in allowing the appeal, reduced the amount of the judgment to $410, reserved to the plaintiff the right of action for subsequent special damages and damages for permanent depreciation, and gave full costs against the appellants, on the ground that they should have accepted the renunciation filed: — *Held*, Davies, J., dissenting, that the Court of King's Bench erred in holding that the defendants had no right to reject the conditional renunciation and in giving costs against the appellants; that the action should be dismissed as to the $2,500 with costs, and the reservation as to further action for depreciation disallowed; but that the judgment for $410 with costs as in an action of that class, with the reservation as to temporary damages accruing since the action, should be affirmed. As the costs at the *enquête* were considerably increased on account of the large amount of damages claimed, it was deemed advisable, in the circumstances, to order that each party should pay their own costs thus incurred:—*Held*, also, that, although the nuisance complained of was caused by the defendants acting under rights secured to them by special statute, yet, as there was negligence found against them with evidence sufficient to support that finding, the maxim *sic utere tuo ut alienum non laedas* applied, and that the powers granted by their special charter did not excuse them from liability. *Can. Pac Ry. Co.* v. *Roy*, [1902] A. C. 220, referred to. *Montreal Water & Power Co.* v. *Davis*, 25 C. L. T. 5, 35 S. C. R. 255.

Electric Power Company — *Authorization by legislature—Injury to neighbouring properties—Vibration.*] — The fact that a company has been authorised by the legislature to carry on a certain manufacture does not render it free from the legal obligation to repair the injury which the carrying on causes to the neighbouring properties. *Can. Pac. Ry. Co.* v. *Roy*, 9 Que. Q. B. 551, followed.—2. When the carrying on of a manufacture, even in a manufacturing centre, causes to the neighbouring properties an injury which goes beyond the ordinary disadvantages of the neighbourhood—for example, by the vibration caused by powerful machines and by the smoke charged with soot which escapes from the furnaces—the person carrying on such manufacture is bound to make

compensation for the injury. *Montreal St. Ry. Co.* v. *Garcau*, 21 C. L. T. 128, 10 Que. K. B. 417.

Electric Power Company — *Erection of power house—Injury to land adjoining—Vibration — Injunction — Damages.*]—An electric power company by the working of their engines caused so much vibration in the land adjoining that on which the plaintiff's house was built as to render it at times almost uninhabitable, though no actual structural injury was shewn to have taken place. The company was incorporated under the Ontario Companies Act, for the purpose of manufacturing, etc., electric power, and to purchase and hold lands to be used in the business, with authority under R. S. O. c. 200, s. 3, to construct, maintain, complete, and operate works for the production, etc., of electricity. But the company had no compulsory power to take lands; and no opportunity had been afforded the plaintiff, as there would have been in such case, of objecting to the location of their works, etc. Moreover, the company were under no compulsion to exercise their powers, nor was any compensation provided, under the statutes relating to them, for any injury done by such exercise:—*Held*, that the company were entitled only to exercise their powers in such a way as not to create a nuisance, and the plaintiff was entitled to an injunction and a reference as to damages.—2. Although the defendants had by their private Act incorporated therein certain sections of the Ontario Railway Act, relating to expropriation, they were not entitled to protection, because no map or book of reference had been deposited. *Hopkin* v. *Hamilton Electric Light & Cataract Power Co.*, 21 C. L. T. 440, 2 O. L. R. 240.

Affirmed 22 C. L. T. 284, 1 O. W. R. 486, 4 O. L. R. 258.

Electric railway — *Vibration, smoke, and noise—Injury to adjoining property—Evidence—Assessment of damages—Reversal on questions of fact — Appeal.*] — Notwithstanding the privileges conferred upon an electric street railway company for the construction and operation of an electric tramway upon the public thoroughfares of a city by its Act of incorporation, the company is responsible in damages to the owners of property adjoining its power house for any structural injuries caused by the vibrations produced by its machinery and the diminution of rentals and value thereby occasioned. *Drysdale* v. *Dugas*, 26 S. C. R. 20, followed. In an action by the owner of adjoining property for damages thus caused, the evidence was contradictory, and the courts below gave effect to the testimony of scientific witnesses in preference to that of persons acquainted with the locality:—*Held*, Taschereau, J., dissenting, that, notwithstanding the concurrent findings of the Courts below, as the witnesses were equally credible, the evidence of those who spoke from personal knowledge of the facts ought to have been preferred to that of persons giving opinions based merely upon scientific observations. In reversing the judgment appealed from the Supreme Court deemed it expedient, in the interest of both parties, to assess damages, once for all, at an amount deemed sufficient to indemnify the plaintiff for all injuries, past, present, and future, resulting from the nuisance complained of, should she elect to accept the amount so estimated in full satisfaction thereof; otherwise the record to be transmitted to the trial Court to have the amount of damages determined. *Garcau* v. *Montreal St. Ry. Co.*, 22 C. L. T. 4, 31 S. C. R. 463.

Electric wire — *Proximity to highway—Injury to child—Dedication — Negligence.*] — Several years before 1894 the owner of land in the township of York built a bridge over a ravine for access to and from the city of Toronto, and about 1894 the defendants placed wires across the ravine about 10 feet from the bridge. In 1904 the bridge was reconstructed and made wider, being brought to within from 14 to 20 inches of the wires, which had become worn and ceased to be insulated. The plaintiff, a boy under 9 years of age, while playing on the new bridge, put his hand through the railing, and his hand touching the wire, he was badly injured:—*Held*, that the plans and deeds in evidence shewed a dedication as a public highway of the bridge and land on each side of it, and such highway included the land over which the wires passed.—*Held*, also, that the wires in the condition in which they were at the time of the accident were dangerous to those using the highway and the company were liable for the injury to G. Judgment of Court of Appeal, 12 O. L. R. 413, 8 O. W. R. 57, reversed. *Gloster* v. *Toronto Electric Light Co.*, 26 C. L. T. 847, 38 S. C. R. 27.

Erection of building — *Obstruction of view—Enforcement of fire by-law—Injunction.*]—The plaintiff by injunction sought to prevent the completion of a warehouse which the defendant was erecting on ground leased by him from a railway company, being part of their right of way adjoining the lawn of a property owned and occupied by the plaintiff as a dwelling in the city of Winnipeg. On the other side of the right of way was a strip of land, owned by the defendant, sloping down to the Red river. The warehouse was situated directly between the plaintiff's house and the river and would obstruct the plaintiff's view of the river. It was being constructed of wood in contravention of the fire limit by-law of the city:—*Held*, that the plaintiff had no right to the unobstructed view of the river.—2. That the plaintiff had no right to enforce the fire limit by-law by injunction, as it was a by-law passed for the protection of the general public and providing for a penalty in case of its infringement, and there was no evidence to shew that the risk of fire to the plaintiff's property would be specially increased by the construction of the warehouse. *Attorney-General* v. *Newcastle*, 2 Ex. D. 441, followed. The plaintiff further urged that the construction and intended use of the warehouse would create a nuisance to her, which she was entitled to have prevented by an injunction, and gave some evidence as to the use by tramps and others of the vacant ground on the side of the warehouse next her property, causing unpleasant smells, but it was not shewn that the defendant was lessee or occupant of that vacant ground:—*Held*, that there was not sufficient evidence to entitle the plaintiff to an injunction on the ground of nuisance. *McLean* v. *Wyllie*, 22 C. L. T. 270, 14 Man. L. R. 135.

Factory — *Neighbouring office — Acquisition of rights.*]—A person who rents an office in a building near an industrial establishment must bear the inconvenience which results from the normal exercise of the industry, especially when the establishment existed and carried on its industry in the same manner before the construction of the building in which such person has rented an office. *Jones* v. *McCleary Mfg. Co.*, 18 Que. S. C. 130.

Factory — *Noxious odours — Municipal by-law — Extra-territorial force—Municipal corporation—Right to compel abatement.*]—A by-law of a municipal corporation imposing a penalty for sending out smoke and noxious odours, has no force outside of the limits of the municipality, and such penalty cannot be enforced against a person carrying on a manufacturing business in an adjoining municipality; but, in the present case, the plaintiffs under s. 34 of their charter, 60 V. c. 66 (Q.), had a right of action to "prohibit" (*faire cesser*) any person from allowing emanations of smoke or unwholesome odours, even when the establishments objected to were in adjacent municipalities, if such municipalities refused or neglected to abate the nuisances. *St. Paul* v. *Cook*, 22 Que. S. C. 498.

Factory — *Slaughter-house — Injury to neighbours.*] — The plaintiff purchased a house in the neighbourhood of a tannery which had been carried on for many years by the defendants' predecessors and himself. The locality was also largely occupied by other manufacturing establishments. The plaintiff alleged damage by the smoke, smell, and moisture emanating from the defendants' tannery. The odour was not proved to be unsanitary. Other residents in the immediate neighbourhood testified that they did not find the smoke or smell specially objectionable. It also appeared that the plaintiff had used his own property for years as a slaughter-house: — *Held*, following *Carpentier* v. *Ville de Maisonneuve*, 11 Que. S. C. 242, that neighbours are obliged to endure the reasonable inconveniences which result from neighbourhood. These inconveniences vary in kind and in extent according to the circumstances of place, and quality of the population, and must be reduced by the care and prudence of neighbours to the lowest possible limit; but under the circumstances above stated the limit had not been exceeded in the present case, especially in view of the facts that the locality was largely occupied by manufacturing industries, that the defendants' occupancy preceded that of the plaintiff, and that the plaintiff had used his own premises as a slaughter-house. *Casson* v. *Galibert*, 22 Que. S. C. 493.

Fire — Destruction of grain in elevator —Abandonment by warehousemen to insurers —Sale of "grain salvage"—Duty of purchaser to remove refuse—Agreement to remove—Absence of consideration—Money demand — Counterclaim — Parties — Costs. *Goderich Elevator & Transit Co.* v. *McNairn*, 11 O. W. R. 938.

Fouling watercourses — Ditch constructed to carry refuse from factory—Liability of municipality—Trespass—Local board of health. *Donovan* v. *Lochiel*, 5 O. W. R. 222, 785.

Highway — Non-repair — Indictment — Abatement—Costs. *Rex* v. *Portage la Prairie* (Man.), 2 W. L. R. 141.

Highway — Non-repair—Remedy—Special damage to land owner—Action—Claim for damages—*Mandamus*—Remedy by indictment — Costs. *Noble* v. *Turtle Mountain* (Man.), 2 W. L. R. 144.

House drains — *Damage to neighbour's premises.*]—The plaintiff and defendants were owners of adjoining buildings. The drains from both ran to a street, where they entered a box drain constructed by the town. The defendants allowed hot water and steam to pass into their drain. The hot water and steam did not pass away, but flowed back into the plaintiff's cellar, and the plaintiff sued for damages thereby caused. The defendants set up that the damage was caused by a stoppage in the public drain:—*Held*, following *Fuller* v. *Pearson*, 23 N. B. R. 283, 21 S. C. R. 337, and *Humphreys* v. *Cousins*, L. R. 2 C. P. 239, that the plaintiff was entitled to recover. *Andrews* v. *Cape Breton Electric Co.*, 24 C. L. T. 237.

Injury to farm by sewage — *Municipal corporation—Fouling natural stream—Damages.*]—The defendants, a municipal corporation, were held liable to the plaintiffs for damages sustained by reason of sewage matter brought upon the plaintiffs' land by a creek which received the outflow from a sewage farm operated by the defendants, and also for anthrax germs brought upon the plaintiffs' land by reason of the defendants' sewage system. The defendants, though authorised by the Municipal Act to undertake and carry out the works, were not authorised to do so in such a way as to cause a nuisance or to injure other persons. Having given leave to the tanneries from which the anthrax germs came to connect with their system of sewers, the defendants were responsible for the result. Although they had forbidden the throwing of the refuse from which the germs were believed to come, into the sewer, they were not relieved from liability, because they had the power, and had not exercised it, of enforcing the prohibition by stopping the connection. The elements of damage in such a case were considered, and damages were assessed for the loss of an animal which died from anthrax, for the value of lands rendered worthless by anthrax, and interest thereon, for permanent impairment of the value of other lands, for the value of additional fencing to keep cattle from the infected water, for loss of pasture, and for pollution of the air in and about a dwelling-house. The acts of the defendants having had the natural effect of giving rise to an apprehension which had destroyed the value of the plaintiffs' property, the defendants were held liable to make the loss good. *Weaver* v. *Berlin*, 24 C. L. T. 371, 8 O. L. R. 302, 3 O. W. R. 812.

Interim injunction — *Application before writ of summons issued—Machinery—Noise and vibration—Statutory duty.*]—The respondents installed an electric pump, in a building belonging to them in a strictly residential neighbourhood, for the purpose of supplementing their plant for pumping water to the high level reservoir of the city. The operation of this electric pump produced

noise and vibration, which affected the health and comfort of the petitioner's family and rendered his residence unfit for private occupation. It appeared that prior to the installation of the electric pump, the work of pumping water to the high level reservoir was done wholly by steam pumps without noise or vibration, whereas the operation of the electric pump caused both noise and vibration over a wide neighbourhood. It also appeared that, from motives of economy, the electric pump was to be used during the night time. An interlocutory injunction was prayed for:—*Held*, that the existence of a writ of summons is not essential to the procurement of an interlocutory order of injunction. *Hart* v. *Rainville*, 15 Que. S. C. 17, followed.—2. Whether the electric pump had been accepted by the respondents from the manufacturer or not, could not affect the petitioner's right.—3. A nuisance, whether public or private, is, speaking generally, cause for an injunction. But with respect to a private nuisance, the petitioner for redress must suffer some special, direct, substantial, or irreparable damage, over and above the general damage sustained by the rest of the public.—4. A nuisance such as the present is ground for injunction, and for an interlocutory order as well, inasmuch as a denial of this remedy would compel the petitioner and other sufferers to resort to a multiplicity of suits, without obtaining the cessation of the grievance, or adequate compensation.—5. The statutory duty of the respondents to supply citizens with water and to provide water for fire purposes, does not affect the right to an injunction against a particular mode of pumping, not shewn to be indispensable, but which, on the contrary, may be replaced by other methods of doing the same work without damage to neighbours. *Adami* v. *Montreal*, 25 Que. S. C. 1.

Interim injunction—*Tenants of rooms in same building*—*Noise*—*Reasonable use of premises.*]—The defendant hired rooms in a building in a business part of the city for the purpose of giving music lessons, put up his sign, and gave lessons on the mandolin to over 200 pupils between the hours of 9 a.m. and 10 p.m. On a motion for an injunction by an occupier of rooms on the opposite side of the hall in the same building, who had taken his rooms subsequently, to restrain the defendant from giving lessons, on the ground that the noise was a nuisance:—*Held*, on the evidence, that the noise to which objection was taken was reasonably connected with and incidental to the teaching; that the defendant's use of the premises was not an unreasonable one; and that to offend against the law, the teaching of music in such premises must be done in a manner which beyond fair controversy ought to be regarded as unreasonable; that an injunction would break up the defendant's business, and it would be better that the plaintiff should be compensated in damages if he was entitled to recover; and the injunction was refused. *Pope* v. *Peate*, 24 C. L. T. 131, 7 O. L. R. 207, 3 O. W. R. 243.

Livery stable — *Injunction — Injury to landlord's reversion—Damages in lieu of injunction—Parties — Tenants—Prospective change in nature of houses in locality.*]—

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1. A landlord is not entitled to an injunction to prevent the carrying on of a livery and feed stable business in proximity to dwellings occupied by his tenants in a mainly residential locality so as to constitute a nuisance, without proof of injury to the reversion or that one or more of the tenants had left because of the annoyance from the stable, but such injunction may be granted at the suit of any tenant who proves such nuisance.—2. Although the nature of the occupancy of a locality is a large factor in deciding whether the carrying on of a certain trade there would or would not create a nuisance; yet, in deciding that question, no consideration need be given to the probability that in the near future, owing to the increase of population, the locality will become mainly a business instead of a residential district.—3. The plaintiffs being tenants from month to month only, it would not be a proper case for awarding damages instead of granting an injunction, as it could not be known how long the tenants might remain, and, besides, injuries of the kind in question cannot be fully compensated by damages, and it would be impossible to estimate such damages accurately in every case. *Jones* v. *Chappell*, L. R. 20 Eq. 539, followed. *McKenzie* v. *Kayler*, 15 Man. L. R. 699, 1 W. L. R. 290.

Machinery — *Continuing nuisance—Permanent injury—Damages — Prescription.*]—Where injuries caused by the operation of machinery have resulted from the unskilful or negligent exercise of powers conferred by public authorities and the nuisance thereby created gives rise to a continuous series of torts, the action accruing in consequence falls within the provisions of Art. 2261, C.C., and is prescribed by the lapse of two years from the date of the occurrence of each successive tort. *Wordsworth* v. *Harley*, 1 B. & Ad. 391, *Lord Oakley* v. *Kensington Canal Co.*, 5 B. & Ad. 138, and *Whitehouse* v. *Fellowes*, 10 C. B. N. S. 765, referred to. In the present case the permanent character of the damages so caused could not be assumed from the manner in which the works had been constructed, and, as the nuisance might, at any time, be abated by the improvement in the system of operation or the discontinuance of the negligent acts complained of, prospective damages ought not to be allowed, nor could the assessment in a lump sum of damages past, present, and future, in order to prevent successive litigation, be justified upon grounds of equity or public interest. *Fritz* v. *Hobson*, 15 Ch. D. 452, referred to. *Garcau* v. *Montreal St. Ry. Co.*, 31 S. C. R. 463, distinguished. Judgment in 13 Que. K. B. 531, reversed. *Montreal St. Ry. Co.* v. *Boudreau*, 25 C. L. T. 124, 36 S. C. R. 329.

Maintenance of pole on highway — Injury to person driving—Negligence—Contributory negligence. *Dale* v. *British Columbia Telephone Co.* (B.C.), 3 W. L. R. 292.

Noisome trade — *Injunction — Prescription.*]—Defendants had worked machinery by horse-power in a factory adjoining complainant's house for over 20 years. Then they introduced steam power, which complainant alleged caused vibration and smoke which interfered with his enjoyment of his

property, and caused an injunction to issue restraining them from so using their factory as to cause the annoyance complained of. Defendants while denying the nuisance also claimed a prescriptive right to use their premises in the manner objected to. A special jury found that the smoke was not a nuisance but that the vibration was:—*Held* (Peters, M.R.), that defendants had not acquired the prescriptive right claimed.—2. That such part of the injunction as related to smoke must be struck out.—3. That the injunction must be made perpetual to restrain the defendants from so operating their factory as to diminish complainant's comfortable enjoyment of his home either by tremulous motion or thumping, or by causing disagreeable noises. *Alley* v. *Duchemin* (1880), 2 P. E. I. R. 340.

Operation of "joy wheel" — *Noise and vibration — Injury to neighbour—Residential district—Injunction—Owner of wheel —Operation by licensees.*]—An injunction was granted to restrain the defendant from operating a "joy wheel" upon his premises in a street in a residential district of a city; the vibration and noise resulting from the operation of the wheel, coupled with the laughter and shouts of its patrons, being such as to disturb the plaintiff's enjoyment of his own house, 5 feet away, and to constitute a nuisance. The injunction was properly sought against the owner of the wheel and the occupant of the premises upon which it was set up, to whom also a license had been granted by the city council to operate the wheel, although it was actually operated by two other men, the defendant's licensees, under his control and direction, they taking the profits and paying him a fixed sum for the use of the wheel. *Keil* v. *Ross* (1910), 13 W. L. R. 512.

Seashore — *Right of riparian owner to make erections between high and low water marks—His right to seaweed—Public have right to navigation and of fishery, but not absolute right of way.*] — The defendants were indicted for a nuisance in erecting a weir for the purpose of collecting seaweed, which the jury found to be in front of their farm, on the space between ordinary high and low water marks, which space had been used for fifteen years by the neighbours as a road for hauling seaweed, etc. The space had once been sand hill belonging to defendants' farm, but was now washed away and covered with water at ordinary high tides. A highway sufficient for all necessary purposes existed inside the inner end of the weir, though not at the outer end, and the general public were not impeded by the weir in travelling, hauling or getting seaweed, or anything to which they had a right on the shore. The question was whether the facts so found amounted to a verdict of guilty. The important point raised was whether the riparian owner "can place such an erection on the shore in front of his land, below ordinary high water mark, for the purpose of collecting seaweed floating on the water, or securing it when relicted, without being guilty of a nuisance for obstructing a highway." For the Crown it was contended that the sea shore, between high and low water marks, is a common public highway, over every part of which the public have a right to travel, and that an erection obstructing such way is a nuisance equally as much as if erected on a highway on land. Defendants contended that they had the right to collect seaweed floating on the sea or lying on the shore between high and low water marks, and, therefore, had the right to use such means as they thought best for collecting and securing it, so long as a sufficient way was left, and the public were not really injured: — *Held* (Peters, J.): Even assuming the public to have a right of way over the space between high and low water marks, yet the use of the space was not limited to that right, and when, as here, the public right was not injured, the riparian owner had a right to make such erections as he required.—The riparian owner has a right in common with the public to take the seaweed when floating in the sea, and has the exclusive right to it when deposited on the shore, and to avail himself of that right may use such contrivances as he likes, so long as he does not practically interfere with the rights of the public on the shore.—The public right over the space between high and low water marks is not the absolute right of way as claimed, but is that of navigation and the liberty of fishing. *R.* v. *Lord* (1864), 1 P. E. I. R. 245.

Smoke — Damages — Injunction — Evidence. *Smith* v. *Consolidated Mining & Smelting Co.* (B.C.), 8 W. L. R. 47.

Smoke — *Penalty.*]—Where a by-law ordains that the penalty for its infraction is a certain sum without qualification, the Court is obliged to impose such sum without reduction when the infraction is established. *R.* v. *Chalifoux*, 8 R. de J. 124, followed. *Montreal* v. *Grosvenor Apartments*, 16 R. de J. 6.

Smoke, noise, and vibration — *Neighbouring proprietor — Company—Charter authorising works—Right to remedy—Damages —Reduction on appeal.*] — The appellants operated a system of waterworks for the supply of water to several municipalities, including the town of Westmount. In this town, in a section entirely residential, the appellants erected a pump station and installed a pumping plant, operated for some years wholly by steam, but later chiefly by electricity. The respondent, proprietor and occupier of a property adjacent to the pump station, for many years before the erection of the appellant's works, claimed damages by reason of the smoke, noise, and vibration caused by the operation of the works, more especially of noise and vibration since the installation of an electric motor plant:—*Held*, affirming the judgment of the Superior Court, 23 Que. S. C. 141, that the fact that the appellants were authorised by their charter to carry on the business of supplying water, and to use steam and electricity for such purpose, did not exempt them from the legal obligation of indemnifying neighbouring proprietors for the damage occasioned by the operation of their works.—2. The appellants being free to select the site for their works, the principle laid down by the Privy Council, in *Can. Pac. Rw. Co.* v. *Roy*, [1902] A. C. 220, 12 Que. K. B. 543, with respect to damage caused by the operation of a railway, did not apply, and the appellants were responsible for the damage caused to adjacent proprietors by their works.—3. The respon-

dents having tendered a part renunciation of the judgment, as to permanent depreciation in the value of her property, the judgment of the first Court was reduced in appeal to the damages suffered by her prior to the institution of her action. *Montreal Water & Power Co.* v. *Davie*, 13 Que. K. B. 448.

Stable — Landlord and tenant — Notice to landlord required. *Crowell* v. *Archbold*, 1 E. L. R. 169.

Tobacco factory — *Odours from—Evidence as to—Injunction restraining—Suspension to afford opportunity to abate nuisance.*] — Divisional Court *held*, that the odours arising from the manufacture of tobacco constituted a nuisance and granted an injunction restraining defendants from so operating their factory as to cause a nuisance. Operation of injunction suspended for six months to allow defendants to abate the nuisance if possible, or to make arrangements for the removal of that part of their business which caused the odours. *Appleby* v. *Erie Tobacco Co.* (1910), 17 O. W. R. 951, 2 O. W. N. 449, O. L. R.

Trespass — *Railway — Continuing damage.*]—In 1888 the defendants ran their line through Britannia terrace, a street in Ottawa, in connection with which they built an embankment and raised the level of the street. In 1895 the plaintiffs became owners of land on that street, on which they had since carried on their foundry business. In 1900 they brought an action against the defendants, alleging that the embankment was built and level raised unlawfully and without authority and claiming damages for the flooding of their premises and obstruction to the egress in consequence of such work:—*Held*, that the trespass and nuisance (if any) complained of were committed in 1888, and the then owner of the property might have brought an action, in which the damages would have been assessed once for all. His right of action being barred by lapse of time since the plaintiffs' action was brought, the latter could not be maintained. *Chaudiere Machine Co.* v. *Canada Atlantic Ry. Co.*, 23 C. L. T. 80, 33 S. C. R. 11.

See CRIMINAL LAW—LIMITATION OF ACTIONS — MUNICIPAL CORPORATIONS—NEGLIGENCE — PARTIES — TRADE UNION—WATER AND WATERCOURSES—WAY.

NULLITY.

See HUSBAND AND WIFE—MARRIAGE—VENDOR AND PURCHASER—WRIT OF SUMMONS.

OATHS.

Allegiance—*Oath of. See* ALIENS—NATURALIZATION.

Interpreter — *Necessity for.*] — The necessity for an interpreter is generally a question for the trial Judge. By Rule 439, examination for discovery is similar to that of a witness. Where the examiner ruled that plaintiff sufficiently understood English to be examined therein, and plaintiff's counsel refused to allow him to be sworn, it was held, that it was premature to object to plaintiff being sworn in English, as he might sufficiently understand English to know that he was being sworn to tell the truth, even though he might be unable to answer intelligently all subsequent questions. When plaintiff said that he did not understand any question, then examiner would have to decide what course to adopt. *Drouillard* v. *Drouillard* (1900), 14 O. W. R. 887, 1 O. W. N. 136.

Municipal Code — *Notary.*] — Oaths required by the Municipal Code may be taken before a notary. *Mondoux* v. *Yamaska*, 22 Que. S. C. 148.

See AFFIDAVIT — EVIDENCE — MILITARY LAW—MUNICIPAL CORPORATIONS — WITNESSES.

OBSCENE BOOKS.

See CRIMINAL LAW.

OBSTRUCTING DISTRESS.

See CRIMINAL LAW.

OBSTRUCTING PEACE OFFICER.

See CRIMINAL LAW.

OBSTRUCTION OF HIGHWAY.

See CRIMINAL LAW—WAY.

OCCUPATION RENT.

See IMPROVEMENTS—LANDLORD AND TENANT —VENDOR AND PURCHASER.

OFFICERS OF COMPANY.

See DISCOVERY.

OFFICERS OF MUNICIPALITY.

See MUNICIPAL CORPORATIONS.

OFFICIAL ADMINISTRATOR.

See EXECUTORS AND ADMINISTRATORS—MINES AND MINERALS.

OFFICIAL BOND.

See PRINCIPAL AND SURETY.

OFFICIAL GUARDIAN.

See DEVOLUTION OF ESTATES ACT—INFANT —VENDOR AND PURCHASER.

OFFICIAL REFEREE.

Lease of settled estates — *Approval of Master-in-Ordinary—Waiver.*] — Appeal from a report or award of a referee on the grounds that the award should have been made under the terms of the lease by Master-in-Ordinary:—*Held*, that the latter is the proper party, but as applicant had waived his right to object by appearing before the referee, appeal was dismissed. *Re Denison & Foster*, 12 O. W. R. 1066, 18 O. L. R. 478.

See DISCOVERY.

OIL AND GAS CONTRACTS.

See CONTRACT—REFEREES AND REFERENCES.

OIL LEASES AND RIGHTS.

See FRAUD AND MISREPRESENTATION—LANDLORD AND TENANT — PRINCIPAL AND AGENT.

OMISSION TO PROVIDE NECESSARIES FOR WIFE.

See CRIMINAL LAW.

ONTARIO ASSIGNMENTS ACT.

See BANKRUPTCY AND INSOLVENCY.

ONTARIO ELECTION ACT.

See LIQUOR ACT OF ONTARIO — PENALTIES AND PENAL ACTIONS.

ONTARIO MEDICAL ACT.

See MEDICINE AND SURGERY—STATUTES.

ONTARIO MINES ACT.

See MINES AND MINERALS.

ONTARIO RAILWAY AND MUNICIPAL BOARD.

Jurisdiction — *Street railway — Management by commission — Ontario Railway Act, 1906 — New board of management.*]— The Ontario Railway and Municipal Board has power to direct the Board of Electric Railway Commissioners of Port Arthur to give up possession of the electric railway between that city and Fort William to a new board and to restrain the said Commissioners from meddling with said railway. *Re Port Arthur Electric St. Ry. Co.*, 13 O. W. R. 811.

See ASSESSMENT AND TAXES — STREET RAILWAYS.

OPENING OF HIGHWAY.

See WAY.

OPPOSITION.

Acte declaratoire — *Costs — Notice —Insolvency.*] — The opponant claimed the ownership of goods seized, in virtue of her marriage contract, and of an *acte déclaratoire et reconnaissance de dettes* from the defendant to her; she also asked that the plaintiff pay the costs, because he acted in bad faith, knowing that these goods belong to the opponant, for in another cause in which the plaintiff was a party, there was a return of *nulla bona* against the defendant:—*Held*, that the plaintiff contesting could not plead that this *acte declaratoire* was of no value against third parties, and that it was passed when the defendant was insolvent; but he might allege that, notwithstanding the return of *nulla bona*, the defendant made opposition on the ground that there had been no discussion, *préalablement* of his movables. *Simard* v. *Drolet*, 8 Que. P. R. 40.

Affidavit — *Attorney of opponant — Frivolous opposition.*] — The deposition which should accompany an opposition, pursuant to Art. 647, C. P., may be sworn to by the attorney of the opponant, if he has a personal knowledge of the facts alleged. An opposition will not be dismissed as frivolous, upon motion under Art. 651, C. P., upon the ground that the price agreed upon for the purchase of the land in question by the vendor of the opponant is not indicated in the opposition and does not appear to have been really paid. *Savard* v. *Bergeron*, 3 Que. P. R. 398.

Affidavit — *Form of — Negligence in petitioning to delay proceedings — Sale.*] — An affidavit in support of an opposition which does not state that the opposition is not made with the object of unjustly delaying the sale, but which mentions "only that it is not made with the object of delaying the proceedings, is irregular, and the opposition will be discharged on motion. *Bourgouin* v. *Pelletier*, 9 Que. P. R. 265, 24 Que. S. C. 473.

Affidavit — *Notary.*] — The affidavit required by Art. 647, C. P., to sustain an opposition *afin d'annuller* may be made before a notary public. *Fleury* v. *Dufresne*, 7 Que. P. R. 410.

Affidavit verifying.] — An affidavit accompanying an opposition to the seizure

and sale of certain goods stating that "all and every one of the facts alleged in the above opposition are true to the best of my knowledge," and "this opposition is not made for the purpose of unjustly delaying the cause but with the object of obtaining justice," is sufficient, and meets the exigencies of Art. 642, C. P. *Beauchêne* v. *Fortin*, 2 Que. P. R. 533.

Amendment — *Affidavit.*] — An amendment to an opposition will not be allowed, because, the opposition being sworn to, the amendment would have the effect of introducing into the opposition a new allegation which would not be supported by affidavit. *Evered* v. *Emond*, 1 Que. P. R. 312.

Contested cause — *Admission.*] — An opposition to a judgment cannot be maintained where the judgment was rendered in a contested cause, more especially where it appears from the opposition itself that a part at least of the plaintiff's claim was well founded. *Robertson* v. *Prasse*, 3 Que. P. R. 251.

Defence — *Time for filing — Order of Judge — Rescission.*]—An opposition to a judgment is a defence to the action, and will be dismissed upon inscription *en droit* if there is nothing in the affidavit to shew that the opposant has been hindered from filing his defence within the proper time: *Ross* v. *Dawson*, Mont. L. R. 2 S. C. 361. 2. The leave of a Judge to file an opposition to a judgment is only an order of procedure, and is subject to rescission: *Hamilton* v. *Bourassa*, 5 Que. S. C. 467. *Bertrieux* v. *Lacroix*, 3 Que. P. R. 432.

Defendant opposing judgment — *Declinatory exception — Deposit.*]—If a defendant, in his opposition to judgment, declines the jurisdiction of the Court, he must proffer that plea by a distinct exception, accompanied by a special deposit and all the essential formalities of preliminary exceptions. *Knauth* v. *Liedley*, 8 Que. P. R. 111.

Deposition — *Form of — Negativing intention to delay proceedings — Sale.*]— A deposition under oath, required by Art. 647 C. P., affirming that the facts alleged in an opposition are true and that the opposition is not made with the object of delaying the proceedings, is sufficient, and a motion to discharge such an opposition will be dismissed. *Boulanger* v. *Dansereault*, 9 Que. P. R. 278.

Dismissal — *Frivolity — Conditional Gift.*] — An opposition stating that the effects seized were given to the opposant absolutely, but on condition that they should be returned to the donor or his heirs, should the donee predecease without descendants, is frivolous and will be dismissed on motion. *Fenaglio* v. *Ouellette*, 7 Que. P. R. 158.

Examination of opposant — *Default — Dismissal of opposition — Art. 651, C. P.*] — The penalty of Art. 651, C. P., under the operation of which an order to appear has been issued, is not imprisonment, but the dismissal of the opposition. Default of the opposant to appear for examination has the same effect as default of a reply to *faits et articles*. *Coté* v. *Décarie*, 8 Que. P. R. 160.

Examination of opposant — *Motion for.*]—A motion merely for the examination of the opposant, and not seeking the dismissal of the opposition after such examination, will not be granted. *Hoome* v. *McConnell*, 3 Que. P. R. 387. *Cf. Bouchard* v. *Ouellette*, 2 Que. P. R. 253.

Examination of opposant — *Wife of debtor — Old Code of Procedure.*]—The examination of an opposant, being the wife of the debtor separate as to property, may be ordered if the opposition makes no distinction between the goods which her husband possessed at the time of the marriage and those which have been acquired since. 2. The examination of the opposant may be allowed upon opposition commenced under the old Code of Procedure. *Prefontaine* v. *Dorval*, 5 Que. P. R. 374.

Exemption — *Claimant not the debtor.*] —If the opposant does not allege nor does it otherwise appear that he is the debtor, he is not entitled to claim that the goods and effects seized are by law exempt from seizure, especially when the defendant has already by his plea claimed to be the owner of the same goods and effects, and asked for their exemption from seizure. *Perkins* v. *Hand*, 9 Que. P. R. 331.

Exhibit — *Default in filing — Exception to form. — Second opposition—Order.*]— The opposant's default in filing an exhibit in support of his opposition is no ground for an exception to the form.—No Judge's order is required on a second opposition filed by a new opposant. *Dupuy* v. *Prud'homme*, 8 Que. P. R. 121.

Extension of time for filing — *Grounds.*]—The absence of the defendant and other serious circumstances explained in an affidavit of the advocate will be sufficient to allow the filing of an opposition to a judgment after the time allowed for so doing. *Grothe* v. *Robillard*, 7 Que. P. R. 393.

Filing — *Want of presentation — Stay of execution — Order.*]—There is no reason to grant a *congé défaut* of a *tierce opposition*, once it has been filed, merely for want of presentation to the Court.—The order of *sursis* having been granted only for a limited number of days, the plaintiff is entitled to proceed with his execution, after the expiry of such delay, without any order of the Court. *Waterman* v. *Eagle*, 7 Que. P. R. 432.

Grounds of — *Attachment by creditor of plaintiff.*]—A defendant cannot oppose the execution of a judgment rendered against him by setting forth an attachment after judgment issued in his hands by a creditor of the plaintiff. *Warin* v. *Werthemer*, 7 Que. P. R. 423.

Grounds of — *Chattels claimed by gift and by purchase.*]—In an opposition *afin de distraire*, the opposant should indicate the chattels seized which have been given

to him and those which he has bought. *Archambault* v. *Lanoau*, 8 Que. P. R. 110.

Grounds of — *Procès-verbal of seizure — Irregularity — Exemptions — Frivolous opposition.*] — The allegations that the effects seized are not sufficiently enumerated in the *procès-verbal* of seizure, and that they are by law exempt from seizure, are good grounds for an opposition to annul, and such opposition will not be dismissed as frivolous on a motion to that effect. *McKeown* v. *Wright*, 8 Que. P. R. 175.

Grounds of — *Sale of immovables by sheriff — New grouping of lots — Prescription.*]—A new grouping of lots in a sheriff's notice of sale, and the allegation of prescription incurred since the date fixed for the new sale, are facts subsequent to the proceedings by which the sale was stopped in the first instance, and are sufficient reasons for a new opposition. *Canada Industrial Co.* v. *Kensington Land Co.*, 7 Que. P. R. 93.

Husband and wife — *Amendment—Re-swearing.*]—An opposition to judgment made by the husband (*commun en biens*) of the defendant is regular. 2. The opposant may add an allegation to his opposition, by amendment, without leave of the Judge, even after it has been sworn to and received by the Judge, provided that the amendment be also sworn to. *Dion* v. *Dionne*, 3 Que. P. R. 497.

Interpellation — *Service — Domicil.*]—The Court will not dismiss upon motion an opposition to a sale of immovables based upon the fact that the interpellation required by Art. 705, C. P., has been made upon a grown-up person in the family of the debtor, without naming such person, if it appears that the interpellation was made at the domicil of the debtor. *Jetté* v. *Désaulniers*, 5 Que. P. R. 437.

Judgment — *Rights of opposant — Bar — Previous opposition—Appeal.*] — An opposition to the sale of movables dismissed on motion as frivolous, or an inscription in appeal afterwards abandoned by the appellant, are not proceedings depriving the defendant of his right to file an opposition to judgment. *Demers* v. *Hurtubise*, 8 Que. P. R. 377.

Judgment for partition — *Sale by licitation — Time — Purchaser at sheriff's sale — Sheriff — Execution — Irregularity.*]—1. A proceeding by which a party opposes judgments declaring the parties to an action for partition, proprietors of a certain immovable property, and ordering the same to be sold by licitation, alleging that he is the owner of the undivided half said to belong to the defendant, and that the plaintiff's half is now under seizure at the instance of one of his judgment creditors, is a tierce-opposition, and is not subject to the delay fixed by Art. 1050, C. P. 2. A purchaser of part of an immovable, at sheriff's sale, becomes proprietor thereof, by the fact of the adjudication, and may oppose judgments rendered in an action for partition of that immovable, to which he is not a party, although at the time of the institution of the action, he had not paid the purchase price, and was not registered as owner. 3. Although the writ of execution had been returned into Court by the sheriff and was not re-issued to him, a deed given by him to the purchaser, upon payment of the price, will not be set aside as irregular, especially if the party invoking such irregularity shews no interest in doing so. 4. A tierce-opposition need not attack the legality of the proceedings which led to the judgment complained of. *Staubridge* v. *Staubridge*, 5 Que. P. R. 140.

Motion to dismiss — *Judgment — Grounds.*]—When the grounds which prevented the defendant from appearing and pleading, have been found sufficient by the Judge who allowed his opposition to be filed, and the plaintiff does not contest the truth of such allegations, a motion to dismiss the opposition will be rejected. *Dupuis* v. *Le Club Jacques Cartier*, 7 Que. P. R. 348.

Motion to reject — *Examination of opposant — Cross-examination.*]—Counsel for the opposant may cross-question the latter on an examination had after the launching of a motion under Art. 651, C. P., to strike out the opposition. *Renaud* v. *Vaillancourt*, 7 Que. P. R. 30.

Motion to set aside — *Deposit.*]—A motion to set aside an opposition to a judgment, which opposition has been presented to and received by a Judge, because the deposit made with it is insufficient, is in the nature of a preliminary exception, and will be dismissed if it is not accompanied by a deposit. *Lavin* v. *Lalonde*, 7 Que. P. R. 481.

Notice of contestation — *Filing of copy only.*]—A notice of contestation on opposition will not be set aside because at the time of service only a copy of the opposition was filed, the original having since been filed. *Leclaire* v. *Payette*, 7 Que. P. R. 44.

Notice of contesting — *Neglect to file — Irregularity — Motion.*]—A party cannot by motion ask to have a proceeding in an action set aside, the proceeding in this case being a notice of contesting an opposition, served but not filed; the only proper motion would be one for dismissal. *Fortin* v. *Drouin*, 5 Que. P. R. 282.

Notice of sale — *Guardian.*]—An opposition *afin d'annuler* based upon the want of notice of sale to a guardian will not be dismissed upon motion as frivolous. *Idler* v. *Lanthier*, 5 Que. P. R. 294.

Notice to contestants — *Time — Return—Service.*]—The opposant on the 11th August served on the plaintiff and others a notice that his opposition had been returned into Court and that if they wished to contest it they must do so within 12 days of the service of this notice. At the time of the service the opposition had not been returned, and was not until the 29th August. On motion of the plaintiff the notice was set aside. *Chalcyer* v. *Warnecke*, 6 Que. P. R. 421.

Opposition afin d'annuler — *Frivolous ground — Delay.*]—An opposition *afin d'annuler*, alleging that the defendant-oppo-

sant does not bear the name under which he is sued, will be dismissed upon motion as being made with the object of unjustly delaying the sale of the goods seized. *Masson v. Tellier*, 5 Que. P. R. 411.

Opposition afin d'annuler — *Peremption — Fresh seizure — Opposition on same grounds — Procedure — Stay.*]—Where an opposition *afin d'annuler* is declared by the Court to be perempted, and a fresh seizure is made, the opposant cannot base a second opposition upon the same grounds, unless by conforming to the provisions of Art. 654 C. P., and obtaining a stay from the Judge. *Clement v. Wolever & Sheppard*, 35 Que. S. C. 119.

Opposition afin de charge — *Security — Motion for — Stay of proceedings.*]—The opposant *afin de charge* is not obliged to give security before his opposition has been maintained and the sale of the property has been announced subject to the charge asserted. A motion to compel the opposant to give security before that date is premature, and will be dismissed. *Loranger v. Loranger*, 10 Que. P. R. 285.

Opposition afin de conserver — *Affidavit — Proof — Time.*]—When an opposition *afin de conserver* is filed without an affidavit and without proof, the opposant will be ordered to make proof of such opposition within a time to be fixed by the Court. *Poirier v. Stadacona W., L. & P. Co.*, 5 Que. P. R. 409.

Opposition afin de conserver — *Payment into Court of proceeds of sale of goods seized — Time.*]—When moneys arising from the sale of chattels under execution have been remitted to the advocates of the plaintiff, the advocates are not bound to deposit such moneys in Court upon the demand of an opposant who has not filed his opposition *afin de conserver* within 4 days after the sale. *Cohen v. Hirsh*, 8 Que. P. R. 407.

Opposition afin de distraire—*Notice to execution creditor—Costs.*]—An opposant who demands the withdrawal from a seizure under execution of a certain chattel which he had left in the possession of the execution debtor, without notifying the creditor of his right of property, cannot, in his opposition, demand that the execution creditor be sentenced to pay the costs of the opposition.—The execution creditor will have a right to contest this part of the prayer of the opposition. *St. Charles & Co. v. Dupré*, 10 Que. P. R. 287.

Opposition to judgment — *Answer — Status of opposant — Admission — Insufficiency of deposit — Preliminary plea.*]—In answer to an opposition to judgment, the judgment creditor (plaintiff) may allege that the opposant has no right to make such an opposition, and that the opposant admitted his liability to the action and upon the judgment as entered; but he cannot plead that the deposit made with the opposition was insufficient—an issue of that character must be raised by a preliminary plea. *Stewart v. Bruneau*, 10 Que. P. R. 284.

Oral agreement — *Previous writing — No admission of.*]—There is no ground for dismissing upon motion an opposition based upon an oral agreement, when it is alleged in support of the motion that a writing previous to the agreement exists, and that writing is not admitted by the opposite party. *Trusts & Loan Co. v. Bourgouin*, 6 Que. P. R. 321.

Payment — *Delay — Notice.*] — An opposition for payment may still be effective if the moneys continue to be in the hands of the bailiff or in the Court awaiting distribution, even if a delay of more than 4 days has elapsed between the sale and the filing of said opposition, and if a still longer delay was permitted to intervene before notice of the opposition was given. *Cohen v. Albert*, 8 Que. P. R. 406.

Presentation — *Service — Practice.*]—An opposition by a third party presented to and received by a Judge, and served upon the plaintiff the next day, is valid; it is not necessary that it should be served upon the opposite party before being presented to the Judge. *Archibald v. Polan*, 7 Que. P. R. 388.

Renewal of — *Necessity for order — New opposant — Affidavit — Amendment.*]—After an opposition has been made and disposed of, a new one may be made by another party without the order of a Judge giving leave therefor; Art. 654 applies only where the second opposition is made by the same party.—2. It is not necessary for the affidavit in support of the opposition to set forth the occupation and domicil of the person making it, if the opposition itself does so. *Semble*, that an affidavit cannot be amended. *Davidson v. Noble*, 2 Que. P. R. 404.

Return — *Notice—Contestation—Time.*]—The notice given by an opposant to the plaintiff that the opposition is returned and that it should be contested within 12 days from the service of the notice, will be set aside upon motion if at the time of such notice the opposition has not in fact been returned. *Labelle v. Hyde*, 5 Que. P. R. 406.

Sale of land — *Description — Error—Particulars.*]—An opposition to a sale of immovables, which alleges simply that they are erroneously described, without saying in what respect the description is erroneous, is frivolous, and will be dismissed on motion. *Phillips v. St. Jean*, 3 Que. P. R. 440.

Sale of land — *Opposition to secure servitude — Way — Plan — Registry laws.*]—The F. estate sold to T. two blocks of land, for $35,945, part of which T. paid in cash, and the vendor retained a *bailleur de fonds* claim for the balance,—the hypothec being restricted to fifty cents per foot of the land so sold. T. caused to be made and registered a plan sub-dividing the two blocks of land into building lots, and also indicating the proposed extension of a street, and of two lanes, through the land. These building lots he subsequently sold to various persons, granting them a servitude of right of

passage over the projected street extension and over the lanes. H. purchased the *bailleur de fonds* claim from the F. estate, and was subrogated in all the rights of that estate. T., having become insolvent, made an abandonment of his property for the benefit of his creditors, and C. was appointed curator of the estate. The city of Montreal refused to carry out the proposed extension of the street, and the result was that the lots sold by T., and on which buildings had been erected, fronted on portions of the land covered by the hypothec of H. H. petitioned for an order upon the curator, for the sale by the sheriff in ordinary course of the land subject to his hypothec. The petition was granted, and the sheriff seized and advertised for sale four lots, being parts of the projected extension of the street, and also parts of lanes. Five oppositions to the sale were filed by persons whose rights of passage would be interfered with by the proposed sale:—*Held*, that the opposition, being an opposition to secure a servitude, was, under Art. 725 C. C. P., unnecessary and inadmissible. *Masson* v. *Hatton* (No. 1), 19 Que. S. C. 218.

Sale of land—*Ordre de sursis—Former judgment — Effect of — Sheriff.*] — The Court of Review confirmed a judgment of the Superior Court which dismissed several oppositions by different persons, to secure an alleged servitude of right of passage, but, as the oppositions were dismissed by the majority of the Court, on the ground that an opposition *afin de charge* to secure a servitude is prohibited by the Code of Procedure, Art. 725, the recourse of the opposants by opposition to annul, or such other procedure as might be advised, was reserved. The opposants now asked for an *ordre de sursis*:—*Held*, that the opposants having urged no reasons subsequent to the proceedings by which the sale was stopped in the first instance, the Court was precluded by Art. 654, C. C. P., from granting the order asked for; and it was not within the jurisdiction of the Court to express an opinion for the guidance of the sheriff as to the effect of the judgment of the Court of Review. *Masson* v. *Hatton* (No. 2), 19 Que. S. C. 254.

Sale of land — *Reasons for — Former judgment — Reservation in.*]—In a judgment of the Court of Review, confirming the *dispositif* of the judgment of the Court below dismissing an opposition, the following clause was inserted:—"*Sauf recours par telle autre opposition ou procédure qu'ils aviseront, mais qu'ils ont adopté n'est pas celle qui leur les délais, en que l'opposition afin de charge qu'ils ont adopté n'est pas celle qui leur compétait, et qu'ils paraissent avoir des droits à sauvegarder.*" The opposants then made an opposition *afin de distraire*, which the petitioner-intervenant moved be rejected from the record:—*Held*, that the opposition, being founded upon reasons which were not subsequent to the proceeding by which the sale was stopped in the first instance, and there being no Judge's order to stop the sale, was without effect under Art. 654, C. C. P., and should be rejected from the record, notwithstanding the reservation contained in the judgment of the Court of Review. *Masson* v. *Hatton* (No. 3), 19 Que. S. C. 256.

Sale of land — *Unregistered lease for a year.*]—A lease for a year, not registered, affords no ground for an opposition *afin de charge* by the lessee with respect to a sale of the demised premises. *Lantaigne* v. *Kelling*, 5 Que. P. R. 101.

Sale of land by hypothecary creditor — *Opposition afin de charge—Security for realization.*] — An hypothecary creditor who puts up for sale immovable property, may demand by motion that the tenant, who makes an opposition *afin de charge* based upon his lease, shall furnish security that the immovable will be sold for a sum sufficient to assure the complete payment of the debt. *Trust & Loan Co.* v. *Charlebois*, 5 Que. P. R. 365.

Second opposition — *Peremption of first — Art. 654, C. P.*]—The fact that a first opposition has been perempted does not change the position of the parties in regard to a second opposition, and Art. 654, C. P., is applicable notwithstanding such peremption. *Clement* v. *Walcrer*, 9 Que. P. R. 339.

Solicitor — *Election of domicil—Default —Motion — Costs — Amendment—Time.*]—By virtue of Rule 63 of the Rules of Practice of the Superior Court, an opposition signed by an attorney who has not elected a domicil pursuant to Art. 86, C. P., may be set aside upon motion, but if the applicant has suffered no prejudice, the Court will grant the motion as regards costs only, and will order that an election of domicil be made, and the time fixed by Art. 650 for contesting an opposition, if the notice thereto mentioned has been given, will be extended until 12 days after the service of notice of such election. *Myers* v. *Mercier*, 22 Que. S. C. 309.

Summary dismissal — *Unjust delay of sale — Discretion.*]—A Judge has a discretionary power summarily to dismiss, upon motion, and without requiring the ordinary rules of procedure to be observed, an opposition to a seizure under execution, made with the object of unjustly delaying the sale, or he may make such other order as will do justice in the premises. *Fontaine* v. *Payette*, 14 Que. K. B. 454.

Tierce-opposition — *Party to action — Husband authorising wife — Judgment against community.*] — When the husband who is *commun en biens* with his wife has been made a party to all the proceedings against his wife for the purpose of authorising her in reference to these various proceedings, to which she was a party in her quality of testamentary executrix, he is not a third party within the meaning of the Code of Procedure, and an opposition made by him to a judgment as rendered against the community will be dismissed. *Ross* v. *Ross*, 8 Que. P. R. 302.

Time for — *"Before the sale" — General sale of property seized.*]—The words "before the sale" in Art. 1166, C. P., must be understood as applying to a general sale of the property seized, and not to a single chattel seized elsewhere than at the domicil of the defendant. *Jarry* v. *Décarie*, 8 Que. P. R. 370.

See APPEAL — ATTACHMENT OF DEBTS — COMPANY — EXECUTION — HUSBAND AND WIFE — PREMPTION—PRINCIPAL AND AGENT — RECEIVER — SALE OF GOODS.

OPTION.

See ARBITRATION AND AWARD—CONTRACT —EXECUTION — LANDLORD AND TENANT—MECHANICS' LIENS — PATENT FOR INVENTION — PRINCIPAL AND AGENT — STREET RAILWAYS—VENDOR AND PURCHASER.

ORANGEMEN.

Motion to quash indictment—*Orangemen on grand jury.*] — Defendant was indicted for riot during which the Orange Lodge in Charlottetown had been attacked and damaged. On the Grand Jury which found the bill against defendant were some Orangemen, though it did not appear that, beyond being members of the association, they had any personal interest in the hall. The case for the Crown was closed when defendant's counsel moved to quash the indictment on the ground that the Orange Grand Jurors were disqualified to act on the Grand Jury in a case where the defendant was charged with riot causing damage to property in which Orangemen were interested:—*Held*, that the Orangemen, as such, were not disqualified to act as Grand Jurors. *R.* v. *Collins* (1878), 2 P. E. I. R. 249.

ORDER IN COUNCIL.

See COMPANY — CONSTITUTIONAL LAW — CROWN — JUDGMENT — LANDS — MINES AND MINERALS — MUNICIPAL CORPORATIONS —PLEADING.

ORDNANCE LANDS.

See MUNICIPAL CORPORATIONS.

ORIGINATING NOTICE.

See WILL.

ORIGINATING SUMMONS.

See DISTRIBUTION OF ESTATES—EXECUTION — LANDLORD AND TENANT — MINES AND MINERALS — MORTGAGE—PRACTICE.

OUSTER.

See TENANTS IN COMMON.

OVERHOLDING TENANTS ACT.

See LANDLORD AND TENANT.

OVERSEERS OF THE POOR.

See PAUPER.

OWNER.

See MECHANICS' LIENS.

PARENT AND CHILD.

Action by father — *Injury to child — Infant — Damages.*]—In an action against a tavern-keeper for damages for injury caused to the plaintiff's infant son by the sale to him of alcoholic drinks, the father cannot claim in his own name damages which are personal to his child. *Charbonneau* v. *Bellevau*, 9 Que. P. R. 88.

Agreement between father and son —Rent of farm — Claim by son against father's estate for compensation for services and improvements — Settlement in lifetime of father. *Oliver* v. *McMillan*, 9 O. W. R. 494.

Agreement for maintenance of parent — Payment — Recovery back — Following into land — Lien — Costs. *Ferguson* v. *Cornelius*, 2 O. W. R. 259.

Conveyance of farm by father to daughters — *Agreement for maintenance — Action to set aside transaction — Understanding and capacity of grantor—Absence of undue influence — Improvidence—Status of heir-at-law as plaintiff.*]—A farmer, 77 years old, conveyed his farm to two of his daughters, subject to a charge for the maintenance of himself and his wife and of a money payment to another daughter. The evidence shewed that he understood what he was doing and approved of it afterwards till his death, four years later. This action was brought by one of his sons, after his death, to set aside the conveyance to the defendants, the two daughters:—*Held*, that the transaction was a righteous one, and that the conveyance, being executed voluntarily and deliberately, with knowledge of its nature and effect, should not be set aside; the advice of an independent solicitor or other person was not a *sine qua non*, it appearing that the transaction was not promoted or obtained by undue influence, and was in itself a reasonable one, having regard to all the circumstances. *Empey* v. *Fick*, 9 O. W. R. 73, 13 O. L. R. 178.—The above decision of a Divisional Court was affirmed, the majority of the Court of Appeal agreeing with the reasons given by the Court below.—*Per* Meredith, J. A.:—If the transaction had been attacked by the grantor in his lifetime, it would have been set aside; it was not so attacked, but rather confirmed; and (*per* Riddell, J., also) no one representing or claiming under the grantor could successfully attack it.—*Per* Riddell, J.:—Since the

Devolution of Estates Act, the right of the heir at law to sue to set aside a transaction of this kind is not higher than the right of a residuary legatee to sue in respect of personal property; the plaintiff had no right to bring the action at all until the expiration of the period of three years fixed by 2 Edw. VII. c. 17, s. 3, amending R. S. O. 1897 c. 127, s. 13; and the fact that the personal representative was made a defendant did not assist the plaintiff. *Empey* v. *Fick*, 10 O. W. R. 144, 15 O. L. R. 19.

Conveyance of farm by mother to son — Improvidence — Voluntary gift — Lease for life — Improvements—Pleading—Amendment — Judgment — Declaration. *Cummings* v. *Maidens*, 11 O. W. R. 232.

Conveyance of land by father to son — Undue influence — Absence of independent advice — Improvidence — Annuity —Covenant for maintenance — Consideration — Delivery of conveyance — Charge on land — Power of distress — Re-entry for breach of covenant. *Delisle* v. *Delisle*, 5 O. W. R. 673, 6 O. W. R. 796.

Duty of son to support father—*Alimentary allowance — Offer to receive at home — Asylum.*]—When a father is in need of support, and his son is in a condition to furnish it to him, the latter cannot refuse to do so on the ground that his father lives with persons whom the son does not consider respectable. 2. A son who is liable to furnish support for his father has no right to offer, in place of such support, to receive him in his house and at his table, or to place him in an asylum, when he has not been declared a lunatic. *Ouimet* v. *Ouimet*, 21 Que. S. C. 479.

Gift — *Presumption — Intention — Action for payment.*]—A son who from time to time furnishes supplies to his mother, without the intention to make her pay for them, has no right to sue for the price later. *Légaré* v. *Lafond*, 34 Que. S. C. 162.

Gift of land — *Oral promise to convey —Statute of Frauds — Improvements—Enforcement of promise — Equitable jurisdiction.*]—The defendant made a gift of a piece of land to his son R. after his marriage for the purpose of erecting a house upon it in which to live. R. went into exclusive possession of the land with the defendant's consent, and made permanent improvements, including the erection of a house at a cost of between $500 and $600. The defendant, at various times, promised to give R. a deed of the land, but failed to do so, and, after the death of R., ejected his widow and resumed possession of the land with the improvements:—*Held*, that the Court, in the exercise of its equitable jurisdiction, would protect the donee and those claiming under him in the enjoyment of the property, and that it was not open to the defendant, after having made an oral gift of the land to his son, and the expenditures made on the faith of that gift, to avail himself of the defence of the Statute of Frauds, and that the plaintiff, who claimed as widow of R., was entitled to a conveyance of one undivided half of the land in question, or to a partition. *Dagley* v. *Dagley*, 39 N. S. R. 313.

Gift of property — *Covenant for maintenance — Breach — Action to revoke gift.*]—The default of the donee to furnish to the donor, his father, blind, poor, and helpless, and to the latter's wife, "the use of a furnished room and firewood," as stipulated in the deed of gift, affords ground for the action *en révocation* provided for by Art. 811, C. C. *Coté* v. *Coté*, 29 Que. S. C. 388.

Goods sold to child — *Liability of parent.*]—A father is not liable for goods sold to his daughter who is of age, without authorisation by himself, unless it be proved, (a) that the goods were necessary for her proper support, (b) that she was both unable to earn her own support by her own work, and was not possessed of any property or revenue out of which she could provide for it. *Simard* v. *Baller*, 18 Que. S. C. 287.

Liability of parent for child's tort — Infant — Knowledge — Division Courts Act. *McCann* v. *Slater*, 1 O. W. R. 131

Liability of parent for tort of infant child — *Evidence — Absence of negligence.*]—Where, in an action against a father to recover damages for acts of his infant son, there is evidence that the acts were done by accident without malicious intention, while the child was playing with the victim of the accident, his habitual playmate, under the eyes of the latter's mother, at a time when his parents had reason to believe that he was sufficiently watched and guarded, and there is also evidence that the child who did the wrong, although unruly, had no evil instincts and had been properly brought up, there is proof sufficient to establish that the father could not have prevented the acts complained of, and therefore that he is not liable therefor. *Deschamps* v. *Berthiaume*, 30 Que. S. C. 135.

Liability of parent for tort of infant child — Evidence — Admission of child — Effect as to father. *Brunet* v. *Roth*, 4 E. L. R. 211.

Service of child — *Payment — Contract — Will — Executors — Infant — Quantum meruit.*] — The plaintiff was induced to give up the employment at which she was earning her living, and to go and live with her mother, in consequence of her mother's promise to leave her all her property at her death. Upon a claim against the mother's executors for payment for the services rendered, it was shewn that during three years at least the plaintiff's services were understood not to be gratuitous. The mother having failed to make provision as agreed, the plaintiff was held entitled to recover on a *quantum meruit* for her services during the time stated.—It was also held that the plaintiff, who was divorced from her husband, must be assumed to be emancipated and not a minor. *Re Slaughenwhite*, 38 N. S. R. 47.

Verbal agreement by father to convey land to son in consideration of maintenance and support — Moneys expended by son on land — Subsequent repudiation of agreement — Action by son to recover moneys expended. *Morrison* v. *Morrison* (N.S.), 6 E. L. R. 407.

Voluntary conveyance — Improvidence —Deed executed without legal advice — Agreement for support of parent. *Inglis* v. *Paw*, 3 E. L. R. 556.

Voluntary conveyance — Natural love and affection — Conveyance by parent to child — Action by parent's creditors — Grantor retaining ample means to pay debts —Laches. *Leard* v. *Cameron*, 3 E. L. R. 561.

See ATTACHMENT OF DEBTS — CONTRACT— DAMAGES — DEED — DOWER—EXECUTORS AND ADMINISTRATORS — FRAUDULENT CONVEYANCE — GIFT—HUSBAND AND WIFE — INFANT — NEGLIGENCE— TRUSTS AND TRUSTEES.

PARISH.

See CHURCH.

PARISH BOUNDARIES.

See CHURCH.

PARISH COMMISSIONERS.

See MUNICIPAL CORPORATIONS.

PARK COMMISSIONER.

See DISCOVERY.

PARKS.

See MUNICIPAL CORPORATIONS.

PARLIAMENT.

See CONSTITUTIONAL LAW — DISCOVERY — ELECTIONS.—TRIAL.

PARLIAMENTARY AGENTS.

See SOLICITOR.

PARLIAMENTARY ELECTIONS.

See ELECTIONS.

PAROL EVIDENCE.

See EVIDENCE.

PARSONAGE.

See ASSESSMENT AND TAXES.

PARTAGE.

See HEIRS.

PART PAYMENT.

See BILLS AND NOTES — CROWN—LIMITATION OF ACTIONS — VENDOR AND PURCHASER.

PART PERFORMANCE.

See CONTRACT — EVIDENCE — MUNICIPAL CORPORATIONS — SALE OF GOODS—VENDOR AND PURCHASER—WAY.

PARTICULARS.

Accident insurance company, sought in damages for bodily injuries by the owner of an automobile, and pleading that the accident in question is not within the category of those mentioned in the policy invoked by plaintiff, will not be ordered to give further particulars, the phrase referred to covering all the exceptions contained in the policy. *O'Brien* v. *Can. Casualty & Boiler Ins. Co.*, (1911), 12 Que. P. R. 261.

Account — *Amendment at trial — Refusal of postponement — Surprise — New trial.*]—Declaration for work and labour and on an account stated. Pleas, payment and set-off, the particulars of which showed a considerable sum due the defendants over and above what was claimed by the plaintiff's particulars which were confined to the count for work and labour. At the trial, where a verdict passed for the plaintiff, the set-off being entirely rejected, an application was made to amend the plaintiff's particulars by making a large addition to the time of the alleged work and labour and by giving particulars of the account stated. The amendment was allowed without terms, although the defendants produced affidavits of one of themselves and their attorney and counsel, stating that they were unprepared to make their defence at the then circuit to the claim of work and labour as set out in the amended particulars; that had the original particulars been served as amended they might have offered to suffer judgment and would have done so had they found the plaintiff's claim was correct; that, as no particulars had been served applicable to the count for an account stated, that count had not been regarded as *bona fide*, and in preparing for trial no consideration had been given to it; that if the amendment was allowed the defendants would be taken by surprise and were not prepared to make their defence, and great injustice would be done to them:—*Held*, that the defendants' affidavit shewed that the amendment was of a character to materially prejudice the defendants, and should not have been allowed without such terms as would, as nearly as might be, place the defendants in the position they occupied when the original particulars were served; and a new trial was ordered. *Hicks* v. *Ogden*, 35 N. B. R. 361.

Account — *Partnership — Interests of partners.*]—It is not necessary for a defendant, sued in *assumpsit*, to know the respective interests of each one of the plaintiffs in their partnership, nor to know the minor details of an account already for the most part paid. *Callaghan* v. *Rutherford*, 5 Que. P. R. 303.

Action by advocate for bill of costs —*Fees and disbursements — Procuration— Copies of proceedings — Demand of particulars — Default of plea — Opening pleadings closed — Terms.*]—The defendant in default for a plea will be relieved from his foreclosure and be allowed to demand particulars of the plaintiff's account, upon payment of the costs, occasioned by his default. 2. The advocate in an action for fees and disbursements in a former suit in which he acted for the present defendant's opponent, must state when the proceedings for which he claims fees were taken by him. 3. He must also indicate the object of his disbursements made in Court or at the sheriff's office. 4. He should also file the procuration of his client authorising him to sue when he alleges such procuration. 5. *Semble*, that he is not obliged to file copies of the proceedings which he has taken nor of the acts which he has had made by a notary on behalf of his client. *Desjardins* v. *Lamoureux*, 4 Que. P. R. 398.

Action for account — Postponement till after discovery. *Canadian Bank of Commerce* v. *McDonald* (Y.T.), 1 W. L. R. 271, 506.

Action for goods sold — *Exception to form.*]—A plaintiff suing for a balance of an account for goods sold and delivered, without giving at the time of service of process details of the quantity, quality, nature, and kind of the goods sold, as required by Rule of Practice 56, will, on an exception to the form, be required to furnish such details on pain of his action being dismissed. *Savaria* v. *Rosenfield*, 7 Que. P. R. 15.

Action for damages — *C. P. 123.*]—In an action for damages against a railway company, plaintiff is bound to give particulars on the following allegations of his declaration: "The defendant is liable, etc., . . . in failure to take proper precautions to avoid an accident, and in not following a proper method of doing the work and not properly superintending it." *Nemuse* v. *Can. Pac. Ry. Co.* (1909), 10 Que. P. R. 408.

Action of ejectment — *Defence of encroachment.*] — A general allegation of encroachment in the defence to an action for possession of land may be the object of a motion for particulars shewing when, how, and to what extent the plaintiff has encroached upon the land of the defendant. *Vallée* v. *Prescott*, 4 Que. P. R. 279.

Adultery.]—In an action for separation from bed and board, an allegation stating that the defendant, since a certain time, has kept, and still keeps, a disorderly house, where she habitually commits adultery, is sufficiently particularised, and the plaintiff will not be bound to give dates and places where, and to name the persons with whom the defendant has committed adultery. *Clément* v. *Clément*, 2 Que. P. R. 455.

Agreement written or verbal — *Costs.*] — Upon an allegation of a special agreement entered into between the parties whereby the defendant agreed to pay interest upon the amount of an account for goods sold, the plaintiff will be ordered, upon motion in that behalf, to state whether the agreement was in writing or oral; and if, at the hearing of the motion, the attorney of the plaintiff declares that such agreement was made orally, the motion for particulars made by the defendant will be granted as to costs only, and a certificate of such declaration will be given. *Brosseau* v. *Beckham*, 3 Que. P. R. 109.

Agreement written or verbal — *Date — Partnership dealings.*]—The statement of claim alleged a partnership and a dissolution, and claimed an account of the property and money of the co-partnership which had come into the hands or under the control of the defendant, under certain circumstances set out in the statement of claim:—*Held*, that the defendant was entitled to know whether the alleged partnership agreement was in writing, and the date, but, as the terms set out in the statement of claim alone constituted the plaintiff's claim, any other terms were not particulars of such claim, and the defendant could not obtain them in this way if he wishes to make them available for a defence. But the defendant was not entitled to particulars of the transactions in respect of which the plaintiff alleged that the defendant became possessed of partnership funds. They were not necessary to enable him to put in his defence. The first question to be decided was whether there had been a partnership which had been dissolved, and the next, the terms of it. If the partnership and the dissolution were admitted or proved, an order for accounting would follow as a matter of course, and these matters would come up before the Master. *Augustinus* v. *Nerincke*, 16 Ch. D. 13, followed. *Forbes* v. *Pearson*, 20 C. L. T. 413.

Animal — *Injury by — Ownership — Provocation.*]—In an action for damages resulting from the biting of a dog, the defendant pleaded that the dog was her husband's property, and not hers, and further that the biting was due to the plaintiff's provocation. On motion for particulars as to the husband's ownership, and also as to the time and place of the alleged provocation:—*Held*, that the defendant was not bound to give particulars of her husband's ownership of the dog in question, the fact not being personal to her, and the plaintiff being able to obtain further information by examining the defendant for discovery.—2. That the provocation in the absence of other particulars, is presumed to have occurred at the time and place where the plaintiff was bitten by the dog and that, therefore, no further details were required. *Hugson* v. *Statton*, 2 Que. P. R. 559.

Attachment before judgment — *Concealment of goods.*]—A defendant sued by way of attachment before judgment can by

motion demand and obtain particulars as to alleged acts of concealment or taking away of goods, etc., and the place, time, and nature of such acts. *Gaudet* v. *Meinville*, 2 Que. P. R. 382.

Bond — *Action on — Defences—Release by time given to principal—Ratification of breaches—Securities.*] — Action on a bond by the defendant as surety for another. The defendant pleaded that the plaintiffs had released him by giving time to the principal to make certain payments; that the plaintiffs had ratified and confirmed the breaches of the bond by their conduct towards the principal; and that the plaintiffs held certain securities for the payment of such sums as might be found due in the action. Particulars (1) of the occasions when time was given, and whether by a written instrument or otherwise, (2) of the acts of ratification and confirmation and the course of conduct relied on, (3) of the securities alleged by the defendant to be held by the plaintiffs, were ordered. *McLaughlin Carriage Co.* v. *Oland*, 20 C. L. T. 342.

Breach of contract — *Statement of damage.*]—In an action for damages resulting from a breach of contract, an allegation that the plaintiff has, through the breach, lost his custom and a large sum of money, by the ruin of his business, is sufficiently particularised. *Gratton* v. *Dawenais*, 5 Que. P. R. 261.

Commission on sale of goods — Information in possession of defendants. *Buckley* v. *Rougier*, 4 O. W. R. 153.

Contestation of opposition—*Illegality of debentures of railway company.*]—Particulars will be ordered to be given of a paragraph in a contestation, alleging generally the illegality of an issue of debentures of the execution debtors, a railway company, without averring in what the illegality in question consists of an opposition to a seizure. *Connally* v. *Baie des Chaleurs Ry. Co.*, 4 Que. P. R. 178.

Counterclaim — Alternative claim — Postponement — Premature motion—*Quantum meruit.* *Dixon* v. *Garbutt*, 9 O. W. R. 392, 509, 586.

Damages — *Plea that damage caused by plaintiff's own acts.*]—When, in pleading to an action for damages, the defendant alleges that if the plaintiff has suffered any damages, which is denied, such damages is due to his own acts, the defendant will be ordered to give particulars of these acts of the plaintiff, and will not be allowed to prove other acts than those which he enumerates. *Montreal and St. Lawrence Light & Power Co.* v. *Stillwell*, 5 Que. P. R. 148.

Declaration — *Acknowledgment of debt sued for — Promise to pay.*]—The Court will not order particulars of an oral acknowledgment of the debt sued for, alleged by the declaration to have been made by the secretary of the defendant company in the name of the company, nor of a promise to pay made in the same way. *Montreal Watch Case Co.* v. *Imperial Button Works, Limited*, 7 Que. P. R. 279.

Declaration — *Amendment.*] — Particulars furnished by the plaintiff pursuant to an order therefor, will not be set aside upon motion because they amount to an amendment of the declaration. *Fournier* v. *Martin*, 6 Que. P. R. 288.

Declaration — *Assault — Names of persons present.*] — When a declaration is properly drawn with sufficient particulars, the plaintiff will not be ordered to give the names of the persons present when the assault upon which he bases the action was committed. *Perron* v. *Thibault*, 8 Que. P. R. 438.

Declaration — *Damages — Motion.*]— The absence of details in the declaration in an action for damages is matter for a motion for particulars, not for an exception to the form. *Lacy* v. *Village of Bordeaux*, 8 Que. P. R. 284.

Declaration — *Document incorporated by reference.*]—A motion for particulars of the declaration will be dismissed, if sufficient particulars are contained in a document to which the declaration refers, and of which it therefore forms part. *Durand* v. *Lecours*, 8 Que. P. R. 418.

Declaration — *Money lent — Writing signed by defendant.*]—Where an action is based upon a document signed by the defendant, in which he acknowledges his indebtedness for advances made to him, he cannot require the plaintiff to give particulars of the dates, the different amounts, and the nature of the advances, at least until after he has filed his defence. *Desbarats Advertising Agency* v. *Goldet*, 10 Que. P. R. 224.

Declaration — *Slander — Names of persons to whom uttered.*]—The object for which particulars of a pleading are ordered is to prevent surprise and to afford a full and fair knowledge of the matter relied upon. Hence in an action of slander, when the declaration sets forth details sufficiently precise to inform the defendant of the nature and occasion of the complaint, the plaintiff will not be ordered, on a motion for particulars, to state the names of the persons before whom he alleges the slander was uttered. *Lebel* v. *Tourrie*, 32 Que. S. C. 251, 9 Que. P. R. 133, 4 E. L. R. 415.

Dedication of town site — *Public user.*]—In an action by the provincial Attorney-General for a declaration that the public had a right of access to the sea over the embankment of the Canadian Pacific Railway *via* certain streets in Vancouver, it was alleged that, in 1870, Her Majesty, by the officers of her colony of British Columbia, laid out and planned a town-site on Burrard Inlet and dedicated certain parts of the town-site to public uses:—*Held*, that the plaintiff must give particulars: (1) Of the authority under which the town-site was laid out. (2) Of the nature and dates of dedication and by whom made; and (3) of what portions of the town-site were dedicated. *Atty.-Gen. for B. C.* v. *Can. Pac. Ry. Co.*, 10 B. C. R. 184.

Defamation — *Justification — Damages — Costs — Grounds for ordering — Surprise — Exception to form.*]—A motion for particulars assumes that the cause of action is sufficiently set forth; the defendant accepts and desires only to have additional or more precise information in order to prepare his defence. Such a motion is not subject to the formalities of an exception to the form, from which it is different. It is a motion according to English law, and has always been admitted in Quebec jurisprudence; it is a matter of discipline in the conduct of causes in order that there may be no surprise. 2. Where the plaintiff in an action for libel has anticipated the defence and undertaken to justify the act of which the defendant has accused him, he will be ordered to give particulars of his grounds of justification, if his allegations are vague. 3. A defendant, on motion for particulars, may obtain an order that the plaintiff shall make more precise all the definite or vague allegations which he has made. 4. If the plaintiff alleges special damage he must give particulars of it. 5. The plaintiff in an action for libel claimed a lump sum of $25,000 damages to his reputation, his honour and his property:—*Held*, that he should give particulars of the special damage intended to be covered by these words. 6. The plaintiff claimed also $25,000 damages as "exhilarement" caused by the libel. He was ordered to declare whether he intended to claim some special damage, and if so to give the particulars of it; but if general damages only, particulars would not be necessary. 7. In an action for defamation the plaintiff stated that the defendant had defamed him before several persons. He was ordered to give the names of these persons, if he knew them, and also the dates. The defendant has a right to all the information which the plaintiff possesses. 8. The costs of a motion for particulars should be in the cause. *Chicoutimi Pulp Co.* v. *Price*, 25 Que. S. C. 351.

Defamation — *Pleading—Justification.*]—Action for damages by an architect who alleged that the defendant had accused him of acting in a dishonourable manner in relation to certain tenders which he had communicated to the tenderers to the prejudice of the defendant. Among other defences the defendant alleged that it was justifiable to believe that the plaintiff had acted in an irregular manner. Upon a motion for particulars:—*Held*, that a defendant who pleads justification will be required to declare upon what facts the justification rests. *Tanguay* v. *Gaudry*, 3 Que. P. R. 255.

Default — *Dismissal of action.*]—If a plaintiff neglects to give the particulars which he has been ordered to give, and if the allegations which he has thus neglected to supplement constitute the whole action, the other allegations being general and simply introductory, his action will be dismissed upon motion. *Gravel* v. *Lafontaine*, 5 Que. P. R. 82.

Default of delivery — *Dismissal of action.*]—Where a plaintiff has been ordered to give particulars of the damages which he claims, and neglects to do so, his action will be, on motion, dismissed with costs, saving the right to apply. *Lalonde* v. *Grand Trunk Ry. Co.*, 2 Que. P. R. 514.

Default of pleading — *Waiver.*]—A defendant who has not pleaded to the declaration within the time allowed must be held to have waived any irregularity in the declaration and to have accepted as sufficient the particulars given by the declaration, and it is, after the lapse of such time, too late to move for further particulars. *Rafferty* v. *Whelan*, 2 Que. P. R. 432.

Default of pleading — *Waiver.*]—A motion for particulars cannot be granted after the time for pleading to the merits has expired. *Clément* v. *Clément*, 2 Que. P. R. 453.

Demand —*Stage of cause — Preliminary demand—1 Edw. VII. c. 34 (Q.)*]—The statute 1 Edw. VII. c. 34 (Q.) declares implicitly that a demand of particulars by way of motion before the Court is not a preliminary demand, and therefore it may be made at any stage of the cause, even during the trial. The decision of the Court in *L'Alliance Nationale* v. *L'Union Franco-Canadienne*, 10 Que. K. B. 116, is no longer to be followed. Judgment in 33 Que. S. C. 477, 9 Que. P. R. 206, reversed. *Landry* v. *Turgeon*, 17 Que. K. B. 372, 9 Que. P. R. 346.

Demand — *Time — Deposit.*]—A demand of particulars is in the nature of a preliminary exception, and therefore must be made within the time fixed for the filing of such exceptions and be accompanied by a deposit. (But see 1 Edw. VII. c. 34). *Alliance Nationale* v. *Union Franco-Canadienne*, 10 Que. Q. B. 116.

False audit — *Damages for.*]—In an action to recover damages because the defendant, being auditor of a bank, has certified false reports of the financial standing of the bank, the plaintiff alleging that he has accepted the position of director of the bank upon the faith of such reports, and that he has been called upon as director to pay a certain sum to identify the creditors and depositors of the bank, the defendant is entitled to particulars from the plaintiff shewing what are the false items in such reports; how and at what dates the defendant has acknowledged his liability; when and to whom the plaintiff has paid the sum indicated—but the defendant cannot require to have indicated to him the exact figures of the items alleged to be false. *Prefontaine* v. *Marin*, 3 Que. P. R. 157.

Filing — *Service — Time.*]—Particulars served within the time fixed by an order requiring them to be delivered will not be set aside because not filed in Court until the day after the last day fixed by the order. *Vallée* v. *Vallée*, 6 Que. P. R. 300.

Fire insurance policy — Falsification of stock lists—Amount of over-statements.—Motion for particulars—Affidavit in support. *Quebec Bank* v. *Phœnix Ins. Co.*, 3 O. W. R. 603.

Further particulars — Interpleader issue—Credits—Settled account. *Tawse* v. *Seguin*, 1 O. W. R. 14, 56.

Gift — *Opposition.*]—An opposant who declares that he is the owner of an article seized, having received it as a gift from a person other than the execution debtor, and who has no writing evidencing the gift, will not be ordered to give further particulars of the gift. *Turner* v. *Bradshaw*, 6 Que. P. R. 277.

Injury to person — *Damages—Motion—Costs.*]—The defendant in an action for damages for injury to the person is entitled to particulars where the plaintiff adds to his enumeration of the damages the words "*et cætera*."—2. In such action the plaintiff is not obliged to furnish details of the amount of damage which he alleges he has suffered in respect of his health, his enjoyment of life, and for medical expenses.—3. Where the motion succeeds only as to part of the particulars sought, the applicant is not entitled to costs. *McDonald* v. *Viacberg*, 3 Que. P. R. 298.

Insufficiency — *Time for moving.*]—If the defendant, having obtained an order for particulars of the plaintiff's demand, wishes to move against the particulars delivered on the ground of insufficiency, he must do so within three days after delivery. *Underwood* v. *Childs*, 16 Que. S. C. 412.

Issue—Attack on conveyance. *McKinnon* v. *Richardson*, 2 O. W. R. 244, 275.

Laches — Crown — Defence to petition of right. *Cartwright* v. *Rex* (B.C.), 1 W. L. R. 82.

Mechanics' lien action — Defects in work—Examination for discovery. *King* v. *Georgetown Floral Co.*, 3 O. W. R. 587.

Mortgage — *Payments — Consideration—Proof of agency.*]—The action was to set aside a deed and for a declaration that two certain mortgages had been paid, or in the alternative for redemption. The defendants pleaded that the plaintiff, being bed-ridden for a number of years, had appointed one of the defendants his agent to transact business for him; that the consideration of one mortgage was money lent by the defendant M. to the plaintiff; that the defendant M. was assignee of the other mortgage; that he had given full consideration therefor to the mortgagee; and that he had also paid to the plaintiff the full consideration for the deed sought to be set aside. The plaintiff, on affidavit, denied knowledge of payments and consideration alleged:—*Held*, that the defendants should give particulars shewing whether the alleged authorization to the agent was in writing, and the date; also dates and items of money alleged to have been lent to the plaintiff, dates and items of payments for mortgage of which the defendant M. was assignee; and how, when, and in what manner the consideration for the deed mentioned in the statement of claim was paid. *Robert* v. *Miller* (No. 1), 20 C. L. T. 408.

Motion for — Affidavit — Notice of reading—Date of filing—Contract—Interest—Offers. *Martin* v. *Moody*, 2 O. W. R. 153.

Motion for — *Can defendant, foreclosed from pleading, make such a motion?—C. P. 123, 197, 205.*]—A defendant who has not filed his plea and who has been foreclosed from so doing cannot make a motion to obtain further particulars respecting plaintiff's declaration without first asking that he be relieved from the foreclosure. *Lerige* v. *Suave* (1910), 12 Que. P. R. 148.

Motion for — *Damages for injury to property.*]—In an action for damages for injury caused to his property, the plaintiff will be ordered, upon motion, to furnish a statement indicating separately each item of damages making up the whole sum claimed. *Hertel* v. *Foley*, 4 Que. P. R. 334.

Motion for — *Deposit — Trial — Adjournment.*]—A deposit is required with a motion for particulars. Upon application, at the hearing, by the party moving for particulars, to be allowed to make such deposit, the *délibéré* will be discharged for that purpose. *Lalonde* v. *Grand Trunk Ry. Co.*, 2 Que. P. R. 449.

Motion for — *Diligence.*]— A motion for particulars is in the nature of a preliminary plea, and must be made with diligence. *Raymond* v. *Whitlall*, 6 Que. P. R. 209.

Motion for — *Exception to the form—Notice—Deposit—Certificate.*] — Every motion for particulars, whether urged against a declaration, a pleading or a paragraph of a pleading, is necessarily founded on the insufficiency of the allegation attacked, and is therefore in its nature an exception *à la forme*, and falls under the rule of Art. 164, C. P. C., requiring notice thereof to be served within three days, and presentment to be made as soon as possible after the delay to which the opposite party is entitled. Such motion must be accompanied with a certificate of deposit. *Loomis* v. *Sun Life Assce. Co.*, 18 Que. S. C. 329.

Motion for — *Libel — Articles in newspaper—Joint damages asked by husband and wife—C. P. 123.*]—*Held*, 1. In an action for libel against a newspaper, it is not sufficient to give the purport of the articles which plaintiff alleges to be libellous; but defendant is entitled to know in which articles of the paper the alleged libel appeared.—2. If husband and wife claim a fixed amount of damages caused by a libel, the defendant is entitled to know how much damage was suffered by the male plaintiff, how much by the female plaintiff and how much is claimed by each of them. *Patron* v. *La Cie "La Vigie"* (1910), 11 Que. P. R. 208.

Motion for — *Notice of suit — City of Montreal—Damages for hasty arrest—C. P. 123; 7 Edw. VII., c. 63, s. 55.*]—In an action of damages directed against the city of Montreal for imprudent arrest it is not necessary to give a preliminary notice.—If, in a plea to an action in damages, the defendant sets up plaintiff's fault and negligence, and cites in support thereof certain parts of the declaration, the defendant will not be ordered to furnish further particulars than those contained in his plea. *Dupuis* v. *Montreal*, 11 Que. P. R. 183.

Motion for — *Order — Amendment of pleading—Costs.*]—A motion for particulars is not an answer to a pleading, and a pleading can be changed or amended once without

costs, without leave of a Judge, after service of notice of a motion for particulars of the original pleading, and even after an order for particulars.—Costs will be given upon a motion to strike out a paragraph of a pleading whereof particulars have been ordered and have not been furnished. *Codville* v. *Woods*, 3 Que. P. R. 233.

Motion for — *Statement of claim—Action for personal services—Contract of hiring —Evidence of—Services rendered — Discovery.*]—Plaintiff brought action to recover for personal services. Defendants denied any knowledge of any contract of hiring or of services rendered, and moved for particulars of statement of claim before pleading. Master in Chambers *held*, that they were entitled to particulars as to the contract of hiring but that particulars as to services rendered could be had on examination for discovery. *Bartlett* v. *Bartlett Mines* (1910), 16 O. W. R. 947, 2 O. W. N. 46.

Motion for—*Time.*]—A motion for particulars, not being in its nature a preliminary plea, may be made after the lapse of the time prescribed for the filing of such a plea. *Xerxa* v. *People's Telephone Co.*, 20 Que. S. C. 538.

Motion for — *Time for answering plea —Lapse.*]—A party, having neglected to file with his inscription in law, or within the delays, his answer to a plea, *is de facto* foreclosed from doing so, and cannot make a motion for particulars. *Demers* v. *Brien dit Durocher*, 7 Que. P. R. 467.

Motion for leave to file particulars, after the delay granted for so doing has expired, should specify the reasons which prevented the moving party from complying with the previous order of the Court within the given delay, and it must also be supported by an affidavit. *Levasseur* v. *Can. Pac. Ry. Co.* (1911), 12 Que. P. R. 221, 17 R. R. S. 8, 175.

Motion for necessity—*It should be alleged—C. P. 123.*]—A party has a right to have only such particulars as are absolutely necessary to him to enable him to answer to the allegations of the opposite party, such necessity should be set out in the motion for particulars. *Chase* v. *Knight* (1911), 12 Que. P. R. 205.

Motion for order to deliver — *Full facts—Evidence at trial—Denial of validity of plaintiff's patents — Further and better particulars as other matters — Want of novelty of patent.*]—Cartwright, Master (17 O. W. R. 626, 2 O. W. N. 336), granted order for delivery of particulars of statement of defence, but refused to strike out defendant's pleadings attacking the validity of certain patents for inventions.—Riddell, J., *held*, that the defendants could deny the validity of the patents under and according to the process of which the defendants were said to be manufacturing; that the defendants could also counterclaim to get rid of the patent as against them.—See judgment in S. C. on similar pleadings, 16 O. W. R. 57, 21 O. L. R. 166, 1 O. W. N. 773; *Duryea* v. *Kaufman* (1910), 17 O. W. R. 1055, 2 O. W. N. 476.

Motion for particulars — *Affidavit — The necessity of particulars—C. C. P. 123.*]—When the plaintiff wishes to know whether certain contracts or agreements, which the defendant alleges passed between him and the plaintiff, were verbal or in writing, he should allege, in his motion for particulars, that such details are necessary, and support his motion by affidavit; because, to enable a party to a suit to admit or deny or explain such allegations, it is apparently necessary that such party should be informed in what manner or form the arrangements were made. *Stewart, Howe & Meek Co.* v. *Pollock*, 11 Que. P. R. 27.

Motion for particulars — *Libel — Articles in newspaper—Joint damages asked by husband and wife—C. P. 123.*]—In an action for libel against a newspaper, it is not sufficient to give the purport of the articles which plaintiff alleges to be libellous; but defendant is entitled to know in which articles of the paper the alleged libel appeared. If husband and wife claim a fixed amount of damages caused by a libel, the defendant is entitled to know how much damage is suffered by the male plaintiff, how much by the female plaintiff, and how much is claimed by each of them. *Patron* v. "*La Vigie*" (1910), 11 Que. P. R. 268.

Motion for particulars of statement of claim — Plaintiff entitled to know what case he has to meet at trial—Particulars to be given in 7 days—If foreman is examined, motion enlarged—Costs in cause. *Gibson* v. *Toronto Bolt & Forging Co.* (1910), 17 O. W. R. 412, 2 O. W. N. 257.

Motion for particulars ought to be clear and explicit — *Making up the account.*]—A motion asking the defendant to render an account "to produce the orders and vouchers wanted, and necessary for the support of his said account, and to furnish particulars of the charges therein set forth, with dates," is insufficient and too vague; it does not indicate what items are lacking in precision and does not ask for the production of any orders and vouchers distinct and determined. *Desrosiers* v. *Larivière* (1910), 10 Que. P. R. 334.

Motion presented after the delays have expired to answer a plea—*C. P. 123, 186, 198.*]—The Court will not grant a motion for particulars made by the plaintiff if the motion is only presented after the delays to file an answer to the plea have expired. *Biron* v. *Biron* (1910), 11 Que. P. R. 258.

Motion to reject particulars — *Delay—C. C. P. 123, 164.*]—A motion to reject as insufficient, particulars furnished in accordance with an order of the Court, will be dismissed if it is made after the expiry of three days from the filing of the said particulars. *Montreal* v. *Montreal Terminal Ry. Co.*, 11 Que. P. R. 63.

Municipal corporations — *Highway — Injury to persons—Precautions — Contributory negligence—Climatic causes—Costs.*]—In an action against the corporation of the city of Montreal to recover damages for injuries received in an accident the defendants are not obliged to particularize the precautions which they say they took, such precau-

tions being defined by the city by-laws. 2. But the defendants are obliged to explain in what the default of the plaintiff consists and the uncontrollable climatic causes to which they attribute the accident. 3. No costs will be given upon a motion for particulars granted in part only. *Matthews* v. *City of Montreal*, 3 Que. P. R. 349.

Negligence — *Knowledge.*]—Particulars are ordered for the purpose of forwarding the applicant's case, and not to hamper the party ordered to give them. When a plaintiff is ordered to give particulars of negligence which are essentially within the defendant's knowledge, the order may provide that the plaintiff shall not be confined at the trial to the particulars given. *Alaska Packers' Association* v. *Spencer*, 9 B. C. R. 473.

Negligence — *Personal injuries—Heads of damage — Admission of liability.*] — A plaintiff who claims damages for injuries caused by an accident, must give particulars of the amounts which he claims: (1) for medical services, nursing, and medicines; (2) for injury to his clothing; (3) for other injuries alleged in his declaration. 2. A plaintiff will be ordered to furnish particulars of the time and place at which the defendant admitted owing him or promised to pay him the amount claimed, or at the least to indicate the circumstances in which such promise was made. *Poole* v. *Hogan*, 5 Que. P. R. 424.

Negligence — *Pleading.*]— In an action for damages for personal injuries, paragraph 5 of the statement of claim contained allegations of negligence which might not have been particulars of the negligence alleged in paragraphs 3 and 4:—*Held*, that the plaintiff must give particulars or else state that they were to be found in paragraph 5. *Kingscell* v. *Crow's Nest Pass Coal Co.*, 9 B. C. R. 518.

Negligence — *Rule 278 (c).*] — The statement of claim alleged negligence by the defendants in the construction of a ditch along the highway in front of the plaintiff's land and neglect to keep such ditch in repair, in consequence of which a larger quantity of water was brought on to the plaintiff's land than would otherwise have naturally flowed thereon. On motion for particulars:—*Held*, that Rule 278 (c) was not applicable; it only applied to a case where a defendant would under the former practice be entitled as to course to an order for particulars. Although there seemed to be a tendency to grant orders for particulars in cases of tort more freely than formerly, there must still in each case be some special reason shewn why the order should be made. The bare statement that the absence of particulars embarrasses the defence, or that the defendants cannot frame their statement of defence without the particulars, is insufficient. *Miller* v. *Rural Municipality of Westbourne*, 20 C. L. T. 394.

Order for — *Affidavit—Action for tort.*] —On an application for an order for particulars of the plaintiff's claim in an action of tort, setting forth at least such facts as would satisfy a Judge that the defendants would be embarrassed in their defence without such particulars and that justice requires their delivery. An affidavit by the defendants' solicitor that he believes the defendants cannot frame their defence without any statement of particulars is not sufficient to warrant the making of such an order. *Brown* v. *Great Western Ry. Co.*, 20 L. T. N. S. 398, followed. *Miller* v. *Rural Municipality of Westbourne*, 20 C. L. T. 394, 13 Man. L. R. 197.

Order for — *Appeal.*]—There is no appeal from an interlocutory judgment ordering a party to furnish certain details and documents in support of his declaration. *Village of St. Lorimier* v. *sisters of Holy Names of Jesus & Mary*, 7 Que. P. R. 64.

Order for — *Dies non juridicus — Enforcement pending appeal.*]—Particulars not having been delivered pursuant to an order, it was contended by the defendant that the order was bad, having been made on Dominion Day, and that it ought not to be enforced while an appeal against it was pending:—*Held*, that neither objection could prevail in these proceedings. An appeal is not a stay, and an order is good until reversed. It was ordered that the defendant should deliver the particulars within twenty days, so as to have them before the trial of the action, and, in default of delivery, that the paragraphs of the defence of which particulars had been ordered should be stricken out with costs. *Davey* v. *Bentinck*, [1893] 1 Q. B. 185, followed. *McLaughlin Carriage Co.* v. *Oland*, 20 C. L. T. 469.

Order for, before trial — Limiting evidence—Non-delivery — Striking out evidence. *Bell* v. *Harrison*, 5 O. W. R. 295.

Patent action — Demand — Time for — Scope of—Costs. *Moffat* v. *Leonard*, 3 O. W. R. 633.

Patent for invention — *Action for infringement—Defence — Want of novelty — Specifications.*]—Action for infringement of a patent giving the exclusive rights within Canada of making and selling a certain fire proof machine. Paragraph 2 of the defence: That the appliances making up the machine are all well known mechanical appliances in use for many years prior to the date of the plaintiffs' patent. 4. That there is no specification in the plaintiffs' patent covering a graduated series of fixed chisels or cutters, and that such a series was not, at the date of the patent, either used or the subject of a patent under the Patent Act of Canada. 5. That the mechanical devices in the plaintiffs' machine alleged to have been infringed, are not covered by the specifications set out in the plaintiffs' patent:—*Held*, that greater degree of particularity was required in respect of the defences set up in particulars of breaches, the object being to limit the expense to the parties, and to prevent patents being upset by some unexpected turn of the evidence. 2. Particulars of the allegation of want of novelty must be given, as they might not be within the knowledge of the patentee. 3. If the defendants knew a particular defect in the specification as to the nature of the invention, and the specification did not sufficiently describe the invention in that regard, they should point it out

in order that the plaintiffs might not be taken by surprise. *Jones* v. *Galbraith*, 22 C. L. T. 76.

Petition of right — Commission on sale of treasury bills and bonds—Names of purchasers—Dates of sales — Prices paid—Particulars for pleading—Delay. *Coates* v. *Rex*, 10 O. W. R. 462.

Plea — *Motion — Specification — Necessity—Affidavit.*]—In moving for particulars of a plea the plaintiff must state what particulars he requires to enable him to reply, and must also allege the necessity of such particulars. The motion must be supported by an affidavit. See Art. 123, C. P. *Landry* v. *Turgeon*, 9 Que. P. R. 140.

Replevin for books and papers — Master and servant — Common knowledge. *Morang* v. *Hopkins*, 2 O. W. R. 285, 703.

Reply — *Close of pleadings.*]—After the close of the pleadings particulars will only be ordered when it is shewn by affidavit, or otherwise, independently of the pleadings, that they are required for the purpose of saving expenses or preventing surprise at the trial.—*Smith* v. *Boyd*, 17 P. R. 463, *Girouard* v. *Fitzgerald*, 37 W. R. 55, *and Bank of Toronto* v. *Insurance Co. of North America*, 18 P. R. 27, followed. *Rat Portage Lumber Co.* v. *Equity Fire Insurance Co.*, 6 W. L. R. 3, 17 Man. L. R. 33.

Residence of husband of defendant —*Motion—Costs.*] — A woman sued as a widow who pleads that her husband is still living, must indicate the domicil or actual residence of her husband, and if she swears that she does not know it, she will be ordered to pay the costs of a motion for particulars. *Merrill* v. *Laprade*, 6 Que. P. R. 271.

Seduction — *Special damage — Stage of action—Cross-examination on affidavit.*]—In an action for seduction, where the defendant denied upon affidavit the plaintiff's allegations, an order for particulars to be given by the plaintiff was made before the defence was filed. *Knight* v. *Eagle*, 61 L. T. R. 780, followed. Such affidavit being filed as an evidence of good faith only, and it not being the duty of the Court to determine on the motion the truth of the facts deposed to, an enlargement of the motion for cross-examination was refused. *Gambell* v. *Heggie*, 24 C. L. T. 91, 2 O. W. R. 1174, 3 O. W. R. 49, 412; *A.* v. *B.*, 7 O. L. R. 73.

Slander action—*Particulars of grounds of belief—Privilege—Bona fides—Apology—9 Ed. VII. c. 40, s. 4.*]—*Held*, that if the defendant did not eliminate the statement as to his full belief of the truth, he should give particulars of the grounds of his belief: If he pleads simply privilege without allegation as to *bona fides* and truth, particulars will not be ordered. As to the plea of apology there is no need to add words qualifying the written apology, which he has pleaded. *Harrison* v. *Madill* (1910), 15 O. W. R. 593.

Statement of claim — Action against bank directors—Responsibility for losses of bank—Material facts sufficiently alleged for purposes of pleading — Facilitating trial — Preventing surprise. *Ontario Bank* v. *Cockburn*, 11 O. W. R. 105, 572.

Statement of claim—Action for damages—Injury to person—Expenses for medical treatment—Nursing—Loss of time—Injury to vehicle and harness—Owing to defects and obstructions of highway. *Stilwell* v. *Houghton*, M.-in-C. (1910), 1 O. W. N. 804.

Statement of claim — Action for negligence—Defects in electrical appliances—Examination for discovery. *Stone* v. *Ottawa Electric Co.*, 2 O. W. R. 384.

Statement of claim — Action to set aside conveyance as fraudulent—Allegations of fraud—Sufficiency. *Hill* v. *Gow*, 9 O. W. R. 248.

Statement of claim — Action to set aside resolution of shareholders of company —Allegation of non-compliance with Companies Acts—Submission to Court. *Maclean* v. *Wood*, 1 O. W. R. 703.

Statement of claim—Better particulars —Contract. *Macdonell* v. *Temiskaming & N. Ont. Rw. Commission* (1910), 1 O. W. N. 831.

Statement of claim — Conspiracy — Libel and slander—Affidavit—Amendment—Rule 268—Disclosing evidence. *Pherrill* v. *Sewell*, 10 O. W. R. 71.

Statement of claim — Contract—Services rendered — Sufficiency of particulars. *Pew* v. *Norris*, 10 O. W. R. 1006.

Statement of claim — Conversion of logs—Pleading over—Trial — Examination for discovery—Damages. *Cleveland Sarnia Co.* v. *Miers*, 6 O. W. R. 780.

Statement of claim — Discovery — Production of documents—Contract—Damages. *Flanner* v. *Wallace*, 9 O. W. R. 722.

Statement of claim — Facts within knowledge of defendants—Evidence in arbitration. *Rathbun Co.* v. *Standard Chemical Co.*, 2 O. W. R. 36, 385.

Statement of claim — Fraud — Embarrassment—Order XIX., Rule 7. *Stewart* v. *Trider*, 40 N. S. R. 610.

Statement of claim — Information for purpose of pleading — Trial — Discovery. *Becker* v. *Dedrick*, 2 O. W. R. 786.

Statement of claim — Infringement of patents—Other claims — Postponement till after discovery—Difference in English practice. *Copeland-Chatterson Co.* v. *Business Systems*, 7 O. W. R. 274, 348.

Statement of claim — Injury to plaintiffs' pipes by escape of electricity from defendants' works—Defence—Damages. *Consumers' Gas Co.* v. *Toronto Rw. Co.*, 10 O. W. R. 105.

Statement of claim — Joint negligence of defendants—Joinder of defendants. *Norman* v. *Hamilton Bridge Works Co.*, 9 O. W. R. 300.

Statement of claim — Libel — Newspaper — Places where and persons to whom publication made—Special damage. *Dingle* v. *Robertson*, 12 O. W. R. 655.

Statement of defence — *Libel — Practice—Examination for discovery — Limited particulars.*]—Action for libel in charging the plaintiff with not accounting for moneys received as agent for the defendants. The defendants pleaded privilege and set out certain circumstances which they alleged created the privilege. They also pleaded in justification of the libel. The plaintiff applied for particulars, and the defendants, while not denying his right to particulars, claimed the right to examine him for discovery before being compelled to deliver particulars. The plaintiff, however, refused to attend for examination until after the delivery of particulars by the defendants: — *Held*, that the plaintiff should forthwith attend at his own expense for examination, and that the defendants should deliver at once particulars of the grounds of their belief that the words complained of were true. *Timmons* v. *National Life Assce. Co.*, 18 Man. L. R. 465, 9 W. L. R. 4, 10 W. L. R. 81.

Statement of claim — *Malicious prosecution—Discovery — Supplemental particulars—Costs.*]—The plaintiff claimed damages from the defendants for "causing and procuring one John McKenzie to lay a series of criminal charges against" him.—On application of the defendants, the Referee ordered the plaintiff to give further and better particulars in writing of the manner in which the defendant caused and procured McKenzie to lay the charges. The plaintiff alleged that he could not furnish such particulars:— *Held*, on appeal, that the order should be varied so as to require only that the plaintiff should furnish the best particulars he could give, with liberty to supplement his particulars after examining the defendants' officers and securing production, such additional particulars to be furnished not later than ten days before the trial of the action.—*Marshall* v. *Intercontinental*, 11 Times L. R. 394, and *Wilkins* v. *Ramsdale*, 56 W. R. 125, followed. —Costs of the appeal and of the order appealed from made costs in the cause to the defendants. *Cousins* v. *Can. North. Rw. Co.*, 18 Man. L. R. 320, 9 W. L. R. 308.

Statement of claim — Master and servant—Injury to servant—Improper construction of machinery—Want of superintendence —Continuing evidence at trial. *Anderson* v. *Can. Klondike Mining Co.*, 9 W. L. R. 158.

Statement of claim — Master and servant—Injury to servant—Workmen's Compensation Act — Examination for discovery. *Vennart* v. *Can. Foundry Co.*, 11 O. W. R. 345.

Statement of claim — Negligence — Absence of affidavit—No necessity for particulars before pleading. *Spalding* v. *Can. Pac. Rw. Co.*, 9 O. W. R. 870.

Statement of claim — *Negligence — Explosion of gas—Injury to person—Discovery.*]—On motion of defendants, plaintiff ordered to give particulars of alleged acts of negligence or have examination. Definite acts of negligence must be alleged and particulars given. Plaintiff cannot here rely on "*res ipsa loquitur.*" A gas company is not an insurer. *Williams* v. *Brantford Gas Co.*, 13 O. W. R. 605.

Statement of claim — Negligence — Fall of building—Tenants—Leases. *McCallum* v. *Reid*, *Tambling* v. *Reid*, 11 O. W. R. 571.

Statement of claim — *Negligence — Knowledge of defendant.*] — In an action for negligence, by reason of the falling of a portion of the defendant's building, which was being altered, whereby the plaintiff's husband was killed, the plaintiff stated in her examination for discovery that she had no knowledge of the condition of the building at the time, or of the precautions, if any, taken to insure its safety, and that she was unable to procure any information on the subject from the defendant, who stated in his examination for discovery that he had no knowledge of what was done or omitted to be done, that knowledge being possessed by the architect, and the contractors for the building:—*Held*, that, in these circumstances, the defendant was not entitled to particulars of the alleged negligence. *Smith* v. *Reid*, 12 O. W. R. 659, 17 O. L. R. 265.

Statement of claim — *Negligence — Personal injuries—Motor Vehicle Act, s. 38 —Discretion — Appeal—Practice.*]—In an action by an administrator for damages for the death of the intestate by reason of injuries received in consequence of being run down by the defendants' motor-truck, the statement of claim gave particulars of the time and place of the accident, and alleged that the truck was in the charge of the defendants' servants, and was operated, in turning a street corner, so negligently, suddenly, and without warning, and at a speed greater than was reasonable or proper, having regard to the traffic then on the highway, that it struck the bicycle on which the deceased was riding, knocking him down, and passed over his body, instantly killing him. The defendants applied for an order for particulars. The Referee in Chambers refused the application:—*Held*, on appeal, taking into consideration the facts that the action was for personal injuries, that some particulars were shewn, that the Referee had exercised his discretion soundly, and having especial regard to the effect of s. 38 of the Motor Vehicle Act, as to the burden of proof, that the Referee's order should not be interfered with. Consideration of the practice and authorities on the subject of particulars. *Cuperman* v. *Ashdown* (1911), 16 W. L. R. 687. Man. L. R.

Statement of claim — Negligence — Railway collision — Injury to servant of railway company — Expenses of illness — Workmen's Compensation Act — Names of persons guilty of negligence—Discovery before particulars. *Scriver* v. *Wabash Rw. Co.*, 11 O. W. R. 832.

Statement of claim — *No necessity for —Function of particulars — Discovery.*] — Upon a motion for particulars of the statement of claim in an action for an account:— *Held*, that the defendant is not entitled, in ordinary circumstances, to discovery before he delivers his defence, and the true function of particulars, when necessary, is to enable the party seeking them to properly frame his pleading, and not to give discovery; and in this case the defendant was really asking for discovery under the guise of particulars, ex-

cept as to one matter, as to which alone an order should be made. *Steves* v. *Murchison*, 13 B. C. R. 188.

Statement of claim — Professional services—Barrister and solicitor—Claim for lump sum—*Quantum meruit* — Defence of criminal charge—Other services. *Arnoldi* v. *Cockburn*, 9 O. W. R. 883, 10 O. W. R. 373.

Statement of claim — Professional services—Compliance with previous order — Pleading—Evidence. *Arnoldi* v. *Cockburn*, 10 O. W. R. 774.

Statement of claim — Sale of horse—Breach of warranty—Unsoundness — Special damage—Personal injuries. *Pepler* v. *Egan*, 9 O. W. R. 247.

Statement of claim — Seduction — Times and places—Death of plaintiff's daughter. *Hodgson* v. *Bible*, 9 O. W. R. 264, 867.

Statement of claim — Services rendered to deceased person—Action against executors for remuneration—Agreement—Promise of legacy — Time and circumstances. *Locke* v. *Toronto General Trusts Corpn.*, 12 O. W. R. 168.

Statement of claim — Slander—Names of persons to whom uttered—Exclusion of evidence at trial—Disclosing names of witnesses. *Moon* v. *Mathers*, 7 O. W. R. 422.

Statement of claim — Trade mark — Infringement. *Morrison* v. *Mitchell*, 1 O. W. R. 709, 858.

Statement of defence — Action for alimony—Defence alleging adultery of wife —Times and places. *Switzer* v. *Switzer*, 10 O. W. R. 949, 1116.

Statement of defence — Action for breach of contract—Patent for invention — Infringement—Affidavit — Practice—Costs. *Copeland-Chatterson Co.* v. *Lyman Bros.*, 9 O. W. R. 129.

Statement of defence — Action on foreign judgment. *Molsons Bank* v. *Hall*, 5 O. W. R. 625.

Statement of defence — Action to establish will—Defences of want of testamentary capacity and revocation. *Kennedy* v. *Hill*, 7 O. W. R. 875.

Statement of defence — Alimony — Defence alleging adultery of wife — Times and places. *Switzer* v. *Switzer*, 11 O. W. R. 143.

Statement of defence — Application before examination for discovery—Particulars for pleading or trial—Affidavit. *Dunston* v. *Niagara Falls Concentrating Co.*, 4 O. W. R. 218, 239.

Statement of defence — *Assault — Wrongful dismissal—Justification.*]— Where in an action by a clerk against his former employer, an hotel keeper, for an alleged assault and for arrears of wages, the defence was that the plaintiff, contrary to his duty, was disrespectful and uncivil to several of the guests, whereby they left and refused to further patronize the hotel, the plaintiff was held entitled to particulars of the names of such guests. *Scott* v. *Membery*, 22 C. L. T. 122, 3 O. L. R. 252.

Statement of defence — Demand of particulars after close of pleadings—Absence of special circumstances — Examination for discovery. *Savage* v. *Can. Pac. Ry. Co.* (Man.), 3 W. L. R. 522.

Statement of defence — Knowledge of defendants. *Campbell* v. *Lindsay*, 7 O. W. R. 509.

Statement of defence — Libel—Postponement till after examination of plaintiff for discovery—Practice. *Timmins* v. *National Life Ins. Co.*, 9 W. L. R. 4.

Statement of defence — Material on application for—Issue joined. *Uda* v. *Algoma Central Ry. Co.*, 1 O. W. R. 246.

Statement of defence — Negligence — Contributory negligence—Voluntary exposure to danger—Defective pleading—Costs. *McGinnis* v. *Hyslop Bros.*, 12 O. W. R. 81, 140.

Statement of defence — Negligence — Contributory negligence—Unavoidable accident. *Plant* v. *Chalcraft*, 12 O. W. R. 922.

Statement of defence — *Order for particulars after pleadings closed—Examination for discovery.*]—Particulars will not be ordered after the close of the pleadings unless under special circumstances. That was the rule in this Court prior to the Judicature Act, and there is nothing in the King's Bench Act or Rules to change the practice in that regard. *Smith* v. *Boyd*, 17 P. R. 467, followed.—Under the English Rules, Order 19, Rules 6 and 7, particulars are treated as amendments to the pleadings, but our Act and Rules contain nothing corresponding to those English Rules. If the party seeking particulars has examined the opposite party for discovery and failed to get them, that might be treated as a special circumstance warranting the order. *Savage* v. *Can. Pac. Ry. Co.*, 3 W. L. R. 522, 16 Man. L. R. 576.

Street railway—Negligence of servants —Defective appliances. *Britton* v. *Toronto Ry. Co.*, 3 O. W. R. 823.

Striking out or amending. *Parsons L. & S. Co.* v. *Scott*, 2 O. W. R. 23.

Test action—*Substitution — Order.*] — Where particulars of the statement of claim in a test action are struck out on an appeal to the full Court, and full and true particulars ordered to be given, the plaintiffs may deliver their particulars in another action which has since been settled on as the test action; and an order obtained in Chambers which has the effect of nullifying in part the full Court order will be set aside. *Leadbetter* v. *Crow's Nest Pass Coal Co.*, 10 B. C. R. 404.

Time for moving—*Pleading.*] — Where the defendant has allowed the delay for filing preliminary exceptions to elapse and has also been foreclosed from pleading to the merits, it is too late for him to move

for further particulars of the plaintiff's demand. *Clément* v. *Clément*, 16 Que. S. C. 435.

Time for service—*Dies non*—*Filing.*]—Particulars ordered to be furnished within a certain delay, may, if such delay expires on a *dies non*, be furnished on the next judicial day. 2. It is sufficient that particulars be served upon the opposite party within the delay fixed without being filed in Court, and such particulars will not be struck out of record because they were only filed in Court on the day following that of their service upon the opposite party. *Germain* v. *Hurteau*, 5 Que. P. R. 380.

Undue influence.]—A party alleging undue influence will be required to give particulars of the acts thereof. *Lord Salisbury* v. *Nugent*, 9 P. D. 23, considered. *Hopper* v. *Dunsmuir* (No. 3), 10 B. C. R. 159.

Vendor and purchaser — *Action en garantie* — *Concealed defects.*]—An allegation of concealed defects in an action *en garantie* by a purchaser against his vendor, is sufficient without other particulars, when a copy of the declaration in the principal action is annexed to the demand *en garantie*. *Gollman* v. *Hoare*, 5 Que. P. R. 321.

Vendor and purchaser — *Action for price of land* — *Plea* — *Fraud of vendor* — *Quantity of land.*]—A defendant, sued for the price of land sold, must indicate, if he complains of having been induced to sign the agreement for purchase by reason of fraud of the vendor, the particulars of that fraud. 2. A defendant who complains that the extent of the lands bought by him was not mentioned in the agreement for sale, must indicate their true extent. *Prefontaine* v. *Bergeron*, 5 Que. P. R. 333.

See ARREST — BANKRUPTCY AND INSOLVENCY — CRIMINAL LAW — DEFAMATION — DISCOVERY — JUDGMENT — MUNICIPAL ELECTIONS — PATENT FOR INVENTION — PENALTY — PLEADING.

PARTIES.

1. ADDITION OF.

Action against magistrate for trespass and false imprisonment — *Motion to add Crown Attorney as a defendant* — *Con. Rule 312.*]—Plaintiff moved to add the Crown Attorney as a defendant to an action for trespass and false imprisonment. Order granted on condition that plaintiff pay disbursement of motion within a week. *Titchmarsh* v. *Graham* (1910), 15 O. W. R. 139, 1 O. W. N. 367. Reversed 1 O. W. N. 418.

Action brought by assignee-trustee — *Assignors added as parties plaintiff*—*Assignment absolute in form* — *Assignors beneficially interested* — *Defence* — *Assignment champertous* — *Must be raised at trial.*]—When an assignment is absolute in form it is immaterial that the assignee holds in trust or that the assignor is beneficially interested as an object or the sole object of the trust.—*Comfort* v. *Betts*, [1891] 1 Q. B. 737, followed.—*Held*, that an assignee-trustee had the right to go to trial and the Judge ought not to have made an order requiring the addition of the assignors as parties plaintiff. Defendant must raise the defence, that by reason of plaintiff having an interest in the proceeds of the litigation the assignment is champertous, at the hearing, and possibly ought to be pleaded. — *Fitzroy* v. *Carr*, [1906] 2 K. B. 305, and *Mills* v. *Small*, 14 O. L. R. 105, 9 O. W. R. 421, distinguished. *Colville* v. *Small* (1910), 16 O. W. R. 908, 2 O. W. N. 12, 22 O. L. R. 1. See 17 O. W. R. 4, 2 O. W. N. 77, 22 O. L. R. 33.

Adding party to suit—*When useless, will be dismissed*—*Exception to the form*—*C. P. 174, 521.*]—When third parties are summoned and called into a case for the simple purpose of hearing that the defendant is indebted to the plaintiff, and without any prayer as against them, they may demand, by exception to the form, that the service of a copy of the writ upon them be declared irregular, illegal and null and void. *Canadian Breweries* v. *Montreal & Laurin* (1910), 12 Que. P. R. 179.

Assignment by plaintiff pendente lite — *Assignee added as plaintiff.*]—Where after the commencement of the action the plaintiff has transferred his claim to a third person, the defendant is in a position to demand that such third person shall be added as a party plaintiff. *Perrault* v. *Bernard*, 9 Que. P. R. 52.

Assignee of chose in action—*Transfer before service of process in action by assignor* — *Dilatory exception.*] — A party sued upon a claim which was, before process in action served, transferred to another, may ask, by dilatory exception, that the assignee be added as plaintiff to the action. *Honan* v. *Anderson*, 7 Que. P. R. 170.

Assignee of claim — *Intervention.*]—A judgment ordering a plaintiff to add the assignee of the claim as co-plaintiff, is not satisfied if the said assignee merely intervenes to protect his rights, and declares that he acquiesces in the plaintiff's conclusions, and that his only interest in the case is to have any sum in which the defendant may be condemned, paid to him, intervenant. *Honan* v. *Anderson*, 7 Que. P. R. 288.

Assignee of plaintiff—*Re-assignment*—*Objection taken in Court of Appeal.*]—A defendant may demand, even in the Court of Appeal, when the cause is before that Court upon an incidental appeal, that the assignee of the plaintiff shall be made a

party, even if there has been a re-assignment. *Vallières* v. *Beaudoin*, 7 Que. P. R. 330.

Assignee of plaintiff's claim pendente lite — *Motion of defendant.*] — A defendant being sued upon a claim, which was, subsequently to the filing of the plea, transferred by the plaintiff to another, may ask, by motion, that the assignee be added as a plaintiff. *Beaudoin* v. *Vallières*, 7 Que. P. R. 440.

Calling into a case of interested persons—*If not done, can this defect be raised by exception to the form?—C. P. 174, 179.*]—The absence of those who should be called into a case cannot be a ground for an exception to the form; the proper proceeding is a dilatory exception: *Pascal* v. *Bank of Montreal & Brouillet* (1910), 12 Que. P. R. 186.

Cause of action — *Injuries received in same collision — Adding plaintiff.*] — Rule 206 is to be read in connection with Rule 185, and parties to an action who might have been joined under the latter may be added by way of amendment under the former. In an action against a street railway company for damages for running an electric car into the plaintiff and his horse and waggon in which his son was seated with him, who was also injured, the son was added as a party plaintiff in an action already commenced by the father alone. *Liddiard* v. *Toronto Ry. Co.*, 23 C. L. T. 156, 5 O. L. R. 371, 2 O. W. R. 145.

Company — Action by shareholder of, against directors — Account of profits — Addition of company — Amendment. *Meyers* v. *Cain*, 6 O. W. R. 834.

Company — Action to enforce contract and for breach — Addition of company as co-plaintiff — Company not in existence when contract made — Principal of *cestui que trust* — Pleading — Amendment. *Cass* v. *McCutcheon* (Man.), 1 W. L. R. 435.

Consent — Verification by affidavit — Identity of names. *Webling* v. *Fick*, 1 O. W. R. 203.

Co-plaintiff — *Action for breach of contract made on behalf of company to be formed — Adding company as plaintiff — Trustee and cestui que trust.*]—The defendant contracted to sell and deliver to the plaintiff all the bricks he should make during the year. It was stated in the contract that the plaintiff entered into it on behalf of a company to be afterwards incorporated under the name of the Manitoba Construction Company. After the incorporation of such company the plaintiff brought this action in his own name for an injunction to restrain the defendant from committing breaches of the contract and for damages for breaches already committed: — *Held*, that the plaintiff should not be allowed to amend his statement of claim by adding the company as a co-plaintiff.—*Held*, also, that the plaintiff should not be allowed to amend his statement of claim by adding claims for damages for himself as trustee for the company and also for the company as *cestui que trust*.—Cases in which it has been held that a trustee may enter into a valid contract on behalf of a *cestui que trust* not in existence at the time, as, for example, an unborn child, distinguished. *Cass* v. *McCutcheon*, 15 Man. L. R. 667, 669, 1 W. L. R. 435.

Co-plaintiff — Rule 242 (*b*)—Consent in writing by agent of added party — Insufficiency — Addition of defendant. *Watt* v. *Popple* (Man.), 4 W. L. R. 519.

Co-plaintiffs — *Consent of one of two partners to addition of firm — Ontario Rules 185 and 206 (3).*]—Plaintiff brought this action as assignee for benefit of creditors of S. and L., the assignment having been executed by L. only. Motion by plaintiff to add S. and L. as co-plaintiffs *nunc pro tunc*, L. only consenting, dismissed. *Barber* v. *Wills & Kemerer*, 13 O. W. R. 870.

Creditors' action — *Payment of plaintiff's debt — Addition of new creditor as co-plaintiff — Costs.*] — Where a creditor, who has brought an action on behalf of himself and other creditors to vacate a transfer of property, has before judgment received payment of his debt, but not of his costs, the Court will not sanction the addition of another creditor as a co-plaintiff, but will allow the controversy to be settled as between the plaintiff and the defendants, leaving the creditor seeking to intervene to begin an independent action. *Griffill* v. *Ough*, 13 O. L. R. 8, 8 O. W. R. 496.

Curator to an interdicted person ought to be made a party in a pending suit with reference to proceedings taken therein subsequent to the interdiction.—2. A motion asking that such curator be made a party to assist defendant will be granted, and an opposition to a seizure lying on the only ground that said curator was not made a party will be summarily dismissed on motion to that effect. *Portier* v. *Villeneuve* (1910), 12 Que. P. R. 53.

Defendant—Agent—Authority — Costs. *Madgett* v. *White*, 10 O. W. R. 787, 929.

Defendant — Application by plaintiff — Facts disclosed on application — Leave to discontinue without costs — Election. *McHroy* v. *Miles*, 9 O. W. R. 542.

Defendant — Application to add wife of defendant — Principal and agent—Election to sue agent. *Perrin* v. *Cook*, 40 N. S. R. 631.

Defendant — Replevin—Counterclaim — Third party procedure — Rules of Court. *Imperial Paper Mills of Canada* v. *McDonald*, 7 O. W. R. 412, 472.

Defendants — *Delay.*]—Motion by two defendants to add certain parties as defendants dismissed with leave to renew application at trial. *Armstrong* v. *Crawford*, 12 O. W. R. 1078.

Defendants — Motion by original defendant — Damage to land by drain—Municipal corporations — Highway — Non-repair — Dividing line between townships—Joint liability for repair. *Donaldson* v. *Dereham*, 7 O. W. R. 617.

Defendants—*Motion by original defendants — Guarantors of promissory note — Adding makers.*]—In an action against the guarantors of a promissory note for $1,935.46, given by a company for machinery bought from the plaintiffs, it appeared that the company before the maturity of the note were claiming from the plaintiffs $953.68 for breaches of the contract of sale, and it was alleged that when the note was given it was agreed that the exact amount should be adjusted during its currency. The defendants paid into Court $1,195.01 as the amount justly due, and moved for an order adding the company as defendants:—*Held*, that the defendants were entitled to the order. *Reid* v. *Gould*, 13 O. L. R. 51, 8 O. W. R. 642.

Defendants by counterclaim — *Addition of—Pleading.*]—The practice of the Supreme Court of the Territories permits a defendant to set up a counterclaim which raises questions between himself and the plaintiff, along with other persons, and to add such other persons as parties by counterclaim; the English practice respecting counterclaims contained in Order 21, rr. 11, 12, 13, 14, and 15, being in force in the Territories. *Robertson* v. *White*, 5 Terr. L. R. 311.

Defendants, upon application of original defendants—Opposition of plaintiff —Vital interest of added defendants in subject of action — Oil lands — Reservation—Lease — License. *Farquharson* v. *Barnard*, 11 O. W. R. 172.

Distinct causes of action—Election to proceed with one. *Plummer* v. *Sholdice*, 1 O. W. R. 789.

Examination of solicitors—*Order for — Summons — Affidavit — Subpœna.*]—Several actions for damages were brought against colliery owners by relatives of miners killed in an explosion, and the defendants applied to add the plaintiffs' solicitors as parties, and while the summons was pending they obtained under Rule 383 an order on summons, in support of which no affidavit was filed, for the examination of the solicitors as to what interest they had in the subject matter of the action:—*Held*, that the summons should have been supported by an affidavit shewing that it was probable that the solicitors had some interest in the subject matter of the litigation, and the order should not have been made as of course. A subpœna under Rule 383 cannot be issued without an order therefor. *Leadbeater* v. *Crow's Nest Pass Coal Co.*, 24 C. L. T. 103, 10 B. C. R. 206.

Foreign partnership as plaintiffs—(*Sask.*) *Rule 37.*]—Foreign partners sued in the firm name. Defendants appeared. Local Master allowed an amendment to add names of partners. Appeals therefrom dismissed. There had been a waiver by appearing. *Kasindorf* v. *Hudson Bay* (1909), 12 W. L. R. 285.

Former owners — *Action to fix boundaries — Motion to add defendants.*] — The defendants, before pleading, applied for an order that the plaintiff join several owners farther back, alleging that the boundaries of the lands adjoining could not be laid out unless that be done, and asked for a stay of proceedings meanwhile:—*Held*, that the motion could not now be granted; that the Court could not now compel the plaintiff to go to the expense of joining these owners. The defendants themselves could, at their own risk, summon them, if they thought proper. *Desrivières* v. *Richardson*, 26 Que. S. C. 128.

Fraud—*Partners — Company name — Affidavit — Information and belief—Pleadings.*]—The plaintiff, having recovered judgment against an incorporated company for an amount claimed for services rendered, under a contract, but not having been able to realize anything upon the judgment, brought this action against the person who had signed the contract as president, for damages for fraud, and alleged that at the time the contract was made, the company had ceased to do business as such, but that the defendant had formed a partnership with L. and C. and the partnership had acquired the property of the company, and was doing business under the company's name, and had obtained the benefit of the plaintiff's services by fraudulent concealment: — *Held*, that the plaintiff was entitled to add L. and C. as defendants, but not the company.—*Semble*, that affidavits must state the source on which belief is founded, but here the statement of claim shewed the facts, and it was not necessary to look at the affidavit. *Chong* v. *McMorran*, 8 B. C. R. 261.

Litigation between agents — *Principals added.*]—T. sued McM. as the drawer of a bill of exchange payable to T.'s order, with an alternative claim against McM. on guaranty that the bill would be paid. T. was the manager of the P. C. Line, of Seattle, which owned the steamer Mexico, and the defendant was the agent of the D. and W. H. N. Co., and these two principals had through T. and McM. entered into a charterparty providing that the steamer Mexico should carry certain freight, for which the D. and W. H. N. Co. agreed to pay. McM. alleged that he gave the bill of exchange sued on along with the guaranty to T. as the balance of the freight moneys due under the charterparty, and the company set up a claim for demurrage, and advised McM. to pay. On an application made by McM. and the company, an order was made adding the company as a defendant, and giving leave to counterclaim against P. C. Line:—*Held*, on appeal, that the order was properly made, as the real parties in interest should be brought before the Court. *Trowbridge* v. *McMillan*, 22 C. L. T. 421, 9 B. C. R. 171. *See* 9 B. C. R. 443.

Motion to amend statement of claim *by adding plaintiff — Bona fide mistake —Motion allowed on terms.*] — Motion by plaintiff for leave to amend writ and statement of claim by adding as plaintiffs, himself and other members of a partnership. Cartwright, Master, *held*, 19 O. W. R. 15, 2 O. W. N. 992, that motion was too late, as it should have been done before joinder of issue, or at least after examination for discovery. Middleton, J., allowed plaintiff's appeal on terms. *McNabb* v. *Toronto Construction Co.* (1911), 19 O. W. R. 191, 2 O. W. N. 1086.

Negligence — *Death of plaintiff's husband — Children of deceased — Stay of proceedings.*]—In an action by a widow for damages caused by the death of her husband through the negligence of the defendants, the defendants cannot ask that the proceedings be suspended until the children of the deceased have been made parties to the suit. *Thomson* v. *Singer Manufacturing Co.*, 6 Que. P. R. 358.

New defendants—*Plaintiff not claiming against proposed defendants.*]—Defendant moved to have other parties added as defendants:—*Held*, that they could not be added as such against wish of plaintiff. Besides their presence was not needed to adjudicate on matters in question. *Cameron* v. *Hamilton*, 9 W. L. R. 356.

New plaintiff—New cause of action — Rule 26. *Hogan* v. *Bactz*, *Hogan* v. *Bactz & Taylor* (Y.T.), 1 W. L. R. 393.

New plaintiff without his consent—Aiding original cause of action—New cause of action — *Bona fide* mistake—Account—Bank — Excessive interest — Voluntary payment — Action by receiver and judgment creditors — Addition of judgment debtor. *Ritchie* v. *Canadian Bank of Commerce* (Y. T.), 1 W. L. R. 499.

Order adding — *Desistment—Amendment — Delay in filing defence — Costs — Pleading — Rule 439.*]—Desistment from a judgment giving leave to add certain parties may be considered as an amendment to the declaration, and filed without the intervention of the Court.—Therefore, there is no reason, after the filing of such a desistment, to allow parties added under the judgment from which the plaintiff has desisted, to file a defence to the action.—If the delay in the filing of the defence has been caused by reason of a misunderstanding between the parties, or has been occasioned by irregularities in the declaration, the Court of Review will not grant costs upon a judgment reversing the decision of the Court below and refusing such leave.—In these circumstances the Court will reserve to the party so added the right to plead to the action or to take such other proceeding as he may think proper.—A party added as a defendant in an action to set aside a will may demand not the dismissal of the action as to him and his discharge from the record on the ground that his interest is identical with that of the plaintiff, but only the dismissal of the action so far as the adjudication to pay costs demanded against him is concerned. *Hébert* v. *Roy*, 8 Que. P. R. 89.

Parties — Delaying trial of action — Indirect reversal of previous order refusing to stay trial. *Armstrong* v. *Crawford*, 12 O. W. R. 1078.

Parties at trial—*Discretion.*]—The addition of a person as a party to an action is in the discretion of the Court; it may be ordered by the Court of its own motion on the day fixed for the trial, if the Judge believes that the presence of such person may be necessary to make the judgment in the action efficacious and to adjudicate upon all questions raised by the parties. *Pélissier* v. *Leveille*, 8 Que. P. R. 409.

Party — Alternative relief. *Castle* v. *Chaput*, 2 O. W. R. 499.

Plaintiffs — *Rule 242 (b)—Consent in writing — Agent.*]—The consent in writing, required by paragraph (b) of Rule 242 of the King's Bench Act, for the addition or substitution of a person as a party plaintiff in an action, must be signed by such person himself. Signature by an agent, however undoubted his authority, will not suffice. *Fricker* v. *Van Grutten*, [1896] 2 Ch. 649, followed.—No such consent, however, is required for the addition, in a proper case, of a person as a party defendant. *Watt* v. *Popple*, 4 W. L. R. 519, 16 Man. L. R. 348.

Representatives of insured — *Action against assignee of life insurance policy—Cancellation.*]—The *cessionnaire* of an insurance policy, sued for cancellation thereof, cannot ask, by dilatory exception, that the heirs and representatives of the party on whose life and in whose favour the policy issued, should be called in to defend the action. *North American Life Assurance Co.* v. *Lamothe*, 7 Que. P. R. 159.

Specific performance — *Several purchasers.*] — Where the owner of property authorised two agents to make a sale for him, and each of them entered into a contract for sale:—*Held*, that in a suit by one purchaser for specific performance, the other had a right, on his own application, to be added as a party defendant. *Bryce* v. *Jenkins—Ex p. Levy*, 8 B. C. R. 32.

Transfer of a debt by plaintiff — *Demand to have the transferee called into the suit — Reasons — C. P. 77.*]—The defendant who wishes that the transferee of a debt should be called into the case should state in his motion the reasons why the plaintiff is bound to do so. *McGarity* v. *Reather* (1910), 11 Que. P. R. 357.

Unincorporated association — *Salvation Army — Estoppel — Interlocutory order — Amendment.*] — *Held*, affirming the judgment of Falconbridge, C.J., 6 O. L. R. 406, 23 C. L. T. 329, that the Salvation Army is not a legal entity, which can be sued for wrongs done by its officers.—*Held*, also, that the defendants were not estopped by the interlocutory decision of a Judge in Chambers, 5 O. L. R. 585, 23 C. L. T. 229. The plaintiff was given leave to amend, upon payment of costs, by adding the chief officer of the Army as a defendant. *Kingston* v. *Salvation Army*, 24 C. L. T. 309, 7 O. L. R. 681, 3 O. W. R. 556, 2 O. W. R. 314, 406, 859.

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2. Executors and Trustees.

Addition of.]—The Court will not allow a party to be added to the cause before it is certain that the presence of the proposed party is necessary. And in an action by a creditor of a deceased person against his heirs or next of kin, the plaintiff was refused leave to add the supposed executors as defendants at a stage when it was undecided whether the next of kin would accept or renounce the succession. *Craig* v. *Heirs of Kenny*, 3 Que. P. R. 164.

Assignment by plaintiff—*Demand for payment to assignee — Exception to form—Want of interest — Dismissal of action.*]—Where a plaintiff has transferred his claim to a third person, and in his declaration asks that the amount thereof should be paid to the third person in trust, his action will be dismissed upon exception to the form, on account of his want of interest. *Gay* v. *Lecours*, 9 Que. P. R. 89.

Motion to appoint representatives—Motion for an order declaring who should represent the heirs-at-law and the next of kin of Agnes Garthorne, deceased, in the action of *Garthorne* v. *Wickerson* — Order granted—Provision for motion to vary — Two months' time given—Postponement of trial. *Garthorne* v. *Wickerson* (1911), 19 O. W. R. 643, 2 O. W. N. 1304.

Removal of executor — *Co-executors.*]—A testamentary executrix, usufructuary under a will, has no right, in an action taken to have her removed from her office of executrix on grounds of maladministration, neglect and refusal to make an inventory, personal to herself, to ask, by dilatory exception, that the proceedings be stayed until her co-executor is made a party to the suit. *Angé* v. *Roy*, 2 Que. P. R. 431.

Trustee and cestui que trust—*Amendment — Fraudulent conveyance—Estoppel.*]—In an action brought against a husband alone for the sale of land vested in his wife by an unregistered deed, and which the plaintiff contended was bound by a registered certificate of judgment against the defendant, the plaintiff applied, after the case had been set down for trial, for leave to amend his statement of claim by adding the wife as a party defendant, and by alleging that the land in question was the defendant's property, and had been mortgaged by him with other lands to a bank; that, after the bank had commenced an action for foreclosure of the mortgage, it was agreed between it and the defendant that the bank should take a final order apparently foreclosing the defendant's title to all of the mortgaged lands, but should accept in actual satisfaction of its claim the mortgaged lands other than the parcel in question, and should hold the latter for the defendant; that such agreement was carried out; and that, after getting such final order, the bank, at the defendant's request, conveyed the parcel in question to the defendant's wife, who gave no consideration for it, but received and had always since held it solely as a trustee for the defendant. When he began the action the plaintiff had knowledge of the facts thus sought to be set up by amendment:—*Held*, that leave to amend as asked should be granted, on payment of costs, and that both husband and wife would be proper parties to such an action, notwithstanding that the defendant in his statement of defence had denied that he had any interest in the land. Such denial could not afterwards be set up as an estoppel against him in favour of his wife, or even in favour of the plaintiff, but would only be evidence that at one time, and for certain purposes, he had repudiated having any such interest. *Bank of Montreal* v. *Black*, 9 Man. L. R. 439, distinguished. *Shiels* v. *Adamson*, 24 C. L. T. 158.

Trustee-plaintiffs — *Joinder.*] — An action (as regards form) properly brought by four surviving trustees and the executors and trustees of the fifth (deceased) trustee, when their administration of the trust has been joint. *Kennedy* v. *Housman*, 2 Que. P. R. 515.

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3. JOINDER — MIS-JOINDER—NON-JOINDER.

Action brought in name of "C. & Co."—Sole plaintiff—Rules of Court. *Cummings* v. *Ryan*, 1 O. W. R. 149.

Action en faux—*Persons profiting.*]—In a principal action to declare null a false document, just as in the case of an incidental inscription for the same purpose, it is not necessary to bring before the Court all the parties to the document alleged to be false, but it is sufficient to make a demand against the one who profits or is in a position to profit by such document. *Audet* v. *Chauvet*, 5 Que. P. R. 6.

Action to cancel registration of document—*Registrar — Person procuring registration.*]—In a suit to set aside the registration of a document affecting real property, it is proper to make the registrar a party, especially when it is alleged that he has treated as a right to real property that which was not in fact one. The neglect to make the one who has procured the registration a party is no ground for a defence in law. *Rochez* v. *Champagne*, 5 Que. P. R. 19.

Action to set aside fraudulent conveyance—*Debtor made party to action.*]—The plaintiff sued to set aside an alleged fraudulent conveyance made by Hudsons Ltd., and joined the latter as defendants. The plaintiff alleged that judgment had been recovered against Hudsons Ltd. for large amounts, but that the latter were still indebted in other amounts, for which judgment had not been recovered. On an application to strike out Hudsons Ltd. as unnecessary parties to the action:—*Held*, that, while the plaintiff was a creditor for an amount for which judgment had been recovered against Hudsons Ltd., yet, as he was also a creditor in respect of an amount for which judgment had not been recovered, Hudsons Ltd. were properly parties to the action. *Belcher* v. *Hudsons Ltd.*, 1 Sask. L. R. 474, 9 W. L. R. 205.

Alternative claims — *Rule 186.*]—A machine sold by the plaintiffs was burnt while in the premises of the defendant railway company at the place for its delivery to the purchaser. The plaintiffs brought this action against the railway company as carriers for the value of the machine and in the alternative against the purchaser for the price:—*Held*, that this could not be done, the relief claimed against the railway company being based on the assumption that the title to the machine was in the plaintiffs, and that against the purchaser on the assumption that title had passed to him. *Quigley* v. *Waterloo Manufacturing Co.*, 1 O. L. R. 606, and *Evans* v. *Jaffray*, 1 O. L. R. 614, applied. *Chandler & Massey, Limited*, v. *Grand Trunk Ry. Co.*, 23 C. L. T. 172, 194, 5 O. L. R. 589.

Application to strike out — *Matter of substance.*]—An objection that one joined as plaintiff in an action has no title to maintain the action, is matter of substance which should be raised on the pleadings as provided by Rule 259, and is not a proper subject for an application to strike out parties under Rule 185. *Morang* v. *Rose*, 22 C. L. T. 168, 3 O. L. R. 354.

Assignment by plaintiffs — Action brought in name of assignors — Want of substantial interest — Insolvency—Motion to dismiss action — Security for costs — Authority of solicitors — Correspondence—Costs. *Hisley & Horn* v. *Toronto Hotel Co.*, 9 O. W. R. 935, 10 O. W. R. 196.

Attorneys-General — Action for injunction — Inference with supply of water —Navigable stream—Conflicting leases from Dominion and Provincial Governments — Necessity for consents — Scope of action. *Eddy* v. *Booth*, 7 O. W. R. 75.

Cause of action — *Exception to form.*]—Where two plaintiffs complain of the same grievances, and each one invokes a right of action proceeding from the same source, and their conclusions are to the same effect, the claims may be joined together by the plaintiffs, who can institute them only as a single suit, and in such a case the suit will not be dismissed upon exception to form. *Slater Shoe Co.* v. *Trudeau*, 5 Que. P. R. 314.

Causes of action — *Conspiracy—Pleading.*]—An action may be brought against a number of defendants jointly for an illegal conspiracy, though they joined the conspiracy at different times, there being in substance only one cause of action, namely, the conspiracy to injure.—In such case, however, the jury may differentiate and assess separate damages against the separate defendants according to the respective dates when they became members of the conspiracy. *O'Keefe* v. *Walsh*, [1903] 2 Ir. R. 681, followed. *Copeland-Chatterson Co.* v. *Business Systems Limited*, 11 O. L. R. 292, 7 O. W. R. 42, 72.

Causes of action—*Partnership account —Conspiracy.*]—The relief sought against the defendant J. was an account and damages for breach of a partnership agreement between him and the plaintiff; and that sought against the other defendants was damages for the malicious procuring of the breach by the defendant J. and for conspiracy:—*Held*, that, despite the form of pleading, there was such unity in the matters complained of as between all parties as justified the retention of the co-defendants. *Kent Coal Exploration Co.* v. *Martin*, 16 Times L. R. 486, specially referred to. *Evans* v. *Jaffray*, 21 C. L. T. 336, 1 O. L. R. 614.

Causes of action—*Pleading — Lease — Action to set aside—Fraud on creditors—Right of assignee for creditors—Termination of.*]—One of the defendants mortgaged land to the plaintiff bank, and then made an assignment under R. S. O. 1897, c. 147, to the other plaintiff for the benefit of creditors. The assignee conveyed to the bank the equity of redemption in the land. This action was then brought to have a lease of the land made by the mortgagor to his co-defendant declared void. The bank alleged that the lease, though dated before the mortgage, was not made until after it; and both plaintiffs alleged that the lease was made voluntarily when the lessor was, to the knowledge of the lessee, in insolvent circumstances, and with intent to defraud creditors:—*Held*, that the right to relief upon the latter ground could be claimed only by the assignee under s. 9 of the Act, and his right terminated when he so dealt with the estate as to render the relief useless to it; and therefore the assignee was improperly joined as a plaintiff. *Semble*, that the proper order would be to strike out the name of the assignee as plaintiff and the claim to set aside the lease as fraudulent against creditors. The order made below, 7 O. L. R. 613, putting the plaintiffs to their election as to which claim they would proceed upon, was, however, affirmed. *Bank of Hamilton* v. *Anderson*, 24 C. L. T. 347, 8 O. L. R. 153, 3 O. W. R. 391, 880, 709.

Consent — *Power of attorney—Insufficiency—Reference — Powers of referee — Amendment — Application to strike out amendments—Appeal.*]—An action, involving mainly the taking of accounts, was referred to the district registrar, the referring order giving that officer all the powers of a Judge as to certifying and amending. On this authority the district registrar, on application, added certain parties plaintiffs, upon the plaintiff filing a consent thereto of the parties so added. The writ of summons and statement of claim were afterwards amended. The defendant H. took out a summons to strike out the amendments to the writ and pleadings, on the ground that amendments were made without an order of the Court or a Judge thereof, and that as to the plaintiffs added, no proper consent signed by them had been filed. The documents purporting to be consents were filed by the plaintiff under a power of attorney authorizing him to sue for, recover, and receive the amount of a certain judgment debt recovered in another action:—*Held*, that the action in which the consents were filed was a new action; that the power of attorney was, in the circumstances, insufficient; and that the amendments made in pursuance of such consents so filed must be struck out.—*Held*, also, that the order conferring on the district registrar power to amend, would also authorize him to add parties.—*Held*, also, that the application to strike out the amendments made by the district registrar was not an appeal, but a substantive application to strike out certain amendments made by the district registrar.—But, *semble*, on the authority of *Hayward* v. *Mutual Reserve Association*, [1891] 2 Que. R. 236, that an appeal would lie to a Judge in Chambers. *Hill* v. *Hamblin*, 12 B. C. R. 253.

Conspiracy — Defamation—Joinder of defendants and causes of action—Particulars.—*Devaney* v. *World* (1910), 1 O. W. N. 454, 472, 547.

Contract — *Undivided share in mining right—Rescission—Parties to contract.*]—A person who has acquired an undivided share in a mining right, has no right of action to set aside the contract by virtue of which

his share has been transferred to him, without bringing before the Court all the parties to the contract. *Jeannotte* v. *Caron*, 23 Que. S. C. 540.

Contract for sale of land — Specific performance—Principal and agent—Damages. *Lee* v. *Britton*, 4 O. W. R. 311.

Counterclaim — Action of ejectment—Counterclaim for declaration of title—Heir-at-law of deceased owner—Administrator—Pleading—Defences—Striking out. *O'Connor* v. *O'Connor*, 5 O. W. R. 701, 751.

Death of one of several defendants after service of process — Application by plaintiffs to strike out his name—Practice. *Dominion Bank* v. *McCracken*, 12 O. W. R. 132.

Defendants — *Action by judgment creditor to set aside fraudulent conveyance.*]—Plaintiff recovered judgment against defendant B. Later she conveyed the property in question to defendant E. The judgment is still unsatisfied, and B. is insolvent. Plaintiff sued B. and E. to set aside the deed to E. as fraudulent and void:—*Held*, that B. is not a necessary party to the action. *Gallagher* v. *Beale*, 10 W. L. R. 278.

Defendants — *Action for rectification of agreement for sale of land—Agent—Authority.*]—In an action for the rectification of an agreement for sale of a certain lot, it developed that the plaintiff had dealt with one L. assuming to act as agent for the defendant corporation, who, on discovery, denied his authority to act as their agent:—*Held*, that the plaintiff had a right to add L. as a party defendant, as, should it transpire that L. was not a duly authorized agent of the owners, the plaintiff might have a right of action against him personally. *Bradley* v. *Yorkshire Guarantee & Securities Corp.*, 13 B. C. R. 68.

Deed—*Rectification—Cancellation — Independent claims—Election.*]—In considering the propriety of the joinder of defendants, the nature of the action and of the relief asked must be considered. If that relief is of an equitable nature, all parties must be before the Court whose presence is necessary to give the plaintiff if successful the full measure of his rights, assuming that the action is not multifarious. On the other hand, the plaintiff cannot join two independent claims merely because they happen to relate to the same subject matter, there being no connection otherwise between the parties. In an action claiming as against one defendant rectification of a deed and as against the other defendant cancellation as a cloud on the plaintiff's title of a deed from a third person to that defendant of part of the land which, as the plaintiff alleged, should have been included in the deed of which rectification was sought, an order was made as in *Chandler & Massey* v. *Grand Trunk Ry. Co.*, 5 O. L. R. 580, requiring the plaintiff to elect as against which defendant he would proceed. *Andrews* v. *Forsythe*, 24 C. L. T. 134, 7 O. L. R. 188, 3 O. W. R. 307.

Defendants — Action for nuisance — Pleading — Joint tort. *Coulstring* v. *Nova Scotia Telephone Co.*, 5 E. L. R. 556.

Defendants — *Alberta Rule 29—Action for negligence — Alternative liability — "Common transaction"—Rule 32.*] — *Held*, that plaintiff is not bound to elect against which defendant he will proceed. It is a "common transaction," and the question is which, if either, defendant is liable. *White* v. *Grand Trunk*, 10 W. L. R. 279.

Defendants — Cause of action—Joint liability—Tort. *Tracey* v. *Toronto Ry. Co. & Grand Trunk Ry. Co.*, 13 O. W. R. 15.

Defendants — Cause of action—Pleading—Negligence. *Campbell* v. *Cluff*, 8 O. W. R. 740, 780.

Defendants — *Counterclaim — Service out of jurisdiction—Cause of action.*]—T., the British Columbia agent for the P. C. Line of Seattle, sued McM., the agent of the D. and W. H. N. Co., on a bill of exchange drawn by McM. on the company in favour of T. This bill was for the balance of freight moneys due under a charterparty entered into between the principals, and the company, having a claim against the P. C. Line for demurrage, obtained an order adding the company as party defendants, and giving them and McM. leave to deliver a counterclaim and serve it upon the P. C. Line (9 B. C. R. 171, 22 C. L. T. 421). An order was then made giving leave to McM. and the company to serve notice on the P. C. Line of the defence and counterclaim:—*Held*, that, as no cause of action or counterclaim against T. was shewn, there was no "action properly brought against some other person duly served within the jurisdiction," and hence there was no jurisdiction to take the order. *Trowbridge* v. *McMillan*, 9 B. C. R. 443.

Defendants — *Joint tort-feasors—Con. Rule 186—3 Edw. VII. c. 19, s. 609 (O.).*]—In an action for damages against the corporation of a city for allowing planks and lumber to remain on one of its streets, which had been negligently piled and wrongfully left there by the other defendants, and which fell on the plaintiff and injured him:—*Held*, that the defendants were not joint *tort-feasors*, and that Con. Rule 186 was not so amended by 3 Edw. VII. c. 19, s. 609 (O.), as to authorize the action as constituted, and the plaintiff was ordered to elect against which defendant he would proceed. *Hinds* v. *Barrie*, 6 O. L. R. 656, *Rice* v. *Whitby*, 25 A. R. 191, and *Chandler & Massey, Limited* v. *Grand Trunk Ry. Co.*, 5 O. L. R. 580, followed. *Tate* v. *Natural Gas & Oil Co. of Ontario*, 18 P. R. 82, and *Langley* v. *Law Society of Upper Canada*, 3 O. L. R. 245, distinguished. *Baines* v. *Woodstock*, 10 O. L. R. 694, 6 O. W. R. 991.

Defendants — No relief claimed against one defendant — Order striking out name with leave to plaintiff to amend—Contract —Stay of action—Costs of former action unpaid. *Buchanan* v. *Newman & Winnipeg*, 9 W. L. R. 510.

Defendants — *Partners — Sale of goods —Action against firm for price—Amendment —Costs.*]—Action brought against the defendant in the name of the A. L. Co. to

recover for goods sold in part by A. while carrying on business in the name of the M. R. L. Co. and in part while doing business in his own name before the formation of the A. L. Co. After the formation of the latter company A. transferred to it a number of book debts, etc., including the account sued for, as his contribution to the assets of the company, but no notice of the transfer was given to the defendant:—*Held*, that the action could not be maintained in the form in which it was brought, there being a clear variance between the pleadings and the proof.—*Per* Graham, E.J., that there should be an amendment; costs to be set off.—*Per* Drysdale, J., Longley, J., concurring, that, as the joinder of the plaintiffs other than A. did not prejudice the defendant, and the trial Judge had directed all necessary amendments, the amendment should be made as directed and the appeal dismissed with costs. *Albion Lumber Co.* v. *Brownell*, 42 N. S. R. 297, 3 E. L. R. 224.

Defendants — Pleading—Joint cause of action—Conversion—Negligence. *Broom* v. *Toronto Junction*, 10 O. W. R. 750.

Defendants — *Pleading—Joint cause of action—Master and servant—Injury to servant.*]—In an action brought against the Guelph and Goderich Rw. Co., the Canadian Pacific Rw. Co., and the Canada Foundry Co., jointly, in which it was alleged that the plaintiff was employed by the Canadian Pacific Rw. Co. to work upon the construction of a line of railway being constructed by them under the name of the Guelph and Goderich Railway, leased and operated by the Canadian Pacific Rw. Co., on which the Canada Foundry Co. agreed to construct a steel bridge, and the plaintiff was ordered by his employers to assist in that work and did so; that "the defendants" undertook the placing of the necessary girders, and the plaintiff assisted on his employers' orders; that the work of placing the girders was so negligently done that he was injured; that the apparatus used, including the roadbed, was under the control of "the defendants"; that they were negligent in not providing a safe roadbed and efficient apparatus; that there were defects in the derrick and plan adopted; and that "the said accident happened by reason of the said negligence of the said defendants, and by reason thereof the plaintiff suffered the injuries herein complained of":—*Held*, that the statement of claim sufficiently alleged a joint cause of action, and the plaintiff was not bound to elect against which of the several defendants he would proceed. *Symon* v. *Guelph & Goderich Rw. Co.*, 13 O. L. R. 47, 8 O. W. R. 320

Defendants — Pleading—Joint cause of action — Negligence. *O'Meara* v. *Ottawa Electric Co.*, 10 O. W. R. 1068, 11 O. W. R. 10.

Defendants — Pleading—Joint cause of action—Negligence—Dangerous fence—Highway—Private owner—Municipal corporation. *Prouse* v. *West Zorra & Dawes*, 10 O. W. R. 682.

Defendants — Pleading—Joint cause of action—Tort. *Collins* v. *Toronto, Hamilton, & Buffalo Rw. Co.*; *Perkins* v. *Toronto, Hamilton, & Buffalo Rw. Co.*, 10 O. W. R. 84, 115, 263.

Defendants — Pleading — Specific performance — Motion to compel plaintiff to elect to proceed against one of two defendants — One claim against both defendants. *Davis* v. *Sovereign Bank*, 8 O. W. R. 484, 554.

Defendants — Pleading—Statement of claim—Multifariousness — Embarrassment. *Howland* v. *Chipman*, 8 O. W. R. 649.

Defendants—*Rule 29 (Alta.)—Cause of action.*]—Plaintiffs were injured by their horse running away while driving along a highway, the horse having been frightened by defendants' motor cars, one following the other: — *Held*, that plaintiffs must elect against which defendant they continue the action. *Edinger* v. *McDougall* (1909), 12 W. L. R. 82.

Defendants — Separate causes of action —Contracts — Sale of goods — Promissory notes—Election. *Waterous Engine Works Co.* v. *Howland* (N. W. T.), 6 W. L. R. 541.

Defendants — Separate causes of action —Election—Amendment. *Creighton Cobalt & Haileybury*, 9 O. W. R. 287, 312.

Defendants — Separate causes of action —*Libel—Alternative claims — Election.*]—The plaintiffs sued the defendant company and the defendant C., the president of the company, for libel, claiming against them alternatively for the same libel:—*Held*, that the real cause of action against each defendant was separate, and no relief was claimed against the defendants jointly, and therefore they were improperly joined as defendants in the same action. *Equity Fire Insurance Co.* v. *Caulkhard-Alexander Co.*, 8 W. L. R. 74, 1 Sask. L. R. 100.

Defendants — *Stay.*] — Plaintiff had formerly brought an action against defendant N. for the same relief as claimed here. That action was dismissed because he did not comply with an order to produce. The corporation of the city of Winnipeg was struck out of this action, the contract sued being one under seal with the defendant N. alone, but under which plaintiff now claimed certain rights. Leave given to apply on notice to amend and add city as a party. Action stayed against N. until costs of former action paid. *Buchanan* v. *Newman*, 9 W. L. R. 510.

Defendants — *Suit against two companies insuring same property—King's Bench Act, Rule 219.*]—Rule 219 of the King's Bench Act, R. S. M. 1902, c. 40, does not permit a plaintiff to proceed in one action against two separate insurance companies upon separate policies, although they cover the same goods destroyed by the same fire. *Faulds* v. *Faulds*, 17 P. R. 480, *Hinds* v. *Barrie*, 6 O. L. R. 656, and *Andrews* v. *Forsythe*, 7 O. L. R. 188, followed.—A plaintiff who had commenced such an action was required to elect within five days which company she would proceed against in the

action and to discontinue as against the other. *Lees* v. *Phœnix Insurance Co. of Brooklyn*, 6 W. L. R. 17, 17 Man. L. R. 61.

Defendants — Trespass to mining claim —Deceit—Misrepresentation — Contract — Right to join plaintiff without consent — Construction of Rules. *Hilditch* v. *Yott* (Yuk.), 6 W. L. R. 565.

Deposit with provincial treasurer —*Action to recover—Other claimants.*]— A plaintiff in an action to recover a sum of money deposited by the debtor at the office of the Provincial Treasurer, in the circumstances mentioned in Art. 1198, R. S. Q., must bring before the Court as parties the other claimants in order to ascertain whether their claims are well founded or not.— Conversely, such claimants brought in as parties are in a position to contest the action by setting up the grounds based upon their claims. *Connolly* v. *Vita Life Insurance Co.*, 29 Que. S. C. 6.

Different causes of action — Sale of goods—Claim for price — Claim for loss. *Chandler & Massey (Limited)* v. *Grand Trunk Ry. Co.*, 5 O. L. R. 589, 2 O. W. R. 286, 407, 427, 1044.

Distinct causes of action — Husband and wife—Wages of wife—Money expended by husband. *Pask* v. *Kinsella*, 2 O. W. R. 824.

Distinct causes of action — Personal injuries—Collision. *Liddiard* v. *Toronto Ry. Co.*, 5 O. L. R. 371, 2 O. W. R. 145.

Exception for want of—*Time for presentation.*]—A dilatory exception, based upon the fact that all the parties interested and whose presence is necessary are not before the Court, must be presented within three days after a judgment maintaining an exception to the form, and dismissing the action as to one of the defendants, saving recourse. *Soucy* v. *Industrial Printing Co.*, 5 Que. P. R. 121.

Foreign unincorporated association —*Money of union—Judgment against members of unincorporated association in representative action—Trust.*]—Action against an association. Certain members were authorised by the Court to defend the action on behalf of themselves and all other members: —*Held*, 1. That the association was not a corporation, individual, partnership, nor a quasi-corporate body. 2. That its members could not be sued by their adopted name. Certain costs were ordered to be paid by defendant members. The plaintiffs sought to garnishee a certain account at the Dominion Bank, headed "Amalgamated Sheet Metal Workers' Union, No. 30." — *Held*, could not be garnished, as order that the defendants shall pay money, without more, cannot be enforced against the property of any one except the defendants themselves. *Metallic Roofing Co. of Canada* v. *Local Union, No. 30, Amalgamated Sheet Metal Workers' International Association*, 1 O. W. R. 573, 644, 2 O. W. R. 183, 266, 819, 844, 5 O. W. R. 95, 709, 6 O. W. R. 41, 283, 5 O. L. R. 424, 9 O. L. R. 171, 10 O. L. R. 108.

Fraudulent conveyance — Action to set aside—Grantor—Partnership—Motion to strike out name of defendant—Claim of some plaintiffs, but not of all—Costs. *Turner* v. *Van Meter* (N.W.T.), 2 W. L. R. 257.

Fraudulent preference—*Action to set aside—Insolvent debtor—Costs of examination of, for discovery.*]—A fiat will not be granted under Rule 932 of the King's Bench Act to tax to a plaintiff the costs of the examination of a defendant who was not a necessary or proper party to the action, although no objection on that ground was taken prior to the application for the fiat. An insolvent debtor who has made an assignment for the benefit of his creditors is neither a necessary nor a proper party to an action by the assignee to set aside a fraudulent preference given by him. *Weise* v. *Wardell*, L. R. 19 Eq. 171, and *Bank of Montreal* v. *Black*, 9 Man. L. R. 439, followed. *Gibbons* v. *Darvill*, 12 P. R. 478, distinguished. *Schwartz* v. *Winkler*, 22 C. L. T. 401, 14 Man. L. R. 197.

Grantor and grantee—*Declaration of ownership of property—Claim for value.*]— A plaintiff who asks to be declared owner of part of a certain property cannot, in the same action, ask as a subsidiary remedy, that the defendant's *auteur* be ordered to pay him the value of that property. *Poirier* v. *Montreal*, 7 Que. P. R. 246.

Heirs — *Service—Representation.*]—The service upon heirs by representation permitted by Art. 135, C. P., can only be made by designating one of the relations in his capacity of an heir, if he really is such, as representing the succession. *Andrews* v. *Frankenberg*, 3 Que. P. R. 45, 17 Que. S. C. 313.

Indorsers of promissory notes sued on—Allegation of payment — Third party procedure. *Canadian Bank of Commerce* v. *Butler* (Yuk.), 1 W. L. R. 173.

Interpleader issue — *Who should be plaintiff—Insurance moneys—Rival claimants —Residence abroad—Security for costs.*]— By the terms of an insurance policy it was made payable to the wife of the insured, mentioning her name. The insured had lived for many years in this province with a person who passed as his wife, and by whom he had a family, and who had possession of the policy; but shortly before his death he made a will whereby he left the policy in question to a person of the same name, who resided out of the province, whom he described as his wife, and to a daughter by name. On settling an interpleader issue to try the right to the policy, the Master in Chambers directed that the legatees under the will should be plaintiffs, and that they should not be required to give security for costs, the difficulty having been caused by the deceased himself; while it might be assumed that the costs of all parties would be made payable out of the fund. The order was varied, on appeal, by directing that the plaintiffs should give security for costs, and that the costs of the appeal and cross-appeal should be costs in the cause. *Bruce* v. *Ancient Order of United Workmen*, 11 O. L. R. 633, 7 O. W. R. 177.

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

Joint or several liability — Causes of action—Separate torts—Election. *Grandin* v. *New Ontario S. S. Co. & Canadian Northern Rw. Co.*, 6 O. W. R. 521, 553.

Libel — *Improper joinder of parties — Separate causes of action—Right of plaintiff to elect.*]—Where it appears in the course of the trial of an action for libel that two or more defendants have been joined in an action for two separate torts, one of which has been committed by both, but the other only by one, the plaintiff should be allowed to elect upon which cause of action he will proceed, and the necessary amendments as to parties made accordingly. *Nesbitt* v. *Williams*, 6 Terr. L. R. 200.

Misjoinder of plaintiffs — Rules 185, 186—Distinct causes of action—Election—False representations. *Smith* v. *Fox*, 11 O. W. R. 604, 673.

Municipal corporation — *Authority to use name — By-law — Retainer — Ratification — Application to dismiss.*]—Under s. 362 of the Municipal Act, R. S. M. 1902 c. 116, which provides that "the powers of the council shall be exercised by by-law when not otherwise authorised or provided for," a by-law is not necessary to authorise the commencement of an action, but a municipal corporation may give such authority by resolution under the corporate seal. *Barrie* v. *Weymouth*, 15 P. R. 95, *Barrie Public School Board* v. *Barrie*, 19 P. R. 33, and *Brooks* v. *Torquay*, [1902] 1 K. B. 601, followed. Where an action has been commenced without authority, a subsequent ratification of the proceedings by a properly executed retainer will be a sufficient answer to an application by the defendant to dismiss the action, subject to the question of costs. *Quære*, whether a defendant has any *locus standi* under the present practice, to ask for the dismissal of an action on the sole ground that it has been brought without the authority of the plaintiff. *Emerson* v. *Wright*, 24 C. L. T. 190, 14 Man. L. R. 636.

Municipal corporation — Causes of action — Municipal Act, s. 606 — Rule 186. *Baines* v. *Woodstock*, 6 O. W. R. 691, 10 O. L. R. 694.

Mutual aid societies—*Action by local C. sort of foreign society—Exception to the form.*]—A local Court of a foreign mutual aid society, cannot, at least if it has not complied with the requirements of the provincial Act governing such societies, bring an action in its own name, and such an action will be dismissed on exception to the form, but without costs against the plaintiff society, considered as non-existent. *Court St. Charles No. 167 of the Order of Catholic Foresters* v. *Gibeault*, 7 Que. P. R. 95.

Negligence — Personal injuries—Separate causes of action — Breach of contract to carry safely — Railway company—Breach of statutory duty. *Grieger* v. *Grand Trunk Rw. Co.*, 4 O. W. R. 152.

Nullity of action—*Dilatory exception.*]—The default of a plaintiff to bring before the Court a person who is a necessary party to the action does not render the action void as a matter of law, and such default should be invoked by a dilatory exception, and not by way of exception to the form. *McNally* v. *Préfontaine*, 11 Que. K. B. 370.

Numerous defendants in the same interest — *Appointment of solicitor to defend.*]—The object of Rule 200, which provides that, where there are numerous parties having the same interest, one or more of such parties may sue or be sued, or may be authorised by the Court to defend, on behalf of, or for the benefit of, all so interested, is to avoid the expense and inconvenience of bringing before the Court a numerous body of persons, all having the same interest; but does not authorise the making of an order by the Court, on the plaintiff's application, for the appointment of a solicitor to defend for a number of persons in the same interest who are already defendants to the action. *Ward* v. *Benson*, 22 C. L. T. 117, 3 O. L. R. 199, 1 O. W. R. 24.

Obligation to provide maintenance —*Joint or several—Action for aliments.*]—The obligation to provide maintenance is neither joint nor indivisible, and a party sued for aliments, cannot, by dilatory exception, stay the suit until another person equally bound to furnish maintenance has been made a party. *Larocheille* v. *Lafleur*, 3 Que. P. R. 527.

Overflow of water—*Damage by—Separate causes of action — "Combined" acts of defendants — Election or amendment.*]—Different defendants cannot be brought before the Court in the same action where the real causes of action that exist against them are separate. In this case the plaintiff sued for the obstruction of a water-course which passed through her property, causing it to be overflowed. The town corporation were charged by the plaintiff with having increased the volume of water, while also obstructing the water-course. The defendant Webb was charged with having obstructed the watercourse where it passed through his land. And it was charged that the natural effect of the combined acts of the defendants was to cause the watercourse to become obstructed and to overflow the plaintiff's land. But it was not alleged that these acts were done in concert, or that the defendants were jointly concerned in their commission:—*Held*, that the plaintiff must elect against which of the two defendants she would continue the action, or amend by setting up a joint cause of action. *Hinds* v. *Barrie*, 24 C. L. T. 4, 6 O. L. R. 656, 2 O. W. R. 995.

Parties.]—Under Rule 29 of the Judicature Ordinance an action may be brought against two persons, seeking to fix them with liability only alternatively upon one contract or one tort, even though the alternative relief sought is not the same. Prin-

ciples in *Honduras Inter-Oceanic Railway Co.* v. *Lefevre*, 46 L. J. Ex. 394, L. R. 2 Ex. 301, and *Bullock* v. *London General Omnibus Co.*, 76 L. J. K. B. 127, [1907] K. B. 264, applied. If two or more persons may be joined under Rule 29 of the Judicature Ordinance, leave need not be obtained under Rule 32. *White* v. *Grand Trunk Pacific Ry. Co.* (1909), 2 Alt. L. R. 54, 10 W. L. R. 279.

Partnership — *Individual partners — Multiplicity of actions—Writ of summons—Election—Appeal—Costs.*]—S. G., and H. P. were residents of England and members of the firm of S. & Co., which carried on business in England only. The plaintiffs issued two writs or summons (neither of which was for service out of the jurisdiction) in respect of the same cause of action, the defendants named in one being the firm and S. G., and H. P. individually, and in the other the three individuals only. The writs were served on H. P. while on a visit to British Columbia, and he entered conditional appearances, and applied to have both writs set aside, and (in the alternative) as to the second action, to have it dismissed as vexatious:—*Held*, that the name of the firm was wrongly inserted and should be struck out of the first writ, and that the plaintiffs should elect as to which action they would proceed with. Before the hearing of the appeal, the plaintiffs gave notice that they were content that the name of S. & Co. should be struck out of the writ.—*Held*, that the defendant appellant was entitled to the costs of the appeal up to the time of the service of the notice, and the plaintiffs to the costs subsequent. *Oppenheimer* v. *Sperling*, 22 C. L. T. 376, 9 B. C. R. 166.

Partnership — Persons interested—Mining ventures—Cautioner. *McLeod* v. *Dawson*, 6 O. W. R. 487.

Plaintiffs—Action by "shareman" — Wages — No necessity to join the other shareamen — Not partners. *Whebby* v. *Sheridan*, 40 N. S. R. 626.

Plaintiffs — *Contract.*] — An action may be brought by several plaintiffs jointly for the recovery of a sum of money alleged to be due, under a contract with the defendant, in equal shares to each of the plaintiffs. *Leggatt* v. *McIndoe*, 16 Que. S. C. 413.

Plaintiffs — Distinct causes of action—Pleading — Election — Amendment—Costs. *Toronto & Weatherall* v. *Lang*, 12 O. W. R. 925.

Plaintiffs — *Joint contract — Separate claims — Causes of action — Irregularity —Preliminary exception — Waiver — Proceeding to trial.*]—Two navigation companies who agree with a railway company to furnish vessels for a regular service between two ports, under the condition of reciprocal obligations, cannot unite to claim in the same action different sums demanded by each of them from the railway company for non-performance of obligations. It is by way of preliminary exception that the railway company should object to the irregularity of such action if it exists; by proceeding to a hearing without complaining of it, the company will be held to have acquiesced, and will not be permitted to set up the irregularity at the hearing upon the merits. *Furness Withy & Co.* v. *Great Northern Ry. Co.*, 32 Que. S. C. 121.

Plaintiffs — *Ontario Rule 185—Consolidation — Amendment.*]—First action is one for damages—the other five actions are for commission:—*Held*, plaintiffs can join in first action under Rule 185. The five actions were properly brought as defendants could not be sued jointly for commission. The five actions were stayed, plaintiff therein to counterclaim in first action. Plaintiffs in first action to amend setting out facts on which they propose to prove fraud or give particulars within a week. *Knick* v. *Aikens*, *Aikens* v. *Knick*, 13 O. W. R. 630.

Plaintiffs — *Ontario Rule 185—Joining 16 claims in one action.*]—16 miners, 14 of whom had judgment for wages against L. company now in liquidation, brought this action under R. S. O. 1897, s. 85, c. 191, against three Ontario directors, who have brought in the three United States directors as third parties. Action allowed to proceed subject to what may be set up as against the two plaintiffs who have not obtained judgment. *Hebert* v. *Evans*, 13 O. W. R. 682.

Appeal allowed, plaintiffs to elect whether one of them and which would proceed with the action or if action be dismissed. *Ibid.*, 13 O. W. R. 682.

Principal and agent — *Action for breach of contract — Alternative claim — Pleading.*]—In an action for breach of contract the plaintiff may join as defendants both the agent through whom the contract was made and his undisclosed principal, claiming alternatively against one or the other; the statement of claim in such case should read "the claims alternatively against one or other of the defendants," rather than "the plaintiff claims damages," and, when the contract is in writing, the plea of a defendant, that, if any agreement was entered into between the plaintiff and defendant, it was entered into by such defendant as agent of the other defendant, and not on his own account, and that, at the time, the plaintiff knew he was so acting, is sufficiently pleaded, there being nothing to prevent the inference that the fact set forth in such allegation appeared on the face of the correspondence forming the contract. *Hart* v. *Bissett*, 37 N. S. R. 320.

Principal and agent—*Bailiff —Conversion — Counterclaim — Judicature Ordinance.*]—In an action of conversion against a bailiff, an application under s. 45, J. O. 1893, by the bailiff's principal to be added as a defendant, on the grounds that the bailiff was entitled to be indemnified, and the principal was entitled to set up, by way of counterclaims, certain claims against the plaintiff not arising out of the conversion complained of, was refused. The plaintiff brought an action against the defendant for conversion of certain household furniture. The defendant applied to add or substitute, as a defendant, one O., on whose behalf he had, as bailiff, seized and sold the goods in

question, alleging, (1) that O. had agreed to indemnify him against the seizure, and (2) that O. desired to be added or substituted as defendant for the purpose of counterclaiming against the plaintiff certain claims, none of which appeared to arise out of the subject matter of the action:—*Held*, that the Court had no jurisdiction to substitute or add O. as a defendant, as it was not necessary for the determination of the question in dispute, he being only indirectly interested in the result, and could be brought in by the defendant as a third party; and that he could not be added for the purpose of setting up a counterclaim which did not arise out of, and was not involved in, the subject matter of the action. *Randall* v. *Robertson*, 2 Terr. L. R. 332.

Principal and agent—*Order 16, Rules 4, 6.*]—Action against an agent and his undisclosed principal for damages for breach of contract. In the defences a point of law was raised that it was not competent to the plaintiff to join both in the same action:—*Held*, that under the old practice it was competent to the plaintiff to sue the agent in one action and the principal in another, but his remedy was limited to a judgment in one action. Having regard to these principles, Order 16, Rules 4 and 6, are wide enough to admit of the action being brought against both. The claim is not in the alternative. The plaintiff cannot recover against both, and must make his election before judgment. *Honduras Rw. Co.* v. *Tucker*, L. R. 2 Ex. 305, and *Thompson* v. *London County Council*, [1896], 1 Que. B. 845, referred to. *Hart* v. *Bissett*, 23 C. L. T. 335.

Recovery of moneys paid by mistake.]—M. brought three separate actions against three insurance companies on three policies of insurance, two on the hull of defendant's vessel, and the third on freight. The three actions were tried together before a jury, but were not consolidated. Upon the findings of the jury judgment was entered for the plaintiff in each action separately with costs. The defendants moved in each action for a new trial, and these motions were dismissed, separate orders being issued. The defendants appealed in each action to the Supreme Court of Canada; and the three appeals were all heard together, but not consolidated. The appeals were allowed on payment by the defendants of the costs of the former trial within thirty days after taxation. There being some uncertainty as to the exact terms of this judgment, the defendants paid the plaintiff's solicitors, under protest, the amount which the latter considered was payable to them as costs under such judgment, the defendants reserving the right to require repayment of any part of the amount paid. In an action on behalf of the three companies jointly to recover part of the money paid as having been paid by mistake:—*Held*, that the claims made against the three companies and their supposed liability being several, and the money to pay the costs having been contributed severally, the implied promise to pay back was several, and the title to the moneys was several, and therefore the companies could not be joined as plaintiffs in one action; but they should have leave, on terms, to amend by striking out two of the companies and leave to tax the costs of the trial severally against each company. *Insurance Company of North America* v. *Borden*, 34 N. S. R. 47.

Replevin—*Equitable title—Striking out name of joint plaintiff.*]—In an action of replevin, the property replevied consisted of two land scrips which had been issued to the defendant B., and which it was alleged she had sold to McM. and allowed him to get possession of, having given him a written contract assigning them to him, but which scrips, it was alleged, she or her husband and a co-defendant afterwards wrongfully seized and kept. It was alleged that McM. sold the scrips to one H., but did not assign to him the contract with B., and that H. sold the scrips to the plaintiff W. The action was brought by W. and McM. On his examination for discovery McM. stated that his sole interest in the scrips when the action was brought was to see that W. got them and to protect himself against claims by H. or W. if the scrips should not be located. The defendants moved to strike out McM.'s name on the ground that the above shewed that he had no interest in the subject matter of the action, and claimed no property in the scrips:—*Held*, that as between McM. and B., McM. had probably the legal title to the scrips. If so, he was properly joined as a plaintiff. If, however, his interest was equitable only, then *Carter* v. *Long*, 26 S. C. R. 430, seemed to be an authority that replevin can be brought on an equitable title. *Wright* v. *Battley*, 24 C. L. T. 278.

Representation — *Members of trade union.*]—The plaintiff sought an injunction against an unincorporated musical protective association restraining them from making a member of that body break a contract which he had entered into with the plaintiff to supply an orchestra to the latter's theatre, and made the president and six other officers or leading members of the association defendants as representing the association:—*Held*, that under Rule 200 the plaintiff was entitled to an order that the defendants might be sued and authorised to defend on behalf of all the members of the association. *Small* v. *Hyttenrauch*, 2 O. W. R. 447, 656, 658, *Cr sswell* v. *Hyttenrauch*, 23 C. L. T. 351, 6 O. L. R. 588, 2 O. W. R. 447, 655, 662.

Separate causes of action — Damage by overflow of watercourse — "Combined" acts of defendants—Election or amending. *Hinds* v. *Barrie*, 1 O. W. R. 775, 2 O. W. R. 995.

Separate causes of action — *Joinder —Rules 185, 186, 187, 192 — Third party notice — Indemnity.*]—The plaintiff sued to recover the amount of a book debt assigned to him. The defendant admitted nothing, and pleaded payment and set-off: — *Held*, that the plaintiff was properly allowed to add as a party defendant the assignor of the alleged debt, and to make a claim against him, in the event of the original defendants succeeding in their defence, basing such claim upon an alleged warranty or a total failure of consideration. Rules 185, 186, 187, 192 discussed. *Tate* v. *Natural Gas and Oil Co.*, 18 P. R. 82, and *Evans* v. *Jaffray*, 1 O. L. R. 614, followed. *Smith-*

scaite v. *Hannay*, [1894] A. C. 494, *Thompson* v. *London County Council*, [1899] 1 Q. B. 840, and *Quigley* v. *Waterloo Manufacturing Co.*, 1 O. L. R. 696, distinguished. —*Held*, also, that the added defendant was properly allowed to give a third party notice to a bank, upon his allegation that he acted only as the bank's agent in assigning the debt. *Confederation Life Association* v. *Labatt*, 18 P. R. 295, followed. *Langley* v. *Law Society of Upper Canada*, 22 C. L. T. 99, 3 O. L. R. 245, 1 O. W. R. 143, 718.

Separate causes of action — *Joinder —Rules 186, 192.*] — Where the plaintiff sought to join in one action the original and added defendants, in order that he might recover against the original defendants damages for breach of an alleged warranty of title and quiet enjoyment of the property in question, if it should appear that the added defendants rightfully dispossessed him of it, or, if it should appear that the latter were wrongdoers, that he might recover from them damages for the conversion of the property, his motion for an order to add them was refused:—*Held*, that the causes of action were entirely separate, and there was no right to join them even as alternative causes. *Thompson* v. *London County Council*, [1899] 1 Q. B. 840, and *Frankenburg* v. *Great Horseless Carriage Co.*, [1900] 1 Q. B. 504, followed. *Child* v. *Stenning*, 5 Ch. D. 695, commented on and distinguished. *Quigley* v. *Waterloo Manufacturing Co.*, 21 C. L. T. 240, 336, 1 O. L. R. 606.

"Series of transactions" — *Common motive.*]—The allegation that the defendants have been actuated by the same motive in each of a number of similar transactions between them and distinct plaintiffs is not sufficient to constitute the transactions a "series" within the meaning of Con. Rule 185, so as to enable the plaintiffs to join in one action. Order of Master in Chambers, 3 O. W. R. 621, affirmed. *Mason* v. *Grand Trunk Ry. Co.*, 24 C. L. T. 325, 8 O. L. R. 28, 3 O. W. R. 621, 810.

Several plaintiffs — Distinct causes of action — Joinder — Election—Life insurance policies. *Hunsinger* v. *Mutual Reserve Life Ins. Co.*, 5 O. W. R. 528.

Several plaintiffs — *Joint action—Exception — Different defences.*] — Several plaintiffs have a right to bring a joint action whereby each claims an equal share of the sum alleged to be due by the defendant under a simple contract, and the defendant will not be allowed to plead by exception to the form, that he cannot set up against the plaintiffs the different defences which he may have against each of them. *Leggat* v. *Melador*, 2 Que. P. R. 399.

Several torts — *Penalties—Company and agent — Election.*]—Claims against two or more defendants in respect of their liability for several torts cannot be joined in the same action. Where, therefore, an action was brought against an extra-provincial company for penalties for carrying on business in Ontario without a license, and against an individual for penalties for carrying on the company's business in Ontario during the same period as its agent, the plaintiffs were ordered to elect as against which defendant they would proceed and the action was dismissed with costs as against the other. *Appleton* v. *Fuller*, 24 C. L. T. 25, 6 O. L. R. 683, 2 O. W. R. 1083.

Shareholder in company — Action against company — Estoppel — Conduct as director — Refusal to add another shareholder. *Stickney* v. *Buckel*, 6 O. W. R. 469, 522.

Slander — Several causes of action. *McEvoy* v. *Wright*, 3 O. W. R. 428.

Specific performance — Action by purchaser — Sale of third person before action —Addition to party after trial — Amendment — Terms. *Clergue* v. *Preston*, 2 O. W. R. 50.

Stated case — *Lieutenant-Governor.*]—*Quære*, whether the Lieutenant-Governor in Council can be a proper party to a cause or matter, and therefore whether the Court should entertain a stated case to which the Lieutenant-Governor is a party. *In re Edmonton By-law*, 21 C. L. T. 100, 4 Terr. L. R. 450.

Striking out and adding names — *Assignment for benefit of creditors.*]—Where, after a suit was brought for a declaration that stock-in-trade in possession of the defendants belonged to the plaintiffs, the defendants made an assignment for the benefit of their creditors, and their assets were insufficient to pay their liabilities in full, the names of the defendants were ordered to be struck out and that of the assignee added. *Gault Bros. Co. Ltd.* v. *Morrell*, 24 C. L. T. 318, 3 N. B. Eq. 173.

Summary application to quash municipal by-law — Countermand—Motion to add or substitute new applicant. *Re Ritz & Village of New Hamburg*, 4 O. L. R. 639, 1 O. W. R. 571, 690.

Tax sale — *Joint wrong-doers.*]—In an action to set aside a tax sale deed obtained by the defendant T. and for an account and damages against the defendant municipality, the tax sale was impeached on the grounds, amongst others, that there were no taxes due, that there was no proper assessor's roll or collector's roll, and that the provisions of the Municipal Clauses Act respecting tax sales had not been observed:—*Held*, that the municipality were not improperly joined as parties defendant. *Lasher* v. *Tetherington*, 24 C. L. T. 209, 19 B. C. R. 438.

Unnecessary party — *Costs.*]—Where C. was brought in as a defendant upon an objection taken by the original defendants that he was a necessary party, and the result of the action showed that he was not a necessary party, he was held entitled to costs against the original defendants, but no costs of any attempt to prove a contract with them. *Phillips* v. *Belleville*, 11 O. L. R. 256, 7 O. W. R. 49.

Will — *Action to set aside—Heirs—Executor — Pleading — Exception.*]—A plain-

tiff alleging nullity of a will is not obliged to make all the heirs parties, but, when indivisible debts or rights are in question, the party served may, by a declinatory exception, stay the suit until all the heirs have been brought before the Court. 2. An executor sued for retaining the property of the estate after his functions have ceased, cannot, by exception to the form, demand a dismissal of an action which has been brought against him personally. *Coleman* v. *Stevens*, 25 Que. S. C. 44.

Will — Setting aside—Establishment of earlier will — Beneficiaries — Inconvenience — Jurisdiction. *McDonald* v. *Park*, 2 O. W. R. 455, 492, 812, 972.

Will—*Validity—Action against executors —Addition of heirs.*]—In an action *en petition d'heredité* for a part of a succession against executors, in which the question of the validity of the will and of the powers of the defendants under it has to be decided, the Court, before final adjudication, will order that all those interested as heirs be made parties to the suit. *Coleman* v. *Stevens*, 28 Que. S. C. 365.

4. Substitution of Parties.

Action by mortgagees — *Assignment of mortgage — Substitution of assignee as plaintiff — Consent — Con. Rule 313.*]—Where the solicitor for the plaintiffs in an action upon a mortgage for foreclosure swore that, though he knew that another person had become entitled to the mortgage, he did not know that it had been absolutely assigned to him, as was the fact, the plaintiffs being trustees of the estate of a deceased person, and it having been the custom with the estate to allot mortgages to different beneficiaries without legal assignments thereof, and that the issue of the writ with the original mortgagees as plaintiffs was a *bona fide* mistake:—*Held*, that this satisfied the requirements of Con. Rule 313, and justified an order substituting the assignee as plaintiff on his consent being filed. *Biggar* v. *Kemp*, 17 O. L. R. 360, 12 O. W. R. 628, 700.

Action in name of minister of interior — *Minister resigning pendente lite — Revivor d'instance — Petition by Attorney-General for substitution.*]—*See Sifton* v. *Balls*, 35 Que. S. C. 259, 6 E. L. R. 222.

Action in warranty — *Payment of moneys — C. P. 183.*]—A person who pays over to another moneys or effects in his possession cannot, when sued by a third person claiming ownership of the moneys or effects, call in warranty the person who has received them. *Pelissier* v. *Bianchi* (1909), 10 Que. P. R. 325.

Defendants.]—Plaintiffs, who had been injured by a motor car, sued G., thinking he was the owner of the car. On his examination for discovery, it appeared that the company of which G. was manager owned the car. Order made substituting the company as defendants in place of G. *Wilson* v. *Gallagher* (1909), 12 W. L. R. 75.

Plaintiff—*Amendment.*]—A new plaintiff cannot be substituted by an amendment to the writ of summons and the declaration; in this case it was sought to replace a sole plaintiff by a firm composed of several partners, and this was refused. *Jamaniter* v. *Bank of Montreal*, 10 Que. P. R. 107.

Plaintiff — *Terms.*] — Action brought without authority. *Slattery* v. *Hearn* (1910), 1 O. W. N. 938.

Substituting plaintiff's assignors as plaintiffs—Leave to amend by, refused, as action was in respect to a champertous agreement. *Coleville* v. *Small* (1910), 17 O. W. R. 745, 2 O. W. N. 371, 22 O. L. R. 426.

5. Third Parties.

Action to set aside — Tax sale—Claim by purchaser to relief over against municipality. *Farmers' Loan and Savings Co.* v. *Hickey*, 1 O. W. R. 695.

Addition of third parties—Action for negligence of ferry company—Claim for relief over against municipal corporation — Neglect to fence wharf — Contract — Indemnity. *Dunn* v. *Toronto Ferry Co.*, 7 O. W. R. 154.

Cancellation of lease—*Premises uninhabitable — Action against tenant—Making landlord party en garantie.*]—Where the lessee is sued by his sub-tenant for cancellation of the lease, on the ground that the premises have become uninhabitable through fire, and the lessor is bound to repair and reconstruct the premises, the lessee has the right to call in the lessor in warranty. *Imperial Button Works Limited* v. *Montreal Watch Case Co.*, 7 Que. P. R. 217.

Company — *Directors — Partnership* — Illegal payment — Setting aside third party notice. *Wade* v. *Pakenham*, 2 O. W. R. 1183.

Company—*Officer of.*] — In an action against a company for a declaration that the plaintiff was the owner of certain shares in the company, the company applied to have its president added as a third party, on the ground that he was the real defendant and was responsible for the action:—*Held*, that the defendant's remedy was by third party notice. *Henley* v. *Reco Mining & Milling Co.*, 7 B. C. R. 449.

Company—*Payment of dividends out of capital — Action by liquidator against directors — Claim of relief over against shareholders — Joinder of as third parties — Rule 209 — Scope of.*]—In an action by the liquidator of an insolvent company against the directors, specifying several alleged illegal acts, amongst which was that of payment of dividends out of capital, the Master in Chambers, at the instance of two of the defendants, who claimed indemnity over against the shareholders for any amounts so paid, issued the usual third party order, under Con. Rule 209, directing that two out of a large number of shareholders should be joined as third party defendants, as a test

case, but no order for their representing the class was obtained, though it was stated that if they appeared such order would be applied for. On appeal by the plaintiff and the third parties to a Judge in Chambers, the order was set aside. An appeal therefrom by the defendants to a Divisional Court was dismissed, the plaintiff undertaking that any moneys realised in the action would not be distributed without notice to the defendants and without leave therefor being obtained from the local Judge. *London and Western Trusts Co.* v. *Loscombe*, 13 O. L. R. 3330, 10 O. W. R. 327, 466, 494.

Costs — *Discretion.*]—On an application by a third party for an order that his costs should be paid either by the unsuccessful plaintiff or the defendant, it was *held* that the question was wholly within the discretion of the Court and no order made as to costs of the third party. *Baker* v. *Atkins*, 11 W. L. R. 287.

Cross-demand—*Principal demand—Contract.*]—When a cross-demand arises from the same cause as the principal demand, the cross-plaintiff may have the proceedings stayed for sufficient time to bring before the Court a third person who was a party to the contract upon which the principal demand is based. *Larue* v. *Gerth*, 5 Que. P. R. 322.

Defective construction of building—*Builders — Privity.*]—A defendant sued for damages for injury to the plaintiff by reason of the defective construction of a roof, may bring in as third parties *en garantie* the persons whom he has employed to construct the roof and who have done it badly. 2. An inscription in law by the third parties brought in, alleging want of privity, will, in these circumstances, be dismissed with costs. *Dagenais* v. *Caron*, 5 Que. P. R. 42.

Defendant en garantie—*Right to appeal from principal judgment.*]—A defendant *en garantie*, in the case of a formal guaranty, may appeal from the judgment in the principal action, although he has refused, in the first instance, to make common cause with the principal defendant. *Desjardins* v. *Robert*, 1 Que. Q. B. 286, followed. *Banque Jacques-Cartier* v. *Cauthier*, 10 Que. K. B. 243.

Delay—Discharge of order—Costs. *Louth* v. *Riley*, 6 O. W. R. 769.

Directions for trial — *Discretion of Court — Setting aside notice — Con. Rules 209, 213.*]—On a motion for directions for the trial of an action under Con. Rule 213, it is in the discretion of the Court to determine whether, having regard to the nature of the case, it is a proper one for the application of the third party procedure, notwithstanding that an appearance has been entered to the third party notice. *Miller* v. *Sarnia Gas and Electric Co.*, 2 O. L. R. 546, and *Holden* v. *Grand Trunk Ry. Co.*, 2 O. L. R. 421, considered. *Dunn* v. *Toronto Ferry Co.*, 11 O. L. R. 16, 6 O. W. R. 920, 973.

Garantie — *Pleading — Defence.*] — A third party brought in by the defendant *en garantie* may take part in the principal action and do what is necessary for the preservation of his rights, but he cannot, after the defendant has appeared and pleaded in the action, file a defence absolutely identical with that filed by the defendant. *Dryden* v. *Yaile*, 24 Que. S. C. 315, 6 Que. P. R. 58.

Garantie—*Right of defendant en garantie to intervene — Judgment by default against him — Right of plaintiff to enforce —Right to principal defendant.*]—Although ordered to intervene and take up the defence of the action in the place of the defendant in the principal action, a defendant "*en garantie*" is not obliged to do so. There is no privity between the plaintiff and the defendant *en garantie* ordered to take up the defence of the principal defendant, and who has neither appeared nor pleaded in the principal action, and therefore the principal plaintiff cannot proceed against him. The principal defendant may require that the defendant "*en garantie*," ordered to take up his defence in the principal action, and who has not intervened, indemnify him from the judgment rendered against him in favour of the principal plaintiff. *Andrews* v. *Laroque*, 27 Que. S. C. 107.

Indemnity—*Bailiff's sale under distress warrant issued by justice of the peace — Warranty of title — Claim to contribution or indemnity by purchaser at bailiff's sale— Summons for directions — Duty and powers of Judge.*]—Where a purchaser of property sold by a bailiff, pursuant to a distress warrant issued by a justice of the peace, is afterwards sued in detinue by a plaintiff claiming to be the true owner of the property, no case for "contribution or indemnity" arises against the bailiff, much less against the magistrate or the complainant in the proceedings before the magistrate. On application to a Judge for directions under the third party procedure, while it is improper to try out the defendant's claim, sufficient should appear to enable the Court to judge whether or not the claim is properly a claim for contribution or indemnity, and directions may be refused where this does not appear.—A bailiff so selling is in the same position as a sheriff selling goods under a writ of execution, and no warranty of title is imported on such sale. *Tanges* v. *Vanderberg*, 1 Alta. L. R. 498, 9 W. L. R. 269.

Indemnity—*Directions—Order allowing notice — Appeal.*]—In an action to recover damages for the death of an employé of the defendants, who was killed at a crossing of the defendants' railway with another railway, the defendants obtained an *ex parte* order allowing them to serve a third party notice upon the other railway company, claiming indemnity under an agreement whereby the latter company were allowed to put in the crossing at the point where the accident happened, upon their indemnifying the defendants against any claim for damages arising during the progress of the work. The defendants asserted and the other company denied that the accident in question happened during the progress of the work:— *Held*, that it was desirable that the question as to the defendants' liability to the plaintiff should be established in such a way as to be binding upon the third parties, al-

though all the matters in dispute between the defendants and the third parties could not be determined in the action. *Baxter* v. *France* (No. 2), [1895] 1 Q. B. 591, distinguished. Form of order giving directions as to the trial and questions of costs in such a case settled.—*Semble*, referring to *Baxter* v. *France*, [1895] 1 Q. B. 455, 458, that it was the duty of the third parties, if they objected to being added, to appeal within due time against the order allowing the notice to be served upon them. *Holden* v. *Grand Trunk Rw. Co.*, 21 C. L. T. 333, 2 O. L. R. 421.

Indemnity — *Trespassers — Tort-feasors.*]—The defendant entered into a contract with one Prince to cut timber on the property of the latter within certain defined boundaries. The defendant cut the timber, but it appeared that the title to the *locus* was in the plaintiff, who brought an action of trespass against the defendant. The defendant obtained leave to serve Prince with a third party notice, and upon application for directions, which was opposed by Prince: —*Held*, that the application must prevail; the rule that wrong-doers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an illegal act. *Weir* v. *Blois*, 21 C. L. T. 481.

Indemnity—Trial of issues—Discovery — Directions. *Deseronto Iron Co.* v. *Rathbun Co.*, 2 O. W. R. 414, 418.

Indemnity or relief over—Application to bring in third party — Lateness of application — Postponement of trial. *Smith* v. *Matthews*, 7 O. W. R. 598.

Indemnity or relief over—*Bringing in third party en garantie — Delay — Connexity — Independent action.*]—A defendant in a personal action has always an action *en garantie* against a third person who is bound by law or contract between them to indemnify him against a judgment or to share the burden with him. The defendant has a right for this purpose to the delay allowed by Art. 183, C. P. C.; but, if this delay has expired, his demand *en garantie* will no longer be an obstacle nor an occasion for delay of the trial of the principal action.—There must be connexity between the principal demand and the demand *en garantie*, but it is not necessary that they should both arise out of the same right or title.—The defendant may, if he chooses, proceed against the third person by an independent action, instead of bringing him into the original action. *Gosselin* v. *Martel*, 27 Que. S. C. 364.

Indemnity or relief over—Negligence —Joint *tort-feasors* — Motion for directions as to trial — Setting aside third party notice. *Cliff* v. *New Ontario S. S. Co.*, *Heyder* v. *New Ontario S. S. Co.*, 7 O. W. R. 804.

Indemnity or relief over — Sale of goods — Warranty. *Oshawa Canning Co.* v. *Dominion Syndicate*, 2 O. W. R. 221, 315.

Joint contractors.]—Action was commenced without the consent of the plaintiff. M., the plaintiffs, were joint contractees. Action stayed until M. is indemnified by his co-plaintiff against all costs he may incur. *Saunders* v. *Tomlinson* (1909), 12 W. L. R. 73.

Master and servant—*Relief over — Damages — Multiplicity of actions.*]—The action was brought by the personal representatives of a person killed while in the defendants' employ, as a conductor upon a train in use in the erection of a bridge on a line of railway in course of construction. The defendants averred that the whole cause of the accident was the subsiding of the track, for which they were not responsible, but wished to serve a third party notice on the railway company, to which the plaintiff objected:—*Held*, that this was not a proper case for a third party notice, because (1) according to the defendants the accident was caused by something for which they were not responsible, and so they were not liable; (2) besides this action, there were two other pending actions on behalf of other workmen, and it would be improper that the railway company should be subject to have any damages for which they were liable assessed piecemeal; (3) the plaintiff would, for reasons mentioned in the judgment, be prejudiced and unnecessarily delayed if the third party notice were allowed. *Mahaney* v. *Canada Foundry Co.*, 12 O. L. R. 544, 8 O. W. R. 651.

Motion for leave to serve notice — Delay — Prejudice to plaintiff. *Irvine* v. *Prendergast*, 7 O. W. R. 719.

Negligence — *Action under Lord Campbell's Act — Deceased killed on siding — Failure of third parties to observe contract —Liability — Trial of third party issue ordered.*]—Plaintiff, a widow, brought action against defendant railway company to recover damages under Lord Campbell's Act, for the death of her husband. The accident took place upon a siding running from the main line to the yards of the Knechtel Lumber Co., third parties, while a train was backing into the siding to connect with a car standing there. Defendants moved for an order directing a trial of third party issue, which Master in Chambers granted. Third parties appealed.—Middleton, J., *held*, that upon the plaintiff's case it might be found that the accident was caused by the failure of the Lumber Co. to observe its contract and keep the siding free from snow and ice, and to keep the space of six feet free from obstruction. On the other hand, the plaintiff might be entitled to recover against the railway in respect of matters quite apart from those indicated. Anyway, the defendant did not lose its right to have its claim against the third party determined in this action, because the plaintiff, in addition to basing her claim to recover upon grounds as to which there was, or might be, a right of indemnity, also alleged that she could recover upon other grounds, with which the third party had no concern. That there ought only to be one trial of the question of defendants' liability; and at that the facts ought to be so ascertained that the question between defendant and third party would be in train for adjustment. This could be accomplished by questions submitted to the jury. Appeal dis-

missed, with costs to be paid by the third party, to the plaintiff and defendant in any event. The order to be so modified as to direct pleadings between defendant and third party, to be delivered so as to enable plaintiff to get to trial on 31st October. *Pettigrew* v. *Grand Trunk Ry. Co.* (1910), 16 O. W. R. 989, 2 O. W. N. 57, 22 O. L. R. 57.

Notice — *Agreement* — *Appearance.*] — The plaintiffs' claim against the defendants was for the balance of a sum agreed to be paid for the hire of a race-track. The defendants alleged that a ferry company had agreed to pay and contribute towards the hire of the track a certain sum for each day of the race meetings, in consideration of the increased travel, and that the defendants had thereby been induced to enter into the agreement with the plaintiffs:—*Held*, that this allegation was not sufficient to support a claim against the ferry company for contribution, indemnity, or any other relief over, within Rule 209; and therefore the defendants should not have been allowed to serve a third party notice.—*Held*, also, that the proper practice in moving against a third party notice, is to move without entering an appearance. *Windsor Fair Grounds and Driving Park Ass'n* v. *Highland Park Club*, 20 C. L. T. 98, 164, 19 P. R. 130.

Notice—*Service out of jurisdiction* — *Partners* — *Amendment* — *Irregular affidavit.*]—After service of the writ the defendant applied for and obtained under Rule 60 (J. O. 1888) leave to issue and serve *ex juris* a third party notice on a partnership carrying on business without and not within the Territories. The notice was directed to them under the partnership name, and not to the several partners as individuals, and was served upon an officer of the partnership, and not upon any of the partners individually:—*Held*, that the order giving leave to issue the third party notice to a firm not carrying on business within the jurisdiction, in the firm's name, was not authorised under Rule 60 (42) that such a notice must be personally served upon the members of the firm, where the firm does not carry on business within the jurisdiction. Amendment of the proceedings was allowed. An affidavit incorrectly intituled was, under the authority of Rule 206 (1898), J. O., received and filed. *Imperial Bank* v. *Hull*, 20 C. L. T. 291, 4 Terr. L. R. 331.

Notice — *Time* — *Enlarging*—*Rules 209, 353.*]—In an action for damages for trespasses on land and cutting down and removing timber and wood, the defendants in their statements of defence justified the acts complained of under agreements which they alleged authorised those acts, and to which the plaintiff's rights in the land were subject. The defendants served notice upon third parties claiming indemnity or relief over in respect of all liability which the defendants might be under to the plaintiff by reason of acts done by them on the faith of representations made by the third parties, who had sold to the defendants the standing timber on the land and the right to remove it, representing that they had acquired title from the owners under which the plaintiff derived his title:—*Held*, that the third party notice was served too late (Rule 209), having been served not only after the time for the delivery of the defence, but after the pleadings were closed and the action entered for trial; and, under the circumstances the time should not be enlarged by virtue of the provisions of Rule 353.—*Semble*, that it was not a proper case for contribution, indemnity, or relief over, under Rule 209. *Parent* v. *Cook*, 22 C. L. T. 31, 110, 2 O. L. R. 709, 3 O. L. R. 350, 1 O. W. R. 396.

Notice — Time for service—Directions for trial — Motion — Costs. *Ontario Sugar Co.* v. *McKinnon*, 3 O. W. R. 64.

Order allowing service of third party notice — Time for moving to discharge — Waiver by appearance — Objection taken on motion for directions as to trial. *Doe* v. *Toronto Ferry Co.*, 6 O. W. R. 920, 973, 11 O. L. R. 16.

Preliminary examination — *Opposition by third party* — *Contestation* — *C. P. 286, 287, 651, 1188.*]—In the case of an opposition by a third party, the plaintiff can examine the opposant on preliminary motion only after the opposition has been contested; Art. 651 C. P. does not apply in such a case. *Smith* v. *Canada Cycle, etc., Co. & Carruthers*, 11 Que. P. R. 176.

Procedure — Claim for indemnity—Order allowing third party notice to be served —Rules 209, 213 — Order directing trial of third party issues — Provisions of. *Peterborough Hydraulic Co.* v. *McAllister*, 9 O. W. R. 724.

Procedure — *Claim for relief over.*] — Plaintiff was holder of a license to operate a ferry between Fort Frances, Ont., and the State of Minnesota. Defendants were engaged in floating logs down the river at the points where the plaintiff operated his ferry. The action was for damages arising from the operation of plaintiff's ferry being interfered with by defendants' logs. Defendants alleged that third parties had erected a dam and power plant in such a manner as to impede defendants in driving logs down the river, and served a third party notice under Con. Rule 209. On appeal from a judgment, dismissing a motion to set aside the third party notice, it was *held*, that the amended rule did not extend to such a case, but to cases where the right to relief over is given by law in consequence of a breach of contract between the third party and the defendant, either express or implied, or is a right given by statute. The measure of damages did not correspond and third party procedure was only applicable where defendant if liable to plaintiff would be entitled to recover against the third party the very damages which the plaintiff sought to recover against him. Appeal allowed, and third party notice set aside with costs. *Gagne* v. *Rainy River Lumber Co.* (1910), 15 O. W. R. 514, 20 O. L. R. 433, 1 O. W. N. 506.

Procedure — Indemnity or relief over—Contract — Damages — Distinct issues — Setting aside third party notice. *Budd* v. *Dixon*, 9 O. W. R. 371.

Procedure — *King's Bench Act, Rules 245, 250 — Indorsee of promissory note against maker — Defence that payee guilty of fraud — Maker not entitled to bring in payee for purpose of relief over.*]—In an action by the indorsee of a promissory note against the maker, the defendant is not entitled to serve a notice on the payee, under Rule 246 of the King's Bench Act, calling him to come in and help to contest the plaintiff's claim, when the defence relied on is that the payee was guilty of fraud in obtaining the note, and that the plaintiff is not a holder in due course. Neither is the defendant entitled, in such a case, to an order under Rule 245 joining the maker as a party to the action. The procedure provided for in Rules 245 to 250 was intended mainly for cases in which the third party is supposed to have some ground which he may be able to urge against the plaintiff's right to recover from the defendant, the object being that, if he fails to come in and urge such ground, he would be precluded afterwards, when the defendant seeks indemnity or contribution or other relief over against him, from saying that the plaintiff should not have been permitted to get his judgment against the defendant. If there is power to make the order asked for in such a case, it should be refused in the exercise of a proper judicial discretion under Rule 250, because the plaintiff might be unreasonably delayed in proceeding with his action. *Bower* v. *Hartley*, 1 Que. B. D. 656, followed. *Daniels* v. *Dickson*, 6 W. L. R. 165, 17 Man. L. R. 35.

Procedure—Service of notice—Motion to set aside — Service too late under Con. Rule 208—No statement of claim served with notice—Objections easily rectified — Under Con. Rule 362—Proper case for third party notice—Motion refused—Costs to third party —Costs to plaintiffs against applicant in any event. *Stuart* v. *Hamilton Jockey Club* (1910), 17 O. W. R. 403, 2 O. W. N. 254.

Proceedings — Action against indorsers of promissory note—Motion for leave to serve third party notice on maker—Delaying plaintiff—Rule 246—No defence to action—Motion for summary judgment. *Canadian Bank of Commerce* v. *Hendrie*, 12 O. W. R. 756

Proceedings — Notice — Indemnity—Other claims—Damages — Convenience—Notice set aside. *Self* v. *Toronto*, 11 O. W. R. 596, 602.

Relief over—*Identity of claims.*]—The owner and occupant of a house in a town sued a gas company for damages alleged to have been sustained by reason of an escape of gas from the defendants' pipes upon the highway into the plaintiff's premises. The defendants served a third party notice upon the town corporation, alleging that the break in the pipes was caused by the negligence of the corporation in the course of construction of a sewer in the same highway:—*Held*, that there was no right to indemnity or relief over, within the meaning of Rule 209, as the damages which might be recovered by the plaintiff against the defendants were not the measure of the damages which might be recovered by the defendants against the third parties. *Miller* v. *Sarnia Gas & Electric Co.*, 21 C. L. T. 597, 2 O. L. R. 120.

Relief over — Municipal corporation — Agreement with street railway company—Obligation to keep highways in repair. *Robertson* v. *Toronto*, 12 O. W. R. 870, 932.

Relief over—*Rule 246—Motion for directions as to trial.*]—By Rule 246: "Where a defendant is or claims to be entitled to contribution or indemnity or other remedy or relief over against any person not a party to the action, he may serve a notice to that effect." The plaintiffs sued for the value of a car load of wheat which, they alleged, had been shipped by the defendants' railway and had not been delivered to the consignees. The defendants denied the receipt of the car from the plaintiffs, and served a third party notice on another company, alleging that, if the car was received, it was wrongfully converted by the third parties:—*Held*, that the claim against the third parties was not within Rule 246. *Gagne* v. *Rainy River Lumber Co.*, 20 O. L. R. 433; *Wynne* v. *Tempest*, 1 Ch. D. 110, and *Windsor, etc., Association* v. *Highland Park Club*, 19 P. R. 130, specially referred to. Where the claim is founded on tort the Rule is not applicable. Where a third party notice is served, the third party, if he objects, should make his objection on the motion for directions as to trial, not by substantive application. *Western Can. Flour Mills Co.* v *Can. Pac. Ry. Co.* (1911), 16 W. L. R. 420, Man. L. R. .

Right of third parties—When a Court, called upon to decide a case, cannot do so without affecting the rights of third parties not before the Court, it may order that they be called into the case and allowed to file their pleas, if they have any, and, in any event, by ordering that the case shall be re-opened so that, by cross-examination, such third parties may control the proof produced by the plaintiff and advance such proof as they may have on their own behalf. A decision, after such third parties have been called into the case, cannot be based upon the evidence submitted in the case in which they took no part and which evidence the Judge, relying upon a pretended discretionary power embodied in Art. 292 C. P., admitted, the article in question being without application to the present case. *Dion* v. *Dion*, 37 Que. S. C. 84.

Right to contribution or indemnity —*Application for directions as to trial — Warranty of title.*]—The plaintiff brought action against the defendants for breach of warranty of title to a horse sold by the defendants to the plaintiff. The defendants, in pursuance of leave given, served a third party notice on G., from whom they had bought the horse, claiming to be indemnified by him to the extent of any damages recovered against them by the plaintiff, on the ground of breach of warranty of title by G.:—*Held*, that upon the application for directions as to trial, the Court should consider the defendants' right to contribution or indemnity, and if satisfied that they were not so entitled should refuse to give directions, which refusal will be tantamount to

a dismissal of the third party from the action.—*Held*, also, that in the circumstances the defendants' claim against G. was not properly one for contribution or indemnity, and that no direction as to trial should be given. *Boldue* v. *Larose*, 5 Terr. L. R. 6.

Sale of mining claim—*Action to set aside.*]—Bunker sold his interests in certain mining claims to Silver, and Silver sold the same to Oakley. In an action by Oakley against Silver for fraudulent misrepresentation, Silver sought to bring in Bunker as a third party defendant:—*Held*, that Bunker had no interest in, and was not a party to such representations, and should not be affected by it. *Oakley* v. *Silver* (1910), 15 O. W. R. 336.

Service of notice on third party out of jurisdiction—"*Proceeding*" — *3 Edw. VII. c. 8, s. 13 (O.)—Con. Rule 162 (e)—Breach of contract within Ontario—Indemnity.*]—A third party notice is a "proceeding" within the meaning of 3 Edw. VII. c. 8, s. 13 (O.), providing that in Con. Rule 162 the word "acts" shall be deemed to include any document by which a matter or proceeding is commenced; but, when applying Con. Rule 162 (e) to service out of Ontario of a third party notice, the word "action" must be read as if it were "third party proceeding"—the effect being that service can be allowed only where the third party proceeding is founded on a breach within Ontario of a contract, wherever made, which is to be performed within Ontario; and in this case there was no breach within Ontario, because the contract under which indemnity was sought by the defendants against the third parties was one under which the obligation to indemnify did not arise until judgment had been recovered and the amount paid by the defendants, and the defendants were in the same action opposing the recovery of judgment.—Order of Anglin, J., reversed. *Montgomery* v. *Saginaw Lumber Co.*, 12 O. L. R. 144, 7 O. W. R. 619, 729.

Setting aside third party notice — Indemnity — Relief over — Breach of trust — Withdrawal of moneys from bank — Knowledge of bank. *Trusts & Guarantee Co.* v. *Munro*, 11 O. W. R. 435.

Settlement between plaintiff and defendant — Notice of discontinuance served by defendant on third parties — Rule 439 (1)—"Plaintiff"—O. J. Act, s. 2 (5). *Bucknall* v. *Mitchell*, 13 O. W. R. 44.

Settlement of action.]—After a third party had been brought in and the usual directions as to trial given, the action was settled as between the plaintiff and the defendants:—*Held*, that the defendants could not proceed to trial as against the third party, and the action was dismissed as against the third party with costs, without prejudice to the right of the defendants to bring an action against the third party. *Wheeler* v. *Cornwall*, 22 C. L. T. 260, 4 O. L. R. 120.

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6. OTHER CASES.

Action to quash order made by county council on appeal — *Appellant before council—Liability of county—Judicial act.*]—In an action to quash an order of homologation of a local *procès-verbal*, made by a county council, on an appeal from the rejection of the same by the local council, the party on whose petition the *procès-verbal* was prepared, and who instituted the appeal to the county council, is properly made a party defendant, and cannot, by inscription in law, ask to be discharged from the suit on the ground that no *lien de droit* exists between the plaintiff and himself. — *Per* Davidson, J.: — The order of the county council to homologate a *procès-verbal*, made on an appeal from the order of the local council rejecting it, is a judicial and not an administrative act, and, if made regularly and within the powers of the council, the county corporation cannot be called on to account for it. *Forest* v. *Letendre*, 25 Que. S. C. 440.

Action to set aside fraudulent conveyances—Grantor made defendant — Action by judgment creditor—Additional claim on simple contract. *Belcher* v. *Hudson*, 9 W. L. R. 205.

During a suit, the exact position of parties at the moment when writ was issued should be maintained: no party to the suit may procure an advantage over the others and thus change the relative situation of parties; parties must abstain from doing an act which would prevent execution of the judgment to be rendered. *Edwards* v. *Ste. Marie du Monnoir* (1910), 12 Que. P. R. 24.

Interpleader issue — Plaintiff in issue —Insurance moneys — Security for costs. *Bruce* v. *Ancient Order of United Workmen*, 4 O. W. R. 241.

Intervenant — *Creditor—Bank—Liquidation.*]—A creditor of a bank in liquidation may intervene in a suit pending between the liquidator and a debtor of the bank, where the success of the defence would have the effect of decreasing the dividend of the creditor. *Kent* v. *La Communauté des Sœurs de la Charité de la Providence*, 3 Que. P. R. 180.

Judgment for costs — *Saisie-arrêt issued by solicitors—Distraction—Subsequent proceeding by original party.*] — Where a *saisie-arrêt* is made in the name of the solicitors for the defendant in respect of costs for which there is distraction in their favour, a contestation of the declaration of the garnishee cannot be made in the name of the defendant himself. *Tapley* v. *Irving*, 6 Que. P. R. 223.

Mis-en-cause — *Costs.*]—A *mis-en-cause* has a right to be represented by an advocate, and the advocate has a right to costs of appearance, etc., against the plaintiff, where the action is dismissed. *Levesque* v. *Page*, 9 Que. P. R. 386.

Mortgage action—Death of plaintiff—Assignment of portion of interest—Revivor —Executors—Assignee—Costs—Reference — Rules 659, 753. *Sexton* v. *Peer*, 2 O. W. R. 845, 1144.

Municipal expenditure — *Suit by ratepayer—Demurrer* — *Attorney-General.*] —A ratepayer in a county filed a bill to re-

strain the county council from expending county funds in the erection of a new gaol building on lands not included in the locus authorized by statute as a site for a county gaol:—*Held*, on demurrer, that the plaintiff could not maintain the suit in his own name, as the bill did not allege any damage or invasion of any right peculiar to himself and not common to all other ratepayers, and that the suit should have been in the name of the Attorney-General on the relation of some person. Leave given to convert the bill into an information by the Attorney-General by way of amendment. *Curtis* v. *Municipality of Carleton*, 20 C. L. T. 18.

Representation — Action to set aside probate of will—Next of kin — Substituted service—Extension of time for delivery of statement of claim—Costs. *Madill* v. *McConnell*, 9 O. W. R. 868.

Two separate causes of action—*Trespass to land—Assault on one plaintiff—Claim for loss of services by other plaintiff—Joinder of plaintiffs.*]—Middleton, J., *held*, that an action to recover damages for assault upon one plaintiff and an action by her mother for loss of her services, could well be joined, as they arose out of the same occurrence. Con. Rule 185.—Order of Master in Chambers, 17 O. W. R. 743, 2 O. W. N. 381, reversed. *Laister* v. *Crawford* (1911), 18 O. W. R. 308, 2 O. W. N. 547.

Want of parties.]—An objection for want of parties to a bill ought to be made in the Court below. The Privy Council will not treat the suit as defective when no such objection was taken in the Colonial Court. *Bowes* v. *Toronto* (1878), C. R. 3 A. C. 10, 11 Moo. P. C. 463.

Who should be plaintiff — Issue as to title to insurance moneys—*Prima facie* right—Burden of proof. *Blahoult* v. *Equitable Life Assurance Co.*, 11 O. W. R. 313.

PARTITION.

Acquisition of entirety by licitation

Effect of incumbrances upon undivided shares—Preference on shares of price.]—Art. 746, C. C., which declares that the co-partitioner who acquires the entirety of an undivided immovable by licitation, is deemed to have always been the owner of such entirety, establishes a fiction of law in favour of such co-partitioner, which must be restricted to the party in whose interest alone it was created. One of the effects of this fiction is, that he acquires the entirety free from all incumbrances; but when the price of the property licitated is deposited in the hands of justice for distribution, the fiction has not the effect of nullifying rights of preference on the shares of the price accruing to the other co-partitioners. Art. 2027, C. C., which declares in effect that a hypothec upon an undivided portion of an immovable ceases to subsist when a partition or a licitation conveys the immovable to a person other than the one who constituted the hypothec, extinguishes the right to follow the property in the hands of such person, but does not abolish the right of preference upon the share of the price which represents the undivided portion of the immovable which was hypothecated, and which price has been placed in the hands of justice for distribution. The partition or licitation has the same effect as a sheriff's sale, which discharges the property sold from the hypothecs which existed at the time of the sale, but does not destroy the efficiency of such hypothecs upon the proceeds of the sale which represent the property. *Bruneau* v. *Banque Jacques-Cartier*, 10 Que. K. B. 525.

Action — Beneficiaries under trust deed—Submission to arbitration—Award — Provision for option of purchase—Exercise of option—Release—Conveyance — Estoppel—Costs. *Tasker* v. *Smith*, 9 O. W. R. 15, 593.

Action—*Dilatory exception—Parties — Names and residences—Practice.*]—In an action for partition, the defendant who asks by dilatory exception that all the heirs be put *en cause* must comply with Rule of Practice 50 (S. C.), and furnish the names and residences of these heirs. *Descoteaux* v. *Lepitre*, 8 Que. P. R. 183.

Action—*Status of heir as plaintiff — Appele—Will—Usufruct.*]—When an heir is an *appelé* only by virtue of the will, he cannot begin an action *en partage et licitation*, as long as the usufruct lasts, the right of the *appelé* to the property not being acquired by him until the end of the usufruct. *Thorston* v. *Thornton*, 8 Que. P. R. 213.

Action for — *Plea to—Portion claimed.*]—It is illegal to plead to an action for partition that the plaintiff's part of the succession is less than that which he claims, his right to demand partition being the same in any case. *Cabana* v. *Latour*, 5 Que. P. R. 102.

Action in partition — *Right to institute it—Inscription in law—C. P. 191, 1037, C. C. 674, 691, 693, 698.*]—Every heir has an absolute right to demand the judicial partition of an immovable forming part of a succession, and the Court should grant such demand, even if the plaintiff is the only co-heir who has refused to agree to a friendly partition. A plea in which it is alleged that the partition should be effected by voluntary licitation will be rejected upon demurrer. *Farmer* v. *Murray* (1910), 11 Que. P. R. 353.

Agreement for sale of lands—*Construction of contract—Right of action — Administration by co-owners — Trust — Interim account — Partial discharge of trustees.*]—A. & S. being the holders of the entire capital stock of the C. & W. Ry. Co., agreed that they would cause a moiety of the company's lands to be vested in H. by a valid instrument to be executed by the company at the request of H., and in such form as he might require. During some years the lands were administered by A. and S., but H. never requested nor received any conveyance of his moiety, and the title to the lands, in so far as they had not been disposed of, remained in the company. In an action by the plaintiff against H. for partition of the lands and to have an order for an interim account by and partial discharge of A. and S. as trustees:—*Held*, that as, at the time of action, the title to the lands was still vested in the

railway company, which was not a party to the agreement, the order for partition could not be granted, and that, independently of partition or other final determination of their trust, the plaintiffs were not entitled to the relief of an interim accounting and partial discharge as trustees. *Angus* v. *Heinze* (1869), 14 R. C. R. 157, 9 W. L. R. 188. Affirmed 42 S. C. R. 416.

Application for summary order — Question of title—Direction to bring action. *Tasker* v. *Smith*, 5 O. W. R. 254.

Bill for — Demurrer — Grand nephews shut out in partition of real, though not of personal property — Proper complainants — When Courts should administer. *McEachren* v. *Coz* (1910), 8 E. L. R. 590.

Costs — *Judgment—Substitution — Sale under execution—Report on distribution — Contestation of—Curator to substitution.*]—The plaintiff, a stranger to the substitution, was owner of an undivided fourth of certain immovables, of which the defendant had the other three-fourths, but burdened with a substitution, of which the contestant was the curator. In an action for partition the immovables were divided, and the judgment ordered that the taxed costs of all parties should be passed and the defendant should pay three-fourths of them, and the plaintiff one-fourth. The judgment was registered. R., the plaintiff's advocate, having judgment against the defendant for costs, caused to be seized and sold a part of the immovables allotted to the defendant in the partition. The contestant was a party to the seizure and sale. The price obtained at the sale was reported by the sheriff with a certificate of the registrar, stated the substitution and its registration and a hypothec made, since the partition, by the defendant to P., his advocate in the action. The debt of R having been paid out of the purchase money, there remained a balance which the prothonotary awarded to P. The curator contested this, alleging that P. had been paid his debt, which at any rate was the defendant's own debt, for which the substitution could not be held bound, and asked that the balance should be paid to him (the contestant). P., while not opposing this demand, and submitting his rights to the Court, alleged that the amount of his hypothec included $45.89 for costs in the partition action, and he said that in case any part of that sum ought to be placed to the charge of the substitution, he was willing to give security for repayment of the portion for which he had no lien. The contestant did not prove that P.'s debt had been paid:—*Held*, that P.'s declaration was an actual plea, which obliged the contestant to proceed as in a contested cause. 2. That the curator had no status to assert that P.'s debt had been paid. 3. That the partition bound the substitution. 4. That the debt of R. for costs of such partition was preferable to the substitution and was apparent on the record, and the decree had purged the substitution. 5. That R. had a lien on the substituted immovables for his debt. 6. That the defendant and the contestant should, as to costs, join their claims together. 7. That the balance of the purchase money belonged to the substitution, and it was the duty of the curator to see that it was not diverted. 8. That the curator should have proceeded by way of opposition *afin de conserver*, or by an intervention, but the procedure which he had adopted was equivalent, and should be maintained. 9. That the hypothec made by the defendant, having effect so long as the substitution was not opened, P. had the right to be paid the balance of the purchase money, upon his furnishing security to repay it upon the opening of the substitution. 10. That as to $26, costs of P. usefully incurred in the partition, he had a lien superior to the substitution, and to this extent he was not obliged to give security. 11. That the costs of the contestation should be paid by P., but to be taxed as the costs of a contestation of collocation in law only. *Pelletier* v. *Michaud*, 20 Que. S. C. 413.

Counterclaim for reformation of deed — *Defence of Limitations Act — Res judicata.*]—In an action for partition of land, and land covered with water, of which the plaintiff and defendants were alleged to be tenants in common, the defendants counterclaimed for the reformation of a deed from the plaintiff, to make it include all the plaintiff's interests in the lot in question. The Court refused the reformation claimed, on the ground that the evidence was not sufficient, no mutual mistake, or fraudulent concealment, on the part of the plaintiff, having been proved, and gave judgment in favour of the plaintiff for partition of all portions of the lot not built on, and those built on within 20 years:—*Held*, that the question of 20 years' adverse possession could not be raised by the defendants in this action, that question having been raised and decided adversely to them in a previous action by the same plaintiff in relation to the same land. *Zwicker* v. *Marash*, 36 N. S. Reps. 365.

Creditor of co-parcener — *Lien on lands—Decree.*]—A creditor of the defendant in respect of a sum of money which the defendant has engaged to pay at the time of an expected partition, among the heirs, of entailed property, has the right to be paid out of such property, and in such a case the decree should declare the land free from the entail. *Prevost* v. *Prevost*, 4 Que. P. R. 85.

Disputed title — *Bona fides* of defendant's claim of title—Condition in will—Forfeiture — Jurisdiction of Court of Chancery to find as to title. *Hurstis* v. *Durant*, 5 E. L. R. 483.

Lease by infant tenant in common — *Repudiation—Partition by deed among tenants in common—Effect as to lessees—Reformation of deed—Trial — Adjournment — Evidence at former trial and on reference—Ouster—Conduct amounting to—Mesne profits—Waste — Damages — General costs—Costs of proceedings under order of reference subsequently reversed — Costs of appeal — Variation of judgment.*]—Appeal by defendant company from judgment of Teetzel, J., (5 O. W. R. 141), in favour of plaintiff for partition of Monro Park, near the city of Toronto. The partition sought was between plaintiff and defendant company for the remainder of the term of a lease to defendant company, which was not binding on plaintiff, as he was an infant when it was made:—*Held*, it was manifest, as well from the testimony as from the whole circumstances, that there was no intention on the part of any

of the parties to the conveyance to take from plaintiff any part of his rights as the owner of an undivided one-third of the premises, or to give any of his property or rights to his brother and sister, so as to increase their property and rights and leave him with less than each of them was to have. Neither his brother nor sister contended that there was any such intention or that they understood that to be the effect of the conveyance. It was not intended to affect the railway company as lessee of two undivided one-third shares. And if the general words of grant and release contained in the conveyance operated to take away from plaintiff or to convey to his brother and sister any right of his in the premises during the existence of the term, it was proper and just to reform it so as to prevent it from so operating. The railway company could not reasonably complain of this being done. Throughout the litigation they contended that the partition made was not binding on them. So far as the railway company were concerned, it was *res inter alios acta*. Then, as the railway company were not parties to or bound by it, they could not insist that the conveyance made must stand for their benefit, even though it be shewn or admitted to be contrary to the intention of the parties to it. The railway company gave no new consideration, and their position has not altered. They held their lease and their leasehold interest unaffected by partition. The railway company can not be permitted to take for their benefit the property of plaintiff because by mistake he had executed a conveyance which appeared to give rise to a claim to that effect. From the date of the repudiation of the lease by the plaintiff, he was entitled to possession of the whole of the premises in common with the railway company, who were bound upon demand to let him into possession along with them. On 17th August, 1900, plaintiff wrote to the railway company stating his repudiation of the lease and asking the company to give him immediate possession. This demand must be reasonably construed as a claim not for the sole but for the joint possession, and it is apparent from the company's letter in reply of 20th August that it was so understood. The demand was not assented to, but it was sought to induce plaintiff to confirm the lease and accept the rent under it. The railway company had at that time their buildings and tracks upon the premises, and after the demand they continued in possession and used the property in the same way as before. It was a fair inference from all the facts that there was a refusal to permit plaintiff to enter. And when this action was brought, there was not only a refusal of possession on the part of the railway company, but there was a denial of his title. The lease did not come within the provisions of the Settled Estates Act so as to be binding on the plaintiff. Ouster being found, damages either as for trespass or by way of allowance for *mesne* profits should follow, and upon the evidence as to the value and rental of adjoining properties it cannot be said that the trial Judge has made an excessive award. There was some slight evidence of waste destructive of the freehold, and the amount awarded on this head ($850) should not be disturbed. *Monro* v. *Toronto Ry. Co.*, 4 O. W. R. 332, 9 O. L. R. 299.

No common title—*Easement — Summary application — Adjournment — Action —Order—Appeal.*]—Where, on summary application for partition or sale of lands, it was alleged by the defendant and *prima facie* evidence given that he had acquired, as to part of the land, title by possession, and as to the residue, had only an easement or right of way over it, and no title to the land itself:—*Held*, that, there being no common title, no interest in common, an order for partition or sale should not be made. It was not open to the plaintiff by admitting an ownership in the land in the defendants, which the latter did not assert, to get a sale by partition proceedings, and thus force the defendants to protect their easement by purchasing, or permitting it to be destroyed by sale. The Master should, on the question of title being raised, have adjourned the hearing of the application, allowing an action to be brought. An appeal lay to a Judge in Chambers from the Master's order granting the application. *Stroud* v. *Sun Oil Co.*, 24 C. L. T. 298, 7 O. L. R. 704, 8 O. L. R. 748, 3 O. W. R. 806, 4 O. W. R. 212.

Objection by tenant for life — *Premature action—Trustee under marriage settlement—Interests of infant—Will.*]—Under an ante-nuptial settlement lands were settled in trust for, successively, the lives of the plaintiff, the settlor, and his intended wife, and on their death to the children of the intended marriage for such estates or estates as the plaintiff and the intended wife should appoint, and in default of appointment to the children in equal shares, with powers of maintenance during minority. After the marriage the plaintiff conveyed all his interest in the lands to one W., who conveyed to the wife. The wife predeceased the plaintiff, having by her will devised the lands to one E. W., who had been appointed the trustee under the settlement in trust to receive and pay over the income from the said lands to the children during their minority, and on their attaining their majority to hand over to them their shares. There were three children, one of whom died prior to another subsequent to, the death of the said wife, leaving one surviving. The plaintiff, on his wife's death, claimed to be entitled to a share in the said lands as one of the heirs of the child who had died subsequently to his said wife, and brought an action to have the same partitioned or sold, to which E. W. objected:—*Held*, that, in the face of the objection of E. W., the trustee and representative of the life estate, the action was premature, her consent being a prerequisite to its maintenance. *Rajotte* v. *Wilson*, 24 C. L. T. 351, 3 O. W. R. 737.

Particulars — *Inscription in law—Parties—Addition of.*]—If it does not clearly appear from the declaration that a certain person predeceased another, the defendant, in an action for partition, may ask for further particulars, but cannot inscribe in law. 2. The fact that all necessary parties have not been brought before the Court is no ground for the dismissal of an action, but when the original parties fail to add the necessary parties, the Court itself should order the calling in of said parties. *Hu-tubise* v. *Stamford*, 5 Que. P. R. 151.

Parties — *Tenant in common — Lease—Infant—Repudiation.*]—The plaintiff, having when he came of age repudiated a lease to the defendants of land of which he and his

brother and sister were tenants in common, made when he was an infant, and having made a partition by deed with his brother and sister, to which the defendants were not parties:—*Held*, Maclennan, J.A., dissenting, that the brother and sister were necessary parties to the plaintiff's action for a partition as against the defendants in respect of their possession under the lease. Judgment of a Divisional Court, 4 O. L. R. 36, 22 C. L. T. 231, 1 O. W. R. 25, 316, 813, reversed, and judgment of Meredith, C.J., *ib.*, restored. *Munro* v. *Toronto Ry. Co.*, 21 C. L. T. 165, 5 O. L. R. 483, 2 O. W. R. 207, 3 O. W. R. 14, 299.

Parties to action — Administrator of tenant for life—Improvements made by tenant for life—Moneys expended in paying off mortgages—Mistake—Intention — Subrogation—Consent of administrator to be added as party — Necessity for. *Re O'Donnell, O'Donnell* v. *O'Donnell*, 12 O. W. R. 623.

Pleading — *Declaration of shares — Licitation—Distribution—Parties — Adverse claim.*]—*Partage* not being attributive, but simply declaratory of the shares which are due to the co-parceners, it is sufficient to claim, in an action *en partage*, that the division of the property or the distribution of the price of its *licitation* be made in conformity with the rights of the parties, without specifying the fraction or proportion of each of them.—2. The action *en partage et licitation* is available to a co-owner of an undivided share against all the others, and it is not necessary, in the case of immovable property, to bring in as parties persons who are in possession under some other title. *Desséteaux* v. *Desséteaux*, 33 Que. S. C. 269.

Pleading—*Shares of plaintiff — Quantum.*]—A defendant, sued for partition of an estate, cannot plead that the plaintiff's share is less than that which he alleges by his declaration. *Cabana* v. *Latour*, 23 Que. S. C. 255.

Proof of lunacy—*Costs.* — Unsoundness of mind of defendant in a partition suit, proved by affidavits under Supreme Court in Equity Act 53 V. c. 4, s. 80. Application refused in a partition suit, that costs of appointing guardian *ad litem* of defendant, a person of unsound mind, not so found, and of proving her unsoundness of mind by affidavits, be borne by a defendant's share in estate. *Masters* v. *Masters*, 23 C. L. T. 266, 2 N. B. Eq. 486.

Report of commissioners — *Review — Error—Powers of Supreme Court of Nova Scotia—Practice.*]—The report of partition commissioners, in general, should be sustained, unless some positive rule of law has been violated or their estimate has been shewn to be erroneous, by clear, strong, and indubitable evidence. To set aside their estimate, there must be something more than the opinions of witnesses against the judgment of the commissioners; there must be something like demonstration that the commissioners have fallen into gross error. — English and American cases on partition reviewed. — *Semble*, that the interpretation clause in the Partition Act confers upon the Supreme Court, in addition to other powers, all the powers possessed by the Equity Court in a bill for partition, and, therefore, the practice of the English Chancery Court would be applicable in Nova Scotia. *Archibald* v. *Handley*, 40 N. S. R. 427.

Report of referee — *Homologation — Notice to advocates—Filing of exhibits — Time.*]—The report of a referee in a partition of a succession should not be declared void on account of want of notice to advocates, when the parties do not suffer any prejudice thereby.—The filing of exhibits and documents by the referee in support of his report at the time of the hearing of the motion to homologate the report, is sufficient, especially when the parties have been previously required by the notary to place in his hands all the documents which they wish to file. *Leclair* v. *Pepin*, 8 Que. P. R. 112.

Report of single expert — *Infants — Order of Court.*]—Where, in an action for partition, in which all the parties are not of full age, a single expert has been appointed, his return will not be homologated until after the consent to having a single expert has been ratified by a Judge. *Farrell* v. *Mount*, 6 Que. P. R. 396.

Retrait successoral—*Universal succession—Devise—Substitution.*] — The right of repurchase of the share of a co-heir sold to a stranger is given to the co-heirs only in the case of a division of the whole succession, and cannot be exercised in anticipation of the division of land devised by a particular title subject to a substitution. *Hamault* v. *Patoel*, 18 Que. K. B. 114.

Right to — Executor—Devisee. *Re Aselstine*, 1 O. W. R. 178.

Right to undivided share — *Action against purchaser — Parties—Defence—Payment — Improvements.*]—The action to recover an undivided part of an immovable of which a purchaser is in possession by virtue of a just title should be an action for an account and partition against the heirs and universal legatees of the grantor of the purchaser, and an action against the purchaser alone will be dismissed upon defence in law. 2. The purchaser, so sued for the recovery of an undivided part of an immovable which he is in possession of as a whole, has a right to set up as a defence the payment made by his grantor and the improvements made by himself upon the immovable in question. *Rougeau* v. *Sicotte*, 3 Que. P. R. 375.

Sale—Oral agreement—Statute of Frauds—Part performance—Acquiescence — Arbitration or valuation — Notice. *Joyce* v. *Joyce*, 1 O. W. R. 479.

Sale — *Special value—Discretion.*]—The form of judgment for partition or sale (Con. Rules, No. 158), must be read in the light of the legislation by which the Court has been given the right to order a partition instead of a sale, and its meaning is, that a partition is to be made unless it is shewn by those who ask for a sale that a partition cannot be made without prejudice to the interests of the owners of the estate as a whole. A report directing partition was therefore upheld where there was no physical difficulty in dividing the land, and the plaintiffs had been allotted that portion of it adjoining other lands owned by them, the argument in

favour of a sale being that the portion allotted to the plaintiffs was of special value to them so that in the event of a sale it would have been necessary for them to purchase the whole of the land at whatever price it might have been bid up to, and thus have benefited the co-owners. History of legislation affecting partition. *Ontario Power Co.* v. *Whattler*, 24 C. L. T. 128, 7 O. L. R. 198, 3 O. W. R. 340.

Separation of patrimony — *Rights of creditors of co-parcener—Double division of estate—Registration.*]—1. The creditor of an estate, the assets whereof consist in an undivided part of another estate, cannot, after the division of the latter, demand from one of the distributees the separation of patrimony provided by Art. 743 C. C. Therefore, the registration, against the land allotted to this distributee, of a demand of separation of patrimony, gives rise in his favour to an action against the creditor who registered it, to set aside the registration.—2. A double division of both estates may be proceeded with, by means of a fusion of the properties of both in a single mass, to be divided, by a single division, among all the heirs. And in this case, the creditor, whose right of preference is extinguished in virtue of Art. 746, C. C., can only attack the division on the ground of fraud. *Laurent* v. *Lemaire*, 25 Que. S. C. 463.

Succession or community — *Partition of part—Property subject to usufruct—Mobilier—Account.*]—One of the several co-owners of an undivided universality, *e.g.*, a succession or a community, is not entitled, in principle,—and without alleging special circumstances shewing that some portion of the property comprised in such universality is temporarily or permanently insusceptible of partition—to demand the partition of part only of the property comprised in such succession or community. The object to be partitioned is the mass composed of all the property, movable and immovable, comprised in the universality, not the particular properties which go to form the mass treated separately. 2. The fact that a property forming part of a succession or community is subject to a right of usufruct does not prevent its partition among those having the *nue propriété*. 3. As regards the movables of a community, the mere fact that they have been converted into money, that the surviving consort has received one-half of the proceeds, and that the other half has been employed by the executor in part payment of debts, is not sufficient to justify the non-accounting for such money by the surviving consort, and by the executor who is one of the co-partitioners, as an incident of the partition. *Mount* v. *Farrell*, 21 Que. S. C. 251.

Summary application—Dispute as to title—Action. *Noel* v. *Noel*, 2 O. W. R. 628.

Summary application — *Practice — Opposition—Title—Action to try—Adjournment of application.*]—Where a motion is made under Rule 956 for a summary order for partition or sale of lands, and it appears on the motion that such order should not be made until after a question of title has been determined, and then only in the event of the determination being against the title set up in opposition to the motion, the practice which should now be adopted is to adjourn the further hearing of the motion, with liberty to the applicant to bring an action to try the question of title. *Macdonell* v. *McGillis*, 8 P. R. 359, and *Hopkins* v. *Hopkins*, 9 P. R. 71, not followed. *Smith* v. *Smith*, 21 C. L. T. 238, 1 O. L. R. 404.

Summary proceedings — *Parties — Absentee—Guardian — Service — Substitution.*]—Where, in a proceeding for partition or sale of lands, begun by summary application, a person interested in the estate, not originally made a party, had been long unheard of, and there was uncertainty whether he were living or dead, an order was made by a Judge, under ss. 16 to 20 of the Partition Act, R. S. O. c. 123, which are expressly made applicable by s. 33 of the Judicature Act, R. S. O. c. 51, appointing a guardian and directing that he be served with an office copy of the judgment or order for partition, and notice, for the absentee. *Semble*, that the Master to whom a reference is directed by the judgment or order has power to dispense with service of his warrant or of an office copy of the judgment: Rules 203, 639. *Smith* v. *Houston*, 15 P. R. 18, discussed. *Semble*, also, that the Court or a Judge has power to make an order for substituted service of an office copy of a judgment or order. *In re Hynes—Hodgins* v. *Andrews*, 20 C. L. T. 390, 19 P. R. 217.

Tenant by the curtesy—Mortgagee—Judgment creditor of owner of interest. *Bank of Hamilton* v. *Hurd*, 1 O. W. R. 450.

Tenant in common — *Statute of Limitations — Possession.*] — Under the Nova Scotia Statute of Limitations, R. S. N. S. 5th ser., c. 112, a possession of land, in order to ripen into a title and oust the real owner, must be uninterrupted during the whole statutory period. If abandoned at any time during such period, the law will attribute it to the person having title. Possession by a series of persons during the period will bar the title, though some of such persons were not in privity with their predecessors. Where one of two tenants in common had possession of the land as against his co-tenant, the bringing of an action of ejectment in their joint names and entry of judgment therein gave a fresh right of entry to both, and interrupted the prescription accruing in favour of the tenant in possession. Judgment in 32 N. S. R. 1, affirmed. *Archibald* v. *Handley*, 20 C. L. T. 111, 30 S. C. R. 130.

Tenants in common — Expensive proceedings—Leave to proceed with former action—Terms. *Mathews* v. *Mathews*, 1 O. W. R. 844.

Undivided property — *Usufruct.*] — The mere fact that an undivided property is subject to a usufruct does not prevent the co-owners demanding a partition thereof. *Thornton* v. *Thornton*, 7 Que. P. R. 277.

Voluntary partition — *Partition judicially effected—Demurrer—C. C. 690, 693, 694, 698, C. P. 1037.*] — 1. An undivided owner is not legally bound to accept a friendly partition; he always has his recourse in a partition judicially effected.—2. In every case in which there are minors whose interests are at stake, the partition must be judicially effected.—3. A defendant

in an action in partition cannot urge that he was willing to take part in a friendly partition, and that the plaintiff was without right in refusing his offer, and that the costs of the action in partition are useless; a plea embodying such reasons will be dismissed upon demurrer. *Farmer* v. *Murray* (1910), 16 R. L. n.s. 489.

Whole property—Right of sale of — Partition of part—Reference. *Ontario Power Co.* v. *Whattler*, 2 O. W. R. 811.

See ADMINISTRATION — DISTRIBUTION OF ESTATES — DOWER — JUDGMENT—LIMITATION OF ACTIONS—MUNICIPAL CORPORATIONS — PLEADING — SPECIFIC PERFORMANCE — STAY OF PROCEEDINGS — SUBSTITUTION — WILL.

PARTNERSHIP.

Account — *Costs.*]—In an action for an account of the partnership dealings between the plaintiff and defendant, who were in business together as hog-dealers and pork-packers, it appeared that the books kept by both parties, at their respective places of business, were incomplete and unsatisfactory. The trial Judge took the account as best he could from the books and the oral evidence and a statement prepared by an accountant, which he adopted with modifications. A balance of $620 was found in favour of the plaintiff; and it was ordered that there should, as between the parties, be no costs with reference to the partnership accounts proper; and that the plaintiff and defendant should have, the one against the other, the costs of the different issues on which each succeeded. *Wheatley* v. *Wheatley* (1911), 17 W. L. R. 117. Man. L. R.

Account—*Judgment directing*—*Extension of time*—*Separate defences of partners.*]—The Court will not extend the delay, fixed by the judgment, for the defendant to render an account, unless special and sufficient reasons be adduced. The fact that the defendants, co-partners, pleaded separately, and that judgment was rendered against one defendant before the delivery of judgment in the case of the other, is not sufficient ground for extending the delay to account fixed by the first judgment so that the defendants may account together. *Beaudette* v. *Parizeau*, 20 Que. S. C. 229.

Account — Misconduct of partner — Damages—Failure to prove special damage —Nominal damages. *Moore* v. *Macrae* (Y.T.), 7 W. L. R. 215.

Account — Payment by partner—Credit for—Consideration—Services in introducing partner to capitalists—Voluntary payment—Reasonable amount to be allowed—Reference —Appeal—Costs. *Evans* v. *Jaffray*, 9 O. W. R. 125, 429.

Account—Payments—Evidence of partner—Attempt to contradict his own statements—Books. *Youngson* v. *Stewart*, 2 O. W. R. 112, 270.

Account — *Pleading* — *Declaration.*]—In an action *pro socio*, a partner who sues his co-partner for an account and payment of his share, is not obliged to allege that he has himself rendered an account; but it is sufficient to allege that the defendant has in his possession property or sums of money belonging to the partnership for which he has not accounted. *Harel* v. *Lemaire*, 10 Que. P. R. 82.

Account — *Profits* — *Use of partnership funds by one partner in purchasing property* —*Right of others to share in profits*—*Partnership Act, sec. 24*—*"Contrary intention"* —*Advances made by partner*—*Withdrawal*—*Right to control funds*—*Assent by conduct.*]—By sec. 24 of the Manitoba Partnership Act, "unless the contrary intention appears, property bought with money belonging to the firm is deemed to have been bought on account of the firm." In an action by two partners in a firm of contractors against the third for an account and share of the profits of certain commercial and speculative ventures entered upon and properties bought and sold by the third (as alleged) with the firm's moneys:—*Held*, varying the judgment of Macdonald, J., 12 W. L. R. 365, that "the contrary intention" appeared from the evidence, and the plaintiffs were not entitled to share in the profits, nor were they responsible for the losses, made by the defendant in the transactions in question; Cameron, J.A., dissenting. *Holmore* v. *Smith*, 25 Ch. D. 456, and *Morice* v. *Bishhard*, 10 W. L. R. 706, explained and distinguished. Per Richards, J.A.:—It was the intention of all the parties that the defendant should be at liberty to use the funds in the way he did; and, even in the absence of any special power to control the funds, he had the right to withdraw moneys representing advances that he had made to the firm and interest thereon, without the consent of the plaintiffs. Per Perdue, J.A.:—The intention to be considered was that of the defendant alone. He did not consult the plaintiffs in making the purchases, and they had no knowledge of them until after the purchases had been made; they could not, therefore, have exercised intention in respect of any of the transactions. The properties were not bought to be used in the trade; they were bought by the defendant with the intention of holding them as his separate estate, and in order to pay for them he drew against his own money in the firm, or his interest in the accrued profits, a small portion of the purchase-money, supplying the rest himself. The money he thus drew from the firm and used was severed from the partnership for his private use. The fact that he made the cheques directly payable to the vendors did not affect the question. A partner may give assent by conduct, as well as by words, to the uncontrolled and unlimited exercise of dominion over the partnership funds by the other; and the evidence showed that the defendant had complete control over the partnership funds, with the consent of the plaintiffs. Review of the authorities. Per Cameron, J.A.:—The moneys invested by the defendant in the transactions in question were partnership moneys, and not the moneys of the defendant; and, therefore, the profits arising from these transactions were partnership profits. It was not established that from the inception it was the intention of the defendant that the transactions should

be for his sole benefit; and, if it were so established, the "intention" mentioned in sec. 24 of the Act must be the intention of all the partners. *Kelly* v. *Kelly* (1911), 16 W. L. R. 575. Man. L. R.

Accounting — *Demand for provisional execution by the party accounting — C. P. 571; C. C. 1898.*]—In an action between partners for an accounting, the defendant cannot demand the issue of a provisional execution for the balance of account acknowledged to be due to him by the plaintiff in the account filed with the latter's action. *Rousseau* v. *Ritchie* (1910), 11 Que. P. R. 302.

Account stated — *Admission of liability—Promise to pay—Evidence to vary—Admissibility.*]—On the dissolution of a partnership the partners signed a statement shewing an amount as due to the plaintiff as his share, and containing a declaration that "for the sake of peace and quiet and to avoid friction and bother," the plaintiff was willing to waive investigation of the firm's books and to agree that the balance as stated should be deemed to be the amount payable by the defendants to the plaintiff:—*Held*, that a promise to pay the amount of the balance so stated to be due should be implied from the admission of liability which the parties had so signed.—In an action on the account stated, the defendants alleged that the plaintiff had agreed not to sue upon it, and that the document was merely intended to shew the amount which would be payable to the plaintiff at such time as collections might be made of outstanding debts due to the firm.—*Held*, that these contentions tended to contradict, vary, and annul the terms of the written instrument, and, consequently, did not constitute collateral agreements in respect of which parol evidence would be admissible. —Judgment of the Court below, 2 W. L. R. 370, reversed. *Jackson* v. *Drake*, 26 C. L. T. 315, 37 S. C. R. 315.

Account stated—*Money lent—Set-off—Statute of Limitations.*]—Action for amount of an account stated and for money lent:—*Held*, that documents sufficiently shewed an account stated, and were sufficiently signed to bar the Statute of Limitations. *Tetu* v. *Tetu*, 11 W. L. R. 271.

Action — *Profits—Expenses.*]—A partner who alleges that his co-partner has received more than his share and must reimburse him for part of the expenses incurred by him for the firm, may bring direct action for those amounts. *Daoust* v. *Chausse*, 7 Que. P. R. 267.

Action against — Appearance—Amendment after trial—Striking out name of defendant appearing as partner—Terms—Costs. *Boston Rubber Co.* v. *Lang*, 3 O. W. R. 254.

Action against firm — *Amendment — Abandonment of part of claim—Re-service—Parties.*]—The claim in an action against a commercial partnership cannot be amended so as to eliminate all conclusions taken against the firm and one of its members, and continued against another of its members, without service of the claim as amended, or the amendment, the service of this amendment at the same time as of the motion to amend upon the attorneys of this firm being sufficient service upon the partner. *Sykes* v. *Dillon*, 7 Que. P. R. 285.

Action against firm — *Death of one partner—Survivor—Personal representatives.*]—When an action has been brought against a commercial firm, and one of the members of that firm dies while it is still pending, the defence must be taken up by the heirs and representatives of the deceased partner, in his place, and not by the surviving partners, who have become the only owners of the assets of the firm. *Wilkins* v. *Eadie*, 4 Que. P. R. 402.

Action against firm — *Procedure — Service of process—Firm name—Partners — Amendment.*]—The service of process upon a firm in the partnership name at its office by a bailiff upon a grown-up person is a good service upon the firm and each of the partners individually. Therefore, a person who has been served as transacting business with a partner under two partnership names at two different places, when in fact he transacts business alone in one of these two names, and appears by attorney, is before the Court for all purposes, as well to conform to orders for amendment of the pleadings which he attacks, as to submit to final judgment, which may be pronounced against him in one or other of his capacities.—It is within the discretionary power of the Court, in the above circumstances, to allow an amendment of the writ of summons by striking out the name of one of the defendants and adding that the other transacts business alone under a firm name. *Sykes* v. *Dillon*, 28 Que. S. C. 230.

Action against, for tort — *Rights of plaintiff — Liability of partners — Arrangements inter se.*]—Any arrangement whatever made regarding the affairs of a partnership between the surviving partner and the heirs of the deceased partner cannot change the rights of a plaintiff in an action resulting from a *quasi-tort* engaging the joint and several liability of the partners. *Levesque* v. *McLean*, 9 Que. P. R. 109.

Action against partners—*Appearance by one—Unconditional appearance—Examination for discovery—Party to action—Objection to being sworn—Irregularity—Waiver—Attendance.*]—Where an action is brought against A. and B., carrying on business under the name, style, and firm of A. & B., they are to be considered as sued individually and not "in the firm name."—An appearance by A., "having been served as a partner, but who denies that he is a partner," etc., will accordingly be deemed an unconditional appearance, and A., having been served with a subpœna, cannot object to be sworn, on an appointment for his examination for discovery, on the ground "that he is not a party to the action, having entered an appearance under protest and not being a member of the defendant firm." — Having appeared before the examiner and taken this objection only, A. will be deemed to have waived an irregularity in the subpœna. *Ransom* v. *Potter & Melbaugall*, 1 Alta. L. R. 247.

Action by commercial firm — *Members of—Some out of province—Security for costs—Procuration.*]—A commercial partnership is not a jural person or entity distinct from the several members who compose it.

It cannot be a plaintiff in an action, and, as all the individual partners must be named as such in the writ, any one of them who does not reside in the province may be required to give security for costs.—In an action brought by a partnership doing business in the province, a member of it who resides outside is represented by those who reside within and who have the right to commit the firm to such an act of administration as the institution of a suit. He is therefore not bound to produce a power of attorney: *Browne* v. *Taylor*, 28 Que. S. C. 462.

Action for account—*Pleading.*]—In an action for an account between partners of a dissolved partnership, where certain assets are in possession of the defendant since the dissolution, it is not necessary for the plaintiff to allege in his declaration that he has rendered an account to the defendant, at any time, relative to the affairs of the dissolved partnership. *Sheridan* v. *Heffernan*, 2 Que. P. R. 491.

Action for account—*Previous rendering.*]—Where, after the dissolution of a partnership by mutual consent, one of the partners was intrusted with the collection of debts due to the firm, the rendering of an account of the amounts collected by him is a condition precedent to the exercise of his right to an account against his co-partner. *DeGagné* v. *Pigeon*, 17 Que. S. C. 508.

Action for account pro socio—*Formation of partnership—Unsettled conditions—Actual dealings as partners.*]—When two persons agree to form a commercial partnership, and, before having definitely fixed the conditions of the contract, one of them leases a shop, where the other deposits goods, and advances a part of his share of capital in the future firm, and both transact business upon the premises leased, under the projected firm name, for two months and a half, and finally separate without having been able to come to an understanding, claims arising from that state of affairs can only give rise to an action *pro socio* for an account. An action of debt by one of the contracting parties against the other for the recovery of advances and a salary for services rendered is irregular and will be dismissed. *McDowell* v. *Wilcock*, 28 Que. S. C. 226.

Action for accounting—*Reference to Local Master.*]—Where defendant appealed from order of Local Master, in favour of plaintiff, in a reference to take partnership accounts, it was held that appeal should be dismissed as defendant had failed to avail himself of leave to call witness and to make certain explanations regarding some accounts. *Grier* v. *Sinclair* (1909), 14 O. W. R. 454.

Action for dissolution — *Appointment of liquidator.*]—The mere fact that an action is brought for the dissolution of a partnership does not entitle the plaintiff to ask for the appointment of a liquidator; some further specific and sufficient ground for a change in the management must be set forth. *Lavrendeau* v. *Lacroix*, 32 Que. S. C. 417.

Action for dissolution — Receiver — Appointment of receiver in English Court—County of Courts. *Hall* v. *Antrobus*, 5 E. L. R. 515.

Action in name of firm — *Demand for names—Sole member—Motion—Costs.*]—The plaintiff, who carried on business alone in a firm name, brought his action in the firm name. The defendants' solicitor demanded names and places of residence of all persons constituting the firm, and no answer was given until four days afterwards, when the plaintiff's solicitor gave the information to the defendants' solicitor; in the office of a special examiner; but at the same hour notice of a motion by the defendants for an order for the information was served at the office of the plaintiff's solicitor. On the return of the motion counsel for the defendants asked only that the costs of the application be made costs in the cause:—*Held*, that, as the plaintiff was the cause of the difficulty in using a firm name, he might well have been ordered to pay the costs so occasioned, and an order was made as asked by the defendants. *Cummings* v. *Ryan*, 22 C. L. T. 150.

Action pro socio — *When it may be brought — Account.*]—The action *pro socio* brought during the existence of the partnership, and before the dissolution thereof, is premature, and will be dismissed, even when only partial settlement or accounting be asked, *e.g.*, where an account is asked as to two of many contracts held by the partnership. *Lachance* v. *Viau*, 25 Que. S. C. 399.

Action to establish — *Declaration that one partner is trustee for the others—Profits—Dissolution of partnership—Accounting.*]—The plaintiff and the two defendants Holland were real estate agents in partnership, but entered into certain investments on their own account (aside from the agency business) in the purchase of three lots, on account of which they paid down $294. Being unable to meet the succeeding calls when due, they invited the defendant Horne into the transaction, he to pay 85 per cent. of the purchase money, and the remaining three to contribute 15 per cent., the profits to be divided. Horne took over the agreements to purchase, and eventually received a conveyance of the lots. There was a verbal agreement that if a sale could be effected before the second instalment of the purchase money became due, and if that sale netted a profit of over 15 per cent., the old partnership should share with Horne equally in the profits. This sale was not made, but, four months after the due date of the instalment, Horne sold a half interest:—*Held*, on appeal (*per* Hunter, C.J., and Clement, J.), that Horne was a trustee for the partnership consisting of the plaintiff, himself, and his two co-defendants. — *Per* Irving, J., that Horne was not called upon to account until he had been reimbursed the money he had been compelled to put into the transaction. *Gordon* v. *Horne*, 14 B. C. R. 138, 9 W. L. R. 482.

Action to establish — Profits—Agreement—Evidence. *Osthman* v. *Carlson*, 12 O. W. R. 1209.

Advocates — *Firm debt — Several or joint liability—Promissory note.*]—The members of a partnership, in this case a firm of advocates, are not responsible severally for partnership debts, and they are not liable to third persons except jointly in equal parts; this distinction applies to commercial debts

which the partnership may contract, as, for instance, a promissory note signed in the firm name. *Irwin* v. *Gauthier*, 5 Que. P. R. 211.

Agency — *Factor — Pledge — Lien — Notice—Res judicata.*]—A partner intrusted with possession of goods of his firm for the purpose of sale may, either as partner in the business or as factor for the firm, pledge them for advances made to him personally, and the lien of the pledgee will remain as valid as if the security had been given by the absolute owner of the goods, notwithstanding notice that the contract was with an agent only. Where a consignment of goods has been sold and they remain no longer in specie, the only recourse by a person who claims an interest therein is by an ordinary action for debt, and he cannot claim any lien upon the goods themselves nor on the price received for them. The plea of *res judicata* is good against a party who has been in any way represented in a former suit deciding the same matter in controversy. *Dingwall* v. *McBean*, 20 C. L. T. 374, 30 S. C. R. 441.

Agreement — *Construction — Continuance after expiry of term—Deceased partner —Purchase of share—Discount—Good-will.*]—A deed, providing for a partnership during seven years from its date, provided for purchase by the survivors of the share of a deceased partner, with a special provision that if one partner, K., should die, the value of his share should be subject to a discount of twenty per cent. After the seven years had expired, the partners continued the business by verbal agreement for an indefinite period, and, while it so continued, K. died:—*Held*, that, even if the parties had not admitted that the business was continued under the terms of the partnership deed, such terms would still govern, as there was nothing in the deed repugnant to a partnership at will; that the surviving partners had, therefore, a right to purchase the share of K., and to be allowed the deduction of twenty per cent. therefrom, as the deed provided; and that, in the absence of any stipulation in the deed to the contrary, the good-will of the business and K.'s interest therein should be taken into account in the valuation to be made for such purpose. *Hibben* v. *Callister*, 20 C. L. T. 325, 30 S. C. R. 459.

Agreement — *Partner withdrawing — Oral promise made by partner to mother of withdrawing partner—No evidence of—Consideration — Leave to amend — Statute of Frauds.*]—Plaintiff gave her son property of the value of $3,000, which he transferred to defendant, in part payment for a share in a partnership business of which defendant was a member. The business was not successful, and a written agreement was entered into between defendant and plaintiff's son by which the latter gave up his share in the business, and certain promissory notes, given by him and endorsed by plaintiff, were cancelled. The action was for a reconveyance of said lands by defendant to plaintiff, and for an account of the proceeds of certain lands sold by defendant to plaintiff, for payment of $3,000 upon an alleged oral promise made by defendant to plaintiff for inducing her son to sign the above agreement.—Sutherland, J., *held*, that plaintiff had failed to prove that defendant made any such promise or agreement, and dismissed the action with costs.—Divisional Court dismissed plaintiff's appeal with costs. Leave given to plaintiff to amend statement of claim by adding plaintiff's son as plaintiff, and defendant to be at liberty to amend by setting up defence of Statute of Frauds. *Schuler* v. *McIntosh* (1910), 17 O. W. R. 233, 1 O. W. N. 456, 2 O. W. N. 48.

Agreement for promotion of company—Purchase of business — Division of profits—Offers of options—Assets of partnership—Making over to other promoters—Payment for—Right of partner to share in—Termination of interest—Consideration — Evidence—Account. *Evans* v. *Jaffray*, 2 O. W. R. 678, 3 O. W. R. 877, 6 O. W. R. 733.

Agreement to form — *Failure to furnish capital—Dissolution—Account.*]—A contract by which two persons agree to enter into partnership from a fixed date, which also defines the nature of the business to be carried on, the contributions and shares of the partners, and stipulates a forfeit in case of non-fulfilment of the agreement, creates a valid partnership on and from the date appointed.—2. The failure of one partner to formally tender his share of the capital does not necessarily prevent such agreement from having effect. He would be liable to interest from the day on which he made default to pay, and his partner would have a right to obtain damages and demand dissolution of the partnership if the default continued.—3. The fact that one of the partners, after acting with the other as his partner, secretly registered the business in his own name, and asserted that he was not a partner, is sufficient ground for an action by the other partner for dissolution of the partnership and for an account. *Whimbey* v. *Clark*, 22 Que. S. C. 453.

Appointment of liquidator—*Discretion of Court.*]—Petition for the nomination of a liquidator for a limited partnership. By the terms of the partnership agreement, the plaintiff was to furnish his time and skill, and the defendant was to provide the capital. Each party was to draw $20 a week salary. After doing business for five weeks, the firm got into difficulties. The plaintiff ceased work, and brought this action for the appointment of a liquidator. He had at that time drawn out $112:—*Held*, that the appointment of a liquidator was in the discretion of the Court; that in the present instance it would be merely imposing a useless expense upon the defendant, as the whole cost would fall on him, the plaintiff having no pecuniary interest in the business; and the petition was dismissed with costs. *Sorignet* v. *Henry*, 23 C. L. T. 118.

Assets — *Salary of partner as Crown official — Dissolution.*]—While C. and M. were in partnership as architects, M. received an appointment from the Dominion government as supervising architect and clerk of the works, in connection with a government building being erected in Nelson, and for a time M. paid the salary of the office into the partnership funds. M. afterwards notified C. that the partnership was at an end, and thereafter refused to account for the salary. C. sued for a declaration that he was entitled to half the salary since the

dissolution: — *Held*, that, even if it were agreed that the appointment should be for the benefit of the firm, the plaintiff would not have any right to share in the salary after dissolution unless there was a special agreement to that effect. Judgment of Hunter, C.J., 9 B. C. R. 297, affirmed. *Cane* v. *Macdonald*, 10 B. C. R. 444.

Assets — *Contribution — Division — Machinery — Stock-in-trade — Rent of building.*]—The plaintiff and defendant entered into co-partnership for a term of 3 years. The defendant owned the land where the business was carried on, and agreed to complete a building on it. The defendant also agreed to contribute to the capital stock certain machinery, and the plaintiff agreed to pay $80 a year, for 3 years, in consideration of said contribution. The co-partnership ceased to exist before the expiration of this term. The plaintiff asserted that the machinery became the property of the firm and that he was entitled to an equal share in it: —*Held*, that the plaintiff was not entitled to an interest in this machinery. Machinery is not covered by the word "stock-in trade." —*Held*, also, that the defendant was not entitled to rent for the use of the building. *Campbell* v. *Mumford*, 40 N. S. R. 37.

Authority of partner—Bill of exchange —Notice. *Bank of Ottawa* v. *Lewis*, 1 O. W. R. 71.

Carrying on business in firm name — Registration—Penalty. *Gendron* v. *Denault*, 3 E. L. R. 32.

Cheque payable to firm — *Discount of cheque—Deposit to credit of another firm.*]—S. company gave a cheque on M. bank to the firm of M. and C., formerly consisting of plaintiff and M. and C. M. and C. endorsed the cheque to the defendants for collection. The proceeds M. and C. deposited to credit of a new firm M., C. and M., of which plaintiff was not a member:—*Held*, that defendants were not guilty of a breach of trust. New firm used proceeds in paying debts of the old firm. *Ross* v. *Chandler*, 12 O. W. R. 341, 13 O. W. R. 247.

Claim against partner — Set-off against claim of partnership — Payment— Equitable degree — Small debt jurisdiction. *Howes* v. *Kinsey* (N.W.T.), 3 W. L. R. 185.

Co-adventurers in procuring and disposing of oil leases—Division of profits—"Carried interest"—Damages—Money had and received — Interest. *Bradley* v. *Egan*, 11 O. W. R. 944.
Affirmed 12 O. W. R. 674.

Company name — *Security for costs — Foreign residence of partners—Powers of attorney — Authorization.*]—Although a partnership (formed for the purpose of carrying on insurance business) is authorized by law to sue in its company name, the real parties to the suit are the members of the partnership, and if they are non-resident the partnership will be condemned to furnish security for costs when bringing suit in this province. —2. The production of a power of attorney must be made in the suit where the same is required; and the deposit of a power of attorney at the office of the prothonotary, in compliance with the Insurance Act, is insufficient.—3. The power of attorney required by Art. 177, C. P., must confer upon a resident of Canada power to institute suit on behalf of the plaintiffs. *Liverpool & London & Globe Ins. Co.* v. *Macdonald*, 4 Que. P. R. 157.

Contract — *Breach — Action by one partner—Damages—Amendment.*]—A plaintiff who is proved to be member of a partnership cannot sue alone for a partnership debt.—2. Even if it is proved that the plaintiff and his partner were to divide equally the profits arising out of a certain contract, for the purposes of which the plaintiff and his partner were associated, the plaintiff cannot, without further proof as to the respective shares of the partners in the said partnership, obtain judgment for one-half of the damages arising out of the breach of the contract by the defendant, the plaintiff claiming damages on many grounds, some of which are personal to himself.—3. In an action for damages brought by a person having a contract with the government to supply it with certain uniforms, against the person who was to supply the cloth for the said uniforms, the plaintiff cannot claim any damages arising from the fact that through the defendant's default of putting him in a position to fulfil his contract, he lost the confidence of the government, and did not obtain from it any other contracts afterwards,—the said damages being too remote to be easily foreseen by the defendant.—4. *Semble*, that the plaintiff, in that case, will not be allowed, after the hearing, to amend his declaration by adding thereto allegations stating that he bought certain goods in connection with the execution of the said contract, had them cut and trimmed with a view to use them as soon as the defendant would furnish the necessary materials,—where the defendant, at the hearing, had objected to that proof as setting a new item of damage, and forcing him to meet a proof which he was unprepared to meet. *Marsolais* v. *Willett*, 2 Que. P. R. 409.

Contract — Construction — Executive management of business by one partner—Removal of manager — Account — Theatrical business—Misconduct—Incapacity — Salary —Profits—Repairs and improvements—Undisclosed interest—Costs. *Cameron* v. *Willis*, 9 W. L. R. 224.

Contract — Interest—Liability of partner—Holding out. *Deering* v. *Beatty*, 1 O. W. R. 363.

Contract — *Judgment — Acceptance as payment—Interest.*]—The defendant P. made a sub-contract with C., who had a railway construction contract, to do the fencing, and P. took the defendant M. into partnership with him to carry out the sub-contract, and then sub-let to the plaintiffs. C. recovered a judgment declaring that he had a lien on the railway for the amount due him, and by that judgment the railway company were ordered to pay P. $8,400. P. "hereby accepting the provisions of this judgment in full of his claim" against C. This was in 1891, and the $8,400 was not paid till 1898:—*Held*, that, as the original contract was between P. and C., and P. was the one with whom C.

dealt, M. must be held to have been bound by P.'s acceptance of the judgment, just as he could have been by a payment made by C. to P. At the time the judgment was taken, the plaintiffs had done all the work under their contract to the satisfaction of the engineer in charge, and P. was entitled to have had a final estimate and payment of the balance. He alleged that the engineer was withholding the final estimate, so that an action could not be brought against C.; if, under the circumstances, P. chose to accept the judgment against the company in full satisfaction of his claim against C., it seemed only reasonable that it should be considered as between him and the plaintiffs that he was then paid the balance that was due on the contract; and therefore the plaintiffs were entitled to interest for six years, for, although the contract did not specify the day of payment, it specified the event upon which payment was to be made, and that was sufficient. *Sinclair* v. *Preston*, 20 C. L. T. 359.

Varied as to interest, 21 C. L. T. 97, 13 Man. L. R. 228.

Contract — Mortgage — Covenant — Dispute as to application of money—Accounts—Reference. *Fisher* v. *Jukes*, 7 W. L. R. 731.

Contracts of the partners with a third party—*Dissolution—Purchase made by one of the partners in the name of the partnership the day on which the declaration of dissolution is filed.*]—The members of a collective partnership which has filed the declaration provided for in Art. 1834 C. C., are responsible for the purchases made by one of them in the name of the partnership, the day on which the declaration of dissolution was deposited in the office of the protonotaire; especially when they continue (under the name of employees) to work in the establishment in the same manner as formerly, and as the grantee from the others continues the business alone only makes the declaration later. *Caldwell* v. *Bouthillier* (1909), 36 Que. S. C. 112.

Creditors of partner — *Diversion of money by formation of partnership—Fraud — Actio paulienne—Assignment—Gift—Personal debt—"Person."*]—A partnership cannot be annulled as having been formed in fraud of the creditors of one of the partners, unless its formation has caused them prejudice, and unless the person with whom their debtor has contracted, knew at the time of its formation that it would cause them this prejudice.—2. A creditor who is in a position to bring an action to set aside a transaction as fraudulent, has no right to demand that a third person, who has dealt with his debtor, shall be condemned to pay him what the latter owes him.—3. The payment by a person forming a partnership into the business of fund which constitutes all his property, is not an act *à titre universel*.—4. An assignment given *à titre universel*, does not bind assignee to the payment of the debts of the assignor, unless the assignment is made by way of gift, and not if it is made *à titre onereux*.—5. When two partners are sued jointly and severally and as partners for a debt alleged to be a debt of the partnership, but which is really only the personal debt of one of the partners, the partner who is the debtor may be, in the action so begun, condemned alone to pay the debt.—*Quære*: Does a partnership in a collective name constitute a "person?" *Walker* v. *Lamoureux*, 21 Que. S. C. 492.

Co-partner—Offer to sell share to—Acceptance — Specific performance — Improvidence—Security—Costs. *Pilgrim* v. *Cummer*, 1 O. W. R. 531.

Death of one partner—Winding-up of partnership—Account—Evidence of surviving partner—Absence of corroboration—Mining ventures—Hotel business—Contract—Conveyances—Declaration of trust—Receipts—Burden of proof—Credits—Real estate—Tenants in common—Improvements — Remuneration for services. *Keating* v. *Olsen* (Y.T.), 4 W. L. R. 351.

Death of partner — Continuation of business by executors—Sale of business and stock in parcels—Rights of purchasers—Use of firm name—Goodwill—"Business." *Beatty* v. *Dickson*, *Dickson* v. *Beatty*, 3 O. W. R. 2, 5 O. W. R. 568.

Death of partner—*Right of survivor to purchase stock—Conservatory attachment.*]—A conservatory attachment will lie in favour of the surviving partner, when he has the first option of purchasing stock of his deceased partner, such covenant vesting in each of the contracting parties a contingent residuary interest in the said stock. *Kuppenheimer* v. *MacGowan*, 9 Que. P. R. 251.

Death of partner—Winding-up—Laches—Appointment of receiver—*Ex parte* order—Motion to rescind — Variation—Appointment of surviving partner. *Keating* v. *Olsen*, (Y.T.), 2 W. L. R. 457.

Declaration — Dissolution — Asset of partnership—Lease of land taken in name of defendant—Assignment of lease as security—Redemption—Reference—Costs. *Troy* v. *Hamilton*, 9 O. W. R. 341, 865.

Defendants sued in firm name — Judgment entered by default against firm after service on one partner—Subsequent service of writ of summons on other partner—Irregularity—Dissolution of firm before action — Knowledge of plaintiffs — Remedy—Execution — Action on judgment. *Ross Brothers Limited* v. *Hankin*, 9 W. L. R. 222.

Dilatory exception — *Dissolution — Demand — Change of position.*]—Where a partner is sued personally, a dilatory exception on his part will be dismissed if it does not shew that a demand for dissolution of the partnership made in such exception, will have the effect of changing the position of the parties as members of the partnership. *Labelle* v. *Paquette*, 8 Que. P. R. 69.

Dissolution.]—A partnership cannot, on the demand of one or more of its members be declared non-existent and to have never existed, by reason of the fact that, at the time of its formation, one of the partners fraudulently represented himself as having knowledge and qualities which he did not possess (*i.e.*, those of an analytical chemist). The fact, if proved, could only give rise to an action to dissolve the partnership. *Ollier* v. *Hadley* (1910), 39 Que. S. C. 166, 17 R. L. n. s. 15.

Dissolution — Account — Construction of articles—Division of assets. *Gouinlock* v. *Baker*, 4 O. W. R. 118.

Dissolution — *Account — Profits from portion of assets withdrawn by partner.*]— Partners owe each other a reciprocal account of everything that arises from the common property, up to the time of the division to be made of the property, and one of them cannot divide the remedy which the law gives him for the liquidation of the partnership affairs. Therefore, an action does not lie for an account of the profits which one of the partners has made, since the dissolution of the partnership, from the use of an article belonging to the assets of the partnership, when no liquidation has been made of the partnership affairs, and while there still remains common property the division of which is not demanded. *Heffernan* v. *Sheridan*, 11 Que. K. B. 3.

Dissolution — *Accounts.*]—One of two partners at will in an hotel business agreed to sell his interest to a third person, and then went away to another province. The purchaser refused to complete because of alleged non-compliance with certain conditions, and the vendor brought this action claiming as against him specific performance, and, in the alternative, as against his partner who had continued to carry on the business, a dissolution of the partnership:—*Held*, upon the evidence, that the vendor was not entitled to specific performance; that his withdrawal was absolute and not conditional upon completion of the purchase; that the withdrawal had worked a dissolution; and that the partnership accounts should be taken as of the date of the withdrawal, and an opportunity given to the continuing partner of acquiring the interest of the vendor as at that date. *Kennedy* v. *Gaudaur*, 21 C. L. T. 224, 1 O. L. R. 450.

Dissolution — Action for — Misrepresentations as to value—Fraud—Evidence—Counterclaim—Costs. *Swanson* v. *Grahame* (B.C.), 8 W. L. R. 48.

Dissolution — *Assumption of debts by one partner—Arrangement inter se — Notice to creditors — Liability of the other partner — Surety — Acceptance of draft — Authority of agent — Novation.*] — Goods were bought by the firm of B. & K. from one H., in British Columbia, in 1905. H. was agent for the W. H. company, carrying on business in Ontario, but, after the order was given for the goods, and in December, 1906, that company was ordered to be wound up, and the plaintiffs, the liquidators, filled the order for the goods, which were sent to the firm of B. & K. When they arrived, it was found that errors had been made, and B. & K. notified H., who examined the goods, and admitted that the orders had not been correctly filled. The firm had already paid the plaintiffs part of the price, and accepted a draft for the balance, which they refused to pay at maturity, because of the dispute as to the proper fulfilment of the orders. The draft was protested in August, 1907, and in October, 1907, B. and K. dissolved partnership. It was a term of the dissolution that B. was to assume the debts and indemnify K. in respect thereof. A notice of the dissolution was sent to the W. H. company at Peterborough. R. had then become purchaser from the liquidators of the claim against B. & K. In April, 1908, it was agreed between B. and the agent of R. that $4,000 should be accepted in full of the balance, and $500 of this had been paid in cash. In the absence of R. from the place where he lived in Ontario, his attorney, acting under a power, in June, 1908, drew two drafts on the firm of B. & K. for the remaining $3,500 due, which B. accepted in his own name, but they were not paid at maturity. This action was brought on the original contract, for the balance of the price of the goods, against the firm of B. & K. individually. B. did not defend, but K. contested his liability:—*Held*, on the evidence, that the defence that the bargain was made with H., and not with the W. H. company, failed. —*Held*, also, that, although, by the terms of the dissolution, B. & K. had placed themselves in the position of B. being the principal debtor and K. a surety as regards the creditors of the firm, and although something might have been done prejudicial to the interests of the surety, and there was no reservation of rights against him, yet notice of the arrangement was not brought home to the plaintiffs, the creditors, because the notice sent to the company, even if it was received, did not by its terms unequivocally convey the information that the relation of principal and surety had by the dissolution been constituted *inter se* by the partners; and no other effective notice was given to the plaintiffs nor to R. nor to any one on behalf of them or him.—*Held*, also, that the acceptance by B. of the draft drawn by R.'s attorney did not constitute a novation. *Trusts & Guarantee Co.* v. *Bryden & Kilpatrick* (1910), 15 W. L. R. 212.

Dissolution — *Assumption of liabilities by members of firm.*]—Action against two partners, A. and B., for goods sold and delivered. Plaintiff drew on B., the partner whom they were informed assumed the firm's liabilities on dissolution, but did not give up an old draft on the firm:—*Held*, that there was no intention to release A., who was held liable. *Fair* v. *Hume*, 11 W. L. R. 28.

Dissolution — *Assumption of liabilities by one partner — Release of the other — Absence of assent of creditors — Promissory notes—Principal and surety — Discharge of surety — Time given to principal debtor — Prejudice of surety — King's Bench Act, sec. 38 (r)—Abandonment of action against principal—Statute of Limitations.*] — The plaintiffs sued the defendant on four promissory notes made by a mercantile partnership firm composed of the defendant and one McD. When the firm was dissolved McD. took over the business and continued it, and agreed with the defendant that he (McD.) would discharge the existing liabilities:—*Held*, upon the evidence, that the plaintiffs were not parties to this agreement, and the defendant was not thereby discharged. The plaintiffs, however, had notice that following the terms of dissolution, McD. was taking over the partnership assets and assuming all liabilities, and, being aware of this, they gave McD. time by taking his personal promissory notes for the debt represented by the four notes sued on, though not in substitution therefor.—*Held*, that, in such circumstances, without reference to sec. 38 (r)

of the King's Bench Act, the position of the partners, in their relation to the common creditor, was changed from that of principal and debtor to that of principal and surety, and that the defendant was discharged by the plaintiffs having given McD. time. *Oakley* v. *Pasheller*, 4 Cl. & F. 207, 10 Bligh N. S. 548, followed. And *held*, upon the evidence, that the plaintiffs dealt with McD. in a way to prejudice the defendant as a surety, within the meaning of sec. 38 (*r*). Shortly after the dissolution, that is, in April and July, 1902, the plaintiffs took McD.'s promissory notes for the old firm's indebtedness; on account of these notes there was paid only $9.14, which was in November, 1902. After that the plaintiffs continued to supply goods to McD., receiving payments from him from time to time on account of the new business, and now and then calling his attention to these two notes, but without threatening suit. On the 15th November, 1907, they brought this action against both the defendant and McD.—never having made any claim on the defendant till a few days before action. The defendant was served with the statement of claim (by which the action was begun) on the 23rd November, 1907. The plaintiffs did not serve McD., but in February, 1909, applied to a Judge for an order extending the time for service. The whole cause of action against McD. had then become barred by the Statute of Limitations. The application was refused. In June, 1910, the plaintiffs obtained an order striking out the name of McD. as a party, and proceeded to trial against the defendant alone:—*Held*, that the defendant had been prejudicially affected by the non-joinder of McD.; the plaintiffs not only allowed the statute to run as to him, but they represented, in effect, to the defendant that they were taking such a course as would preserve his recourse against McD., and induced him to rely on such representation. *Watson Mfg. Co.* v. *Roscoe* (1911), 16 W. L. R. 505, Man. L. R.

Dissolution — *Book-debts—Account.*]—When upon the dissolution of a partnership by mutual consent, one of the partners takes over the assets for due consideration, and agrees to share with his late partner any amount of the book-debts he may collect in excess of a stated amount, he becomes liable to such partner and his legal representatives, to account to them for collections so made. *O'Meara* v. *Ouellet*, 28 Que. S. C. 418.

Dissolution — Claim against withdrawing partner—Moneys of firm used for private purposes—Sale of interest without deduction —Construction of agreement—Reformation —Fraud. *Greig* v. *Macdonald*, 5 O. W. R. 80, 6 O. W. R. 342, 8 O. W. R. 61.

Dissolution—*Conservatory attachment.*]—Conservatory attachment does not lie in favour of a partner against his former partner, the partnership having been liquidated and brought by the latter. *Brunet* v. *Keegan*, 7 Que. P. R. 75.

Dissolution — *Contract — Covenant — Action.*]—When a partnership is dissolved, one of the partners surrendering his share in it to the other, who assumes all its liabilities, and a covenant is added that as further consideration for his share in the business, including a specified contract supposed to be a further source of profit, the retiring partner will accept a sum of $500, and a release from an overdraft he owes the firm, followed by three other alternatives to meet contingencies which may, but do not, arise, because the contract is cancelled, such a covenant is to be read as providing part of the consideration of the agreement to dissolve, and should not be restricted so as to apply only to the disposal of the contract mentioned in it. The partner in whose favour it is made has, therefore, an action to recover under the first of the 4 alternatives which it contains. *Parkes* v. *Webster*, 29 Que. S. C. 519.

Dissolution — *Contracts previously made.*]—Notwithstanding the dissolution of a partnership, a partner continues, until a receiver is appointed, to have the same power that he had before the dissolution to complete contracts previously made, for the purpose of winding up the partnership affairs. *Hale* v. *People's Bank of Halifax*, 23 C. L. T. 157, 2 N. B. Eq. R. 433.

Dissolution — *Covenant—Construction —Particular asset — Contract.*]—When a partnership is dissolved, one of the partners surrendering his share in it to the other, who assumes all its liabilities, and a covenant is added that a special asset (viz., a contract with a company supposed to be a future source of profits) shall be disposed of in one of 4 ways, at the option of the partner who takes over the business, this clause must be considered as apart from and independent of the agreement to dissolve. Its operation is contingent upon the existence of the contract mentioned in it, and, upon the latter being declared null and void by a competent Court, it becomes inoperative, notwithstanding the expression, "as further consideration for his share in the business," in the first of the 4 options. Judgment in *Parkes* v. *Webster*, 29 Que. S. C. 519, reversed. *Webster* v. *Parkes*, 16 Que. K. B. 242.

Dissolution — *Division of profits.*]—In an action to dissolve a partnership and to take accounts, it was held that various profits made by the defendant belonged to the firm. Partnership dissolved. Reference to take accounts. *Kelly* v. *Kelly*, (1909), 12 W. L. R. 966.

Dissolution — *Evidence — Continued use of firm name—Omission to give notice of dissolution or file certificate—Treasurer of corporation—Mixing of funds—Liability.*]—On the evidence set out in this case a partnership in a private banking business which had existed between the defendant and one H. was held to be dissolved; but, as the business continued to be carried on in the firm name, and no notice of the dissolution was given, or any certificate thereof under the Co-partnership Act, R. S. O. 1887 c. 150, s. 7, was filed, the defendant's liability to persons dealing with the firm continued.—After the dissolution of the partnership, H., who was also treasurer of a municipal corporation, received, as such, moneys belonging to the corporation, out of which, and other moneys, he made certain payments for the corporation and deposited the balance in a chartered bank where the firm kept its

account, subsequently using it in the firm's business:—*Held*, that the defendant was not liable therefor, for in dealing with the moneys H. did so either as the corporation's authorised agent or in breach of his duty; if as agent, his knowledge that the defendant was not a partner must be attributed to the corporation; and if in breach of his duty, his improperly mixing them with his own moneys, in which the defendant had no interest, could not render the defendant liable. *Oakville* v. *Andrew*, 30 O. L. R. 709, 6 O. W. R. 454.

Dissolution—Fraudulent misrepresentation—Damages — Evidence—Forfeiture — Waiver—Contract — Counterclaim—Costs. *Swanson* v. *Grahame* (B.C.), 8 W. L. R. 982.

Dissolution — *Goodwill — Customers — Use of firm name—Injunction.*]—An appeal from the decision of McDonald, C.J., 23 C. L. T. 260, was dismissed, the Court holding that the use of the firm name by the defendant was both misleading and injurious to the plaintiff. *Macdonald* v. *Miller*, 24 C. L. T. 137.

Dissolution — *Grant of credit—Insolvency of the grantor to the knowledge of the grantee—Compensation—Partnership debt—Partnership's guarantee.*]—*Held*, a partner sued by the grantees of his co-partner to receive the balance for which he acknowledged his liability at the time of the dissolution of the partnership, may raise the defence that the grant has rendered the grantor insolvent to their knowledge and that the amount is covered by the share of the grantor in a debt of the partnership, not owed at the dissolution but determined afterwards, for which the grantee is firmly bound to the grantor. *Aubertin* v. *Mungeon*, 1909, 36 Que. S. C. 447.

Dissolution — *Interlocutory injunction —Assets.*]—A partner in the course of an action for dissolution of the partnership has, against his co-partner, the right to an interlocutory injunction to restrain the latter from continuing to infringe the rule that the partners must continue in the same position as regards the assets until the action has been tried out. *Bourdon* v. *Dinelle*, 5 Que. P. R. 240.

Dissolution — Judgment against partners—Contribution between partners—Settlement—Mistake — Omission to include outstanding liability—Setting aside settlement —Accounting. *Jackson* v. *Jackson* (N.W. P.), 5 W. L. R. 512.

Dissolution — *Liability of individual partners.*]—The partners in a general partnership are jointly and severally liable for the obligations of the partnership, and their liability continues notwithstanding its dissolution. *Hetu* v. *Humphrey*, 33 Que. S. C. 217.

Dissolution — *Obligation of partners to account to each other.*]—Upon dissolution of a commercial partnership, a reciprocal obligation arises for each partner to account to his co-partners, for whatever he may have done, as such, in the course of the business. Each one may therefore demand such an account of the others, but he must, as a condition precedent, render his own. Such account, however, being merely for comparison and investigation, in order to liquidate the affairs of the partnership, need not be in the form required for accounts rendered by a tutor, or by one who has, in a fiduciary capacity, administered the property of another. Hence, the obligation is sufficiently discharged by the plaintiff in an action *pro socio*, who files statements, of which copies have been previously delivered to defendant, shewing the assets and liabilities, the receipts and expenditures and account of profit and loss of the concern. *Stephens* v. *Higgins* (1909), 19 Que. K. B. 1, affirmed 32 S. C. R. 352.

Dissolution — *Partnership Act, s. 38 (e), (f) — Business carried on at a loss — Disastrous circumstances — Judgment decreeing dissolution—Counterclaim—Costs — Fraud — Unfounded charges.*]—Under the wide powers given to the Court by the Partnership Act, R. S. M. ch. 129, as to adjudging a dissolution of a partnership, s. 38, clause (*e*), "when the business of the partnership can only be carried on at a loss;" (*f*), "whenever in any cases circumstances have arisen which, in the opinion of the Court, render it just and equitable that the partnership be dissolved," judgment was pronounced directing the dissolution of a partnership, where there had been heavy losses, and, upon the evidence, it was impossible to believe that a continuance of the business would result in anything but disaster. The defendant's counterclaim for loss arising through the agreement not being carried out and for trespass was dismissed without costs. The plaintiff, having failed to substantiate charge of fraud made against the defendant, was deprived of the costs of the action. *Kennedy* v. *Erikson* (1910), 15 W. L. R. 602.

Dissolution — Reference to take accounts — Partnership articles — Covenant for payment of specified sum—Lien for—Report of Master — Special circumstance. *Cameron* v. *Peters*, 8 O. W. R. 359.

Dissolution — *Solicitors — Goodwill — Right to firm name—Acquiescence — Abandonment — Injunction — Parties.*]— Upon the dissolution of a partnership, in the absence of an agreement between the partners to the contrary, the firm name being a part of the goodwill, and not having been dealt with upon the dissolution, remains the property of all the partners, like any other undisposed of partnership property; and each member of the late partnership is entitled to carry on business in the firm name, subject to the limitation that no man has a right to hold out his late partner as still being his partner in business, contrary to the fact. *Burchell* v. *Wilde*, [1900] 1 Ch. 551, followed. A firm of solicitors had carried on business as "Smith, Rae & Greer" down to October, 1902, and after that until the dissolution of the firm in January, 1903, as "Smith & Greer;" — *Held*, that both the names must be taken to have formed part of the goodwill of the firm at the time of the dissolution. At the time of the dissolution the firm consisted of four members. Three of them formed a new firm and used the name "Smith, Rae, & Greer." The fourth, the defendant, protested against the others

assuming that name, but, on their refusing to abandon it, notified his clients, the legal profession, and the public, that he had severed his connection with the firms of Smith, Rae, & Greer and Smith & Greer, and intended to carry on his own business under his own name. For nearly ten and a half months he adhered to this position, frequently addressing his late partners as "Smith, Rae, & Greer," and permitting them to acquire the right to be known by that name as its sole owners:—*Held*, that he could not, after this conduct and lapse of time, assume the name of Smith, Rae, & Greer, and that the members of the firm who had adopted that name were entitled to have him enjoined from using it. *Levy* v. *Walker*, 10 Ch. D. 436, 448, followed. Rae had at one time been a member of the old firm of Smith, Rae, & Greer, but had ceased to be so before the dissolution. He permitted his name to be used in the style of the new firm, but was not a member of it, and was not practising as a solicitor.—*Held*, that he was not a necessary party to the action, nor was there such danger of liability being incurred by him by his being held out by the defendants as a partner as entitled him to an injunction. *Smith* v. *Greer*, 24 C. L. T. 226, 7 O. L. R. 332, 3 O. W. R. 135.

Dissolution — *Taking accounts.*]—There were four partners. Three advanced the money and took in the fourth, who advanced nothing, giving him a fourth interest in the profits of the enterprise, a gold mining company. There were no profits and the property has been sold at less than the original cost:—*Held*, that the cash advances must be first paid to the three parties making the advance, before the fourth, who advanced nothing, can share in the proceeds. The three parties making advances must all stand on the same footing. *Hall* v. *Antrobus*, 6 E. L. R. 507.

Division of profits—Collateral business affairs—Trust—Account — Findings of fact. *Horne et al.* v. *Gordon*, 42 S. C. R. 240.

Division of profits—Partnership—Question of fact—Onus—Appeal. *Rat Portage Lumber Co.* v. *Kendall*, 1 O. W. R. 197, 528.

Evidence to establish—*Action against executors of deceased partner — Corroboration — Demeanour of witnesses.*]—Action against executors of B. for establishing a partnership:—*Held*, on appeal, that the evidence unequivocally shewed plaintiff had never been a partner. *Oakes* v. *Stephens* (1909), 14 O. W. R. 189.

Evidence to establish—Action against personal representative of deceased partner —Contract—Lands held in trust for partnership — Declaration of trust — Condition — Waiver—Statute of limitations—Account — Costs. *Evans* v. *Hunsinger*, 11 O. W. R. 861, 12 O. W. R. 678.

Evidence to establish—Agreement to share profits—Account — Reference. *Berg* v. *Kern* (Man.), 6 W. L. R. 757.

Evidence to establish — *Business carried on by two in firm name—Action pro socio for account—Wrong remedy sought — Failure to object—Costs—Appeal—Question of principal.*]—Two persons who propose to form a commercial partnership, and who, during their negotiations, carry on business together, under the proposed firm name, during a period at the end of which they separate without having agreed upon the conditions of the contract, are partners in fact for the period thus ended, and their operations afford no ground, in favour of either one of them, for an action except one *pro socio* for an account.—2. When the remedy exercised by a plaintiff is not that provided by law, and the defendant files a counterclaim *au fond*, without setting up such a preliminary objection, there is a common fault of both parties, and the judgment which dismisses the plaintiff's action as unfounded should not award to the defendant the costs of a contestation *au fond*, when an inscription in law would have been sufficient for the purpose of the defence. — 3. The award of costs may be reviewed in appeal when it violates a principle or a positive rule of law. *McDowell* v. *Wilcock*, 16 Que. K. B. 459.

Evidence to establish—Moneys contributed by partners—Assets—Account—Dissolution. *Meyers* v. *Debolt* (N.W.T.), 2 W. L. R. 452.

Evidence to establish—Registered declaration—R. S. O. 1897 c. 152—Application to banking business—Partnership in fact —Estoppel—Holding out—Character in which moneys received—Misapplication—Following moneys. *Oakville* v. *Andrew*, 3 O. W. R. 829, 6 O. W. R. 454, 10 O. L. R. 709.

Executors and trustees—Partners — Assets employed in trade—Action by *cestui que trust* for account of profits—Debt not called in by executor—Payment of interest—Election—Acquiescence. *Carroll* v. [illegible], 5 E. L. R. 477.

Father and son.] — Plaintiffs brought action to recover $1,395.13 and interest, being the amount of certain money orders alleged to have been drawn by John Maughan & Son as agent for plaintiffs, and also indemnity in respect of another order not accounted for. Defendant John Maughan denied any agency either by him or his firm for plaintiffs, and asserted that the agency, if any, was with his son individually, and also denied that the son was a member of the firm or had any right to sign the name John Maughan & Son. At the trial the action was dismissed. Divisional Court entered judgment against both defendants with costs, on the ground that the father had held out his son as a partner under circumstances as to justify a jury in finding that plaintiff knew of it and believed that son was a partner. Judgment of Riddell, J., 28th May, 1909, reversed. *Dominion Express Co.* v. *Maughan* (1910), 15 O. W. R. 237; 20 O. L. R. [illegible].

Firm of real estate agents — *Registration of certificate of co-partnership.*] — Defendants G., M., and C. formed a real estate and insurance co-partnership, a certificate thereof being registered. M. and C. withdrew and assigned their interest to B., while G. continued the business with defendant S. as manager. S. having been instructed by A. to get a tenant in his place,

obtained plaintiff, who paid S. $325 as a deposit on account of rent, if his offer accepted. Plaintiff's offer not having been accepted, and never taking possession, he now sued for $625. Judgment against G. The partnership not being a trading one it was unnecessary to register same. M. and C. not being required to register a new certificate on their withdrawal, are not liable to plaintiff. *Stitt* v. *Arts & Crafts Limited*, 13 O. W. R. 730.

Fishing vessel—*Master and owners — Construction — Evidence.*] — Plaintiff, the master of a fishing vessel, sued for damages for wrongful dismissal and breach of contract. He claimed that he was to have two fishing trips, each on shares, but failed to establish any such agreement. Action dismissed. *Silver* v. *Burns*, 7 E. L. R. 513.

Foreign judgment — *Corporation — Action—Judgment — Estoppel — Service — Execution — Issue.*]—A judgment was recovered by the plaintiff in Quebec against certain defendants sued and described as "La Compagnie de Publication Le Temps," a corporation having its head office in Ottawa, Ontario, in an action for libel. There was no incorporated company in Ontario of that name, but a partnership in that name was registered in Ottawa, the partners being F. M. and his wife. This action was begun by writ of summons specially indorsed with a claim for the amount of the Quebec judgment. The writ was served upon F. V. M., the manager of Le Temps Publishing Co., but without the notice in writing required by Rule 224, informing him in what capacity he was served. Le Temps Publishing Co. appeared by the name mentioned in the writ as if sued as a corporation, and the plaintiff obtained a summary judgment against the defendants, and afterwards an order to examine F. M. as a partner in what was now called the defendant partnership. Upon a motion by the plaintiff for leave to issue execution against F. M. and his wife, as members of the partnership, an issue was directed to determine whether they were members and liable to execution:—*Held*, that it must be taken that the judgment in this jurisdiction was recovered against a partnership and not against a corporation. If the Quebec judgment was to be regarded as one against a corporation, and therefore not capable of being the foundation of an action thereon against a partnership firm of the same name, that objection should have been taken, but was not, on the motion for summary judgment. On that motion it might have been shewn, but was not, that there never had been an effective service of the writ upon the firm, or the firm might have moved to set aside the faulty service on the manager. Neither of these courses having been taken, there was an unimpeached judgment against a firm, which could not be attacked in a collateral proceeding; and it was open to the plaintiff to apply under part (2) of Rule 228 for leave to issue execution against F. M. and his wife as members of the firm; and, as they disputed their liability, the question, not of the validity of the judgment, but of their liability as members of the firm to execution thereon, should be determined by the issue directed. *Gibson* v. *Le Temps Publishing Co.*, 24 C. L. T. 21, 6 O. L. R. 690, 2 O. W. R. 1122.

Fraud of partner—*Discount of promissory note of firm for private account — Alteration in indorsement—Holder for value without notice—Bank put upon inquiry.*]—A bank, with knowledge that the partnership is a non-trading one, have no right to discount for one of the partners for his own purposes a promissory note made in favour of the firm, although indorsed in the name of the firm, and will be liable to account to the other partners for his share of the proceeds, in the absence of circumstances creating an estoppel. *Levinson* v. *Lane*, 13 C. B. N. S. 278; *Fisher* v. *Linton*, 28 O. R. 322, and *Garland* v. *Jacomb*, L. R. 8 Ex. 216, followed.—2. The conversion of a special indorsement on a promissory note into an indorsement in blank by striking out the words "Pay to the order of the Home Bank of Canada," above the signatures by the firm and the individual partners on the back, was a circumstance sufficient to put the bank on inquiry as to the right of one of the partners to discount it for himself. *Pickup* v. *Northern Bank*, 18 Man. L. R. 675, 9 W. L. R. 173, 10 W. L. R. 589.

Fraud of partner—Discount of promissory notes of firm for private account—Banks and banking — Notice to bank — Material alteration—Suspicious circumstances putting bank on inquiry — Authority of defrauded partner—Conduct—Estoppel — Ratification —Counterclaim—Promissory note — Delay in demanding payment. *Pickup* v. *Northern Bank*, 9 W. L. R. 173.

Funds in bank—*Parties.*]—In an action to dissolve a partnership, the only means of bringing the facts which give rise to the dissolution to the knowledge of the bankers in whose hands are deposited the funds of the society is by making the bankers parties to the action. *Bouchard* v. *Plamondon*, 16 Que. S. C. 483.

Goods sold and delivered to — *Dissolution—New firm with old name—Notice of dissolution — Judgment by default.*]—Plaintiffs sold and delivered goods to a partnership firm, then the partnership dissolved, and a new partnership was organized under old name. Notice of the dissolution was given plaintiffs, but they forgot about it. The new firm became insolvent, and plaintiffs proved their claim against the insolvent partnership under the impression that it was the old firm. Later plaintiffs learned that defendant was not a member of the insolvent partnership. Then they brought action against defendant:—*Held*, that plaintiffs were entitled to recover on the ground that it was incumbent on defendant to prove such facts as would raise the inference that the creditor had agreed to discharge his claim against him and accept the new firm as his debtors. *Scarr* v. *Jardine* (1882), 7 A. C. 345, distinguished. Judgment of Riddell, J., at trial, 8 Dec., 1908, affirmed. *Cluff* v. *Norris* (1909), 14 O. W. R. 693, 1 O. W. N. 54, 19 O. L. R. 457.

Holding out—*Estoppel—Ratification.*]—Goods were ordered from the plaintiff by O. as for the firm of O. & T. and received by O., but there was in fact no partnership. T., however, after the goods had been given to O., went to the plaintiff's store, and by his conversation led the plaintiff to believe that there

was a partnership:—*Held*, that T. was not estopped from shewing the fact to be otherwise, but that he had ratified the agency of O., and the plaintiff was entitled to succeed. *Grady* v. *Olsen*, 20 C. L. T. 193.

Holding out—*Evidence—Admissions — Finding of trial Judge — Ratification—Consideration — Estoppel.*]—O. purchased goods from the plaintiff on the credit of a partnership, which he represented to the plaintiff existed between himself and the defendants. The trial Judge, on contradictory evidence of the statements and conduct of the defendant after the goods were supplied, accepted the plaintiff's version of what took place, and held that the admissions of the defendant established a partnership. On appeal, the Court, while feeling bound to accept the trial Judge's view as to the credibility of the witnesses, was of the opinion that the evidence did not establish a partnership, but established a ratification by the defendant. *Per curiam*: A ratification is not a contract; it is the adoption of a contract previously made in the name of the ratifying party, and it requires no consideration to support it. The dissenting judgment of Martin, B., in *Brook* v. *Hook*, L. R. 6 Ex. 89, must be taken as an accurate statement of law. *Scott* v. *Bank of New Brunswick*, 23 S. C. R. 277, followed. A statement by T., made after the goods were supplied, that he and the defendant were partners, would not,—though a "holding out" to the same effect made before the goods were supplied would,—constitute an estoppel. *Grady* v. *Tierney*, 20 C. L. T. 193, 4 Terr. L. R. 133.

Incorporated company — *Pleading — Reply — Departure.*]—Action against two men, jointly and severally, charging them as having carried on business under the firm name of the "C. P. & L. Co.," to recover the amount of a bill of exchange accepted in the name of the company by its president (one of the defendants) and secretary (not a defendant). The defendants pleaded denying the alleged partnership, alleging that the company was duly incorporated, and that it only was liable to the plaintiff. The plaintiff replied that the company was composed in reality of the two defendants only, who were incorporated to limit their liability to creditors:—*Held*, that the plaintiff could not thus by reply attack the letters patent incorporating the company, when their cancellation was not originally asked in the action. *Blois* v. *Fortier*, 3 Que. P. R. 254.

Insolvency—Action to set aside a bill of sale and for an accounting—Execution creditor — Seizure of stock for rent — Sale by bailiff—Fraud—Pleading. *Pitts* v. *Campbell* (N.S. 1910), 9 E. L. R. 10.

Insolvency — *Notice to creditors.*] — Where the assets of a partnership are in Court for distribution in the advertisement calling for creditors' claims to be filed, the creditors of the individual partners should be notified as well as those of the co-partnership, although the latter will be entitled to be paid first. *Irvine* v. *Hervey*, 5 E. L. R. 578.

Insolvency — Receiver — Assets—Distribution—Notice to creditors. *Irvine* v. *Hervey*, 5 E. L. R. 578.

Interest in quarry — *Contract—Construction—Moneys due for rock taken prior to agreement—Assignment of interest in—Contribution to expenses.*]—Action for a declaration of plaintiff's interest in a certain quarry:—*Held*, that he is not entitled to share in moneys received by defendant except on the term of contributing one-third share of the moneys expended by the defendant in prosecuting the claim to both land and money. *Coulthard* v. *Sinclair*, 11 W. L. R. 215.

Judgment — *Execution against partners — Husband and wife—Separate estate—Dissolution of partnership—Registered declaration.*]—A man and wife made a statutory declaration under R. S. O. 1897 c. 152, that they were partners. A judgment was recovered against the firm. Wife set up that she was incapable of becoming a partner of her husband:—*Held*, that a registered declaration signed by the husband only that the partnership had been dissolved was no evidence of his favour and that the wife was precluded from setting up that she was incapable of becoming a partner of her husband. Execution against the wife limited to her separate estate. *Gibson* v. *Le Temps Publishing Co.*, 25 C. L. T. 40, 8 O. L. R. 707.

Judgment — Settlement — Accounting. *West* v. *Benjamin*, 1 O. W. R. 242.

Judgment against partner — *Attachment of interest — Dissolution — Receiver.*]—The fact that a judgment has been rendered against a member of a partnership, and that an attachment in the hands of the firm has been maintained for the share the partner has in the firm, does not operate the dissolution of the partnership *de plein droit*, and does not justify the appointment of a liquidator. *Clément* v. *Salhamy*, 9 Que. P. R. 99.

Judgment against syndicate—Motion for leave to issue execution against members—Rule 228 (2)—Judgment against member or partner individually. *McKim* v. *Cobalt Nipigon Syndicate & Campbell*, 12 O. W. R. 717, 780.

Lands of—*Transfer to one partner — Alienation—Cancellation of lease.*]—A partnership had made a lease of land with a stipulation that in case of sale the lease should be cancelled after notice. The firm being afterwards dissolved, a transfer of this land was made by the firm to the plaintiff, one of the partners, who engaged to pay a sum of money to the other partner and to pay the debts of the firm:—*Held*, that the plaintiff must be regarded as having been the owner when the lease was executed. The transfer of the land to him had only the effect of confirming his right. Therefore it was not an alienation, and the event upon which cancellation of the lease could be ordered had not taken place. *Langlois* v. *Dubray*, 17 Que. S. C. 328.

Limited partnership—*Special partner—Contribution—Cash — Interest in precious partnership.*]—The contribution of a special partner must be in actual cash paid at the time of the formation of the limited partnership. The provisions of Art. 1872, C. C., which require that the contribution of a special partner shall be "in cash payments," are not complied with where the circum-

stances are as follows. A person became a special partner in a firm, for the term of one year. At the end of the year a new partnership was formed, without liquidation of the pre-existing business, and while there were debts of the first firm outstanding. The special partner became a special partner in the second firm, and his contribution was stated in the certificate at $561, in goods then in the possession of the firm. *Barry* v. *Hamel*, 26 Que. S. C. 265.

Loss of capital—*Depreciation in machinery.*]—Where under a partnership agreement a partner gave to the partnership business his time and skill, and the use of, but not the property in, certain machinery, in consideration of a weekly salary, and one-half of the net profits of the business:—*Held*, that he was not entitled to an allowance for the depreciation in the value of the machinery arising from ordinary wear and tear on the taking of the partnership accounts, as a loss to him of capital put into the business. *Lawton Saw Co.* v. *Mackum*, 21 C. L. T. 153, 2 N. B. Eq. R. 191.

Losses—*Contribution inter se.*]—By an agreement between the plaintiffs and defendant it was provided that the defendant, who was carrying on the business of manufacturing wire fencing, should furnish machines, in which he had patent rights, for the purpose of carrying on the business of manufacturing and selling wire fencing; that he should devote his time and energy to furthering the interests of the business; that the machines and patent rights therein should be security for money advanced by the plaintiffs; that the plaintiffs should advance to the defendant $500, purchase wire needed for manufacturing, and pay wages, etc., in consideration of a commission of five per cent. on all purchases and advances; that the plaintiffs should furnish space on their premises for the business at a yearly rent; that the defendant should receive a weekly salary; that the plaintiffs should attend to the office work of the business, for which they should be paid a weekly sum; that the net profits of the business should be divided; that the business should be conducted under a company name; and that the agreement should continue for one year, when the plaintiffs could purchase a half interest in the business and patent rights of the defendant or continue the business for a further term. The business resulted in a loss:—*Held*, that the parties were partners *inter se*, and should share equally in the losses of the business. *Lawton Saw Co.* v. *Mackum*, 2 N. B. Eq. R. 112.

Method of taking accounts — *Construction of partnership articles* — *Yearly accounting and dividing of profits*—*Net proceeds*—*Interest.*]—On a special case stated for the opinion of the Court in a partnership action, *held*, that the accounts were to be made up and the profits divided "per annum." The defendant is not entitled to make up any deficiencies in his share of the profits in one year out of the surplus earned in another year. "Net proceeds" are simply gross proceeds, less running expenses. No interest allowed as between partners. *Tunstall* v. *McKechnie*, 10 W. L. R. 372.

Mining deal—*Agreements* — *Evidence as to terms*—*Not clear*—*Action to establish partnership*—*Not proved*—*Action dismissed*—*Costs.*]—Plaintiff brought action for a declaration that he was, and is, a partner in the acquisition and sale of certain mining claims and entitled to one-half the profits derived from defendant Waldman's dealings with said lots; and that a certain agreement was obtained by fraud, misrepresentation and deceit, and for an account:—Sutherland, J., *held*, that while it seemed clear, from the evidence, that the plaintiff was to get some interest in the property or remuneration from the defendant, he could not find, on the whole evidence, that a partnership had been made out, or that the agreement with respect to the same, which plaintiff set up, had been proved. That the agreement of August 17th, 1906, was binding upon the plaintiff and could not be set aside. Action dismissed with costs. *Pierce* v. *Waldman & Waldman Silver Mines Co.* (1910), 17 O. W. R. 419, 2 O. W. N. 258.

Mining properties — *Release obtained through fraud and misrepresentation* — *Release set aside.*]—Action to enforce an agreement dated 3rd Jan., 1908, whereby defendant granted a one-half interest in net profits of all his mining undertakings in the Montreal River district, and to set aside a release obtained from plaintiff, alleged, through fraud and misrepresentation, and for an account and winding-up of the partnership business:—*Held*, that the so-called release or conveyance or settlement of 1st Feb., 1909, should be set aside, and that the partnership under the first agreement be terminated and determined as of 1st Feb., 1909, save as to certain mining properties and ascertaining profits and taking accounts between parties. Reference to local master at Ottawa to take account of partnership dealings between parties, and of dealings of defendant since 3rd Jan., 1908, in mining lands, and mining rights, and mining properties, and interests acquired by defendant in what was on that date the Montreal River district. Costs of reference and further proceedings reserved. *Gorman* v. *Morrow* (1910), 15 O. W. R. 394.

Mining prospectors — Construction of articles — Dissolution — Notice. *Lewis* v. *Banville*, 3 O. W. R. 20.

Mining syndicate—*Liability of syndicate member.*]—Action to recover an advertising account from members of a mining syndicate. The defendants purchased what was called "special memberships" in a mining syndicate, but were not entitled to a membership until they received a proper certificate. After the receipt of the defendants' applications, but before the issue of their certificates, the syndicate entered into an advertising contract with plaintiffs, who subsequently recovered judgment against the syndicate and its manager. Not recovering from these, this action was brought:—*Held*, that defendants not liable, the applications not making them partners. *McKim* v. *Bizet* (1909), 13 O. W. R. 726; affirmed, 14 O. W. R. 41, 19 O. L. R. 81.

Non-registration—*Action for penalty*—*Affidavit*—*Requirements of*—*Pleading* — *Declaration.*]—In a *qui tam* action for failure to register a partnership, it is not necessary to state the whole declaration in the affidavit, but only to make such a summary statement as will be necessary to shew that in making

the affidavit the plaintiff was referring to the same matter as is stated in the declaration.—2. The words "carry on business" sufficiently designate a commercial or trading business in the sense of Arts. 1834 and 1834 (a), C. C., especially where it is further alleged that the defendant acted in violation of those articles.—3. The word "alone" sufficiently indicates that the defendant was not associated in partnership with any other person.—4. The word "transmit" a declaration is not sacramental, and the word "file" may be substituted therefor.—5. The name "Rothholz, Sponging Co.," used as a business name is manifestly such a name as is referred to in s. 5636, R. S. Q. *Bull* v. *Lanigan*, 3 Que. P. R. 329, 19 Que. S. C. 30.

Non-registration — *Penalty—Joinder of claims against both partners—Exception to form.*]—An action by which the penalty of $400 is claimed from two partners jointly for non-registration of their partnership, improperly joins two distinct causes of action, and will be dismissed on execution to the form. *Monty* v. *Ouimet*, 8 Que. P. R. 153.

Note given in settlement of partnership transaction — *Counterclaim for partnership account—Opening up stated account—Laches.*]—Action on a promissory note. Plaintiff has not established a stated account comprehending all partnership transactions. Error in partnership accounts was proved. Defendant is entitled to a general account. There were no laches. *York* v. *Powell*, 10 W. L. R. 407, 2 Alta. L. R. 58.

Offer of partner to sell share—Acceptance—Specific performance—Covenant—Restraint of trade—Security. *Pilgrim* v. *Cummer*, 2 O. W. R. 443.

Operation of farm — *Seizure of crop under execution against one partner—Claim by other partners — Claim by vendor of land under agreement to share in crop — Bills of Sale Act, s. 39 — Interpleader — Satisfaction of interest of execution debtor — Right to remainder of crop.*]—In 1908 C. agreed to sell a half-section of land to T. and T.'s wife and son. The purchase-money was to be paid in annual instalments with interest, and the purchasers covenanted to seed the land, sell the crop, and apply one-half the proceeds in payment of interest, taxes, and principal to C., and keep the other half for themselves. Before the wheat crop of 1909, 1,540 bushels, was threshed, it was seized by the sheriff under executions against T. The crop was then threshed, and the expenses of threshing paid by a sale of part of it. The remainder of the wheat, except exemptions on the part of T., was sold by the sheriff, and the first execution creditor was paid. There then remained in the sheriff's hands the proceeds of 592 bushels, which he was about to apply on the execution of the plaintiff S., when the money was claimed by C. and T.'s wife and son; an interpleader issue was then ordered to be tried. Upon the trial it appeared that the purchasers had each a third interest in the land. Both father and son worked at putting in and harvesting the crop, while the wife worked outside, as well as kept the house. They were each to get one-third of one-half of the crop:—*Held*, that the land could not be considered as partnership property, but would belong to the purchasers as tenants in common; partnership could consist only in the working of the land and the sharing of the profits; and, upon the evidence, there was a partnership by which the 3 had equal shares in the profits arising from the operation of the farm.—*Manitoba Mortgage Co.* v. *Bank of Montreal*, 17 S. C. R. 692, followed.—*Held*, also, that T. having been allowed his exemptions and the first execution against him having been paid out of the crop, he had, as against his partners, received his full share, and he had no interest in the 592 bushels, and his second creditor, S., had no claim upon the proceeds of the 592 bushels, as his execution took effect only upon the interest of his execution debtor.—*Held*, also, that if s. 39 of the Bills of Sale Act, R. S. M. 1902, c. 11, which makes void a security taken upon growing crops or crops to be grown, applied, the execution creditor, S., could take no advantage from it; for, as against T.'s partners, the issue must be found against him (S.), without regard to the claim of C.—*Held*, also, that S. not being in a position to claim the proceeds of the 592 bushels, and T.'s partners admitting that C.'s claim was valid and prior to theirs, C. was entitled to judgment upon the issue to the extent of his one-half interest in the crop, after deducting the cost of threshing, and T.'s son to any balance remaining, T.'s wife not having appealed from the judgment at the trial in favour of S.—Judgment of Locke, Co.C.J., reversed. *Smith* v. *Thexton* (1910), 15 W. L. R. 709, 20 Man. L. R. 120.

Oral contract — Purchase and sale of timber limits—Interest in land—Statute of Frauds — Part performance — Findings of jury. *Hoeffler* v. *Irwin*, 2 O. W. R. 714, 4 O. W. R. 172.

Ostensible partnership — *Infancy — Preference of firm creditor over creditor of individual partner.*]—One of the defendants, who were carrying on business ostensibly in partnership, was indebted to the plaintiffs for goods supplied to the firm in the belief of an existing partnership. The alleged firm consisted of two brothers, one of whom was an infant, who though not in reality a partner, held himself out to be one:—*Held*, that, notwithstanding the infancy, and the non-existence of the partnership as a fact, it must, so far as the plaintiffs were concerned, be deemed to be one, and that the plaintiffs were entitled to recover their indebtedness out of the assets of the ostensible firm in priority to a debt owed individually by the adult member of the reputed partnership. *Codville Georgeson Co.* v. *Smart*, 10 O. W. R. 496, 15 O. L. R. 357.

Partner, creditor of his co-partner for the purposes of the partnership, cannot sue the latter for a fixed amount by alleging that he has not fulfilled the conditions of the agreement, but his remedy lies in action *pro socio* or an action to dissolve the partnership. *Ollier* v. *Hadley* (1910), 17 R. L. n. s. 15, 39 Que. S. C. 165.

Payment by one partner to the other — *Dispute as to payment—Action*

against executrix of deceased partner—Evidence — Onus.]—Plaintiff brought action against executrix of his deceased brother's will to recover $255 and interest alleged to have been paid the deceased brother as his half interest in a cheque for $750 given to plaintiff by a customer of the partners. The said cheque was not paid when presented. Clute, J., *held*, that the plaintiff had failed to shew that the money had in fact been paid to deceased partner and dismissed the action. *Garnett* v. *Garnett* (1910), 16 O. W. R. 271.

Payment of debt by partner—*Subrogation.*]—Under the principles of the common law as it obtains in England and in Ontario a partner who pays a partnership debt cannot be subrogated to the rights of the creditor against his co-partner.—The law as applied in similar cases by the Courts of Quebec and of the United States discussed. *Rex* v. *Connor*, 26 C. L. T. 527, 10 Ex. C. R. 183.

Placer mining operations—Evidence to establish partnership agreement—Statute of Frauds—Refusal to carry out agreement—Damages. *Cameron* v. *Suttles*, 7 W. L. R. 686.

Pleading—*Reply—Obligation to pay for goods purchased by partner before partnership—Fraud — Formation of partnership — Creditors—Capital—Assignment — Personal debt of partner.*]—A plaintiff cannot, by a special reply, reform, complete, or modify his declaration.—2. One who, not being a purchaser, obtains goods which have not been paid for, does not thereby incur an obligation to pay for them.—3. A partnership can be annulled as having been contracted in fraud of the creditors of one of the partners, only if its formation caused the creditors prejudice, and if he with whom their debtor contracted knew at the time of its formation that it would cause such prejudice.—4. A creditor who is in a position to bring an action to set aside a transaction as fraudulent, has no right to claim from a third person, who has dealt with his debtor, payment of what the debtor owes him.—5. An act by which a person forming a partnership puts in capital constituting all the property he has, is not an act *à titre universel*.—6. An assignment, even *à titre universel*, does not impose upon the assignee the obligation of paying the debts of the assignor, unless the assignment is made *à titre de donation*, and not if it is made *à titre onereux*.—7. When two partners are sued jointly and severally and as partners for a debt alleged to be the debt of the partnership, but which is in fact only the personal debt of one of the partners, the partner debtor may, in such an action, be adjudged to pay the debt. Judgment in 21 Que. S. C. 492, affirmed. *Walker* v. *Lamoureux*, 13 Que. K. B. 209.

Practice — Appearance as for—Foreign corporation carrying on business without license. *Duthrie* v. *McDearmott*, 1 O. W. R. 776.

Profit and loss—Promissory note paid by one partner—Liability of the other for contribution — Gaming transactions — Criminal Code, s. 231. *Brault* v. *Kennedy*, 6 E. L. R. 61.

Profits—Dispute as to shares—Finding of equality. *Graham* v. *Frank* (Yuk.), 1 W. L. R. 519.

Promissory note — *Joint liability.*]—The obligation of the members of a partnership who sign a promissory note in their partnership capacity, is joint and not several. *Drouin* v. *Gauthier*, 12 Que. K. B. 442.

Promissory note — *Trust account* — Plaintiff and defendant had been partners. The former paid certain firm liabilities to the bank and sought to recover half so paid from the defendant. Judgment for plaintiff. *Beault* v. *Kennedy*, 5 E. L. R. 61.

Promissory note signed in firm name by partner for accommodation of stranger—*Absence of consideration—Non-liability of firm and other partners—Partnership Ordinance* (Alta.), *ss.* 7, 9.]—Defendant A. sold his business to defendant B., who placed defendant C. in charge, conducting the business under the name of A. B. & Co. Plaintiffs asked A. to get B. to sign a note for their account, which B. refused to do. A. then saw C. and induced him to sign the firm name to the note:—*Held*, that even if B. were a partner, there was no consideration for the note and neither the firm nor partners are liable under above sections. *Morris* v. *Sabey* (1909), 12 W. L. R. 558.

Promissory notes—Improper use of firm name by partner—Notice to plaintiff, holder of notes—Absence of ratification—Liability of firm—Charge to jury—Weight of evidence—Motion for new trial. *Rattenbury* v. *Carter*, 5 E. L. R. 149.

Purchase of goods by partner — *Ratification.*]—Where one of two partners, without the knowledge of the other, purchases goods in his own name or in the name of a firm which he expects to form afterwards in partnership with some other person, intending to exclude the other partner from the contract, the latter cannot be made liable upon the contract by ratification afterwards, although the old partnership is continued and the goods are subsequently taken into stock and disposed of for the benefit of the firm. A man cannot be made a party to a contract unless he who assumes to contract does so on behalf of that man; and no ratification can be effectual unless the act has been done by the agent on behalf of the party who ratifies, or, in other words, there can be no binding ratification by a person not contemplated by the agent as his principal at the time of entering into the contract. *Watson* v. *Swann*, 11 C. B. N. S. 771, and *Keay* v. *Ashby*, 10 B. & C. 288, followed. *Durant* v. *Roberts*, [1900] 1 Q. B. 629, distinguished. *Fraser* v. *Sweet*, 20 C. L. T. 283, 13 Man. L. R. 147.

Purchase of machinery—*Liability of partner to contribute to costs of—Exclusion from partnership.*]—The three plaintiffs and defendant purchased a threshing outfit. Promissory notes were given to the manufacturers, upon which payments were made, but owing to default the manufacturers repossessed themselves of the outfit, and this action was brought against defendant to compel him to contribute his share of the costs of the machine:—*Held*, that there was

a partnership which was subsequently dissolved by mutual consent. Reference to take accounts between the partners. *Bodin* v. *Ducker*, 11 W. L. R. 145.

Purchase of partner's interest by co-partners — *Errors in statements — Fraud.*]—In order to avoid a dissolution of partnership and a winding-up of the business, the interest of a partner in the partnership assets was purchased by his co-partners for an amount equal to the profits standing at his credit, his salary to the time of the purchase, and a percentage of his capital as shewn in the last yearly balance sheet, which was based upon statements prepared under the supervision of this partner. More than two months after the transaction the plaintiffs brought this action, alleging that part of the stock-in-trade had been overvalued in the statements, and claiming repayment of part of the purchase money:—*Held*, upon the evidence, that the purchase price was arrived at as a compromise, and not as an arbitrary proportion of definite items, but that, apart from this, as the statements had been prepared in good faith and in accordance with the uniform usage of the business, the defendant was not liable. *Stroud* v. *Wiley*, 20 C. L. T. 398, 27 A. R. 516.

Purchase of property — *Re-sale at profit—Agreement for division — Consideration — Declaration of trust.*] — Upon information supplied by the plaintiff, the defendant purchased certain property, which upon re-sale yielded a surplus after meeting a liability the defendant had assumed for the benefit of the plaintiff's father. The defendant promised the plaintiff that in the event of there being a surplus it should belong to him:—*Held*, that the plaintiff and defendant were not partners in such a way as to entitle the plaintiff to share in the profits from the re-sale of the property, and that the defendant's promise, which was not a declaration of trust, was *nudum pactum*. *Leighton* v. *Hale*, 25 C. L. T. 88, 3 N. B. Eq. 68.

Affirmed 2 E. L. R. 136, 37 N. B. R. 545.

Real estate brokers — *Necessity for registration — Action for penalty — Costs.*] —A partnership of real estate brokers is not a partnership for trading purposes, within the meaning of s. 3 of the British Columbia Partnership Act, and a declaration of partnership need not be registered. An action to recover a penalty under the Act being dismissed, it was held that there was power to award costs to the defendants. *Paisley* v. *Nelems*, 25 C. L. T. 111.

Reference to take accounts — *Construction of will — Intention of testator — Costs.*]—A memorandum signed and registered, certified that certain parties were not partners except for the purpose of continuing the capital of deceased in the firm, with rights flowing from their capacity as executrix and executor; it was held that this bare statement could not affect their partnership relation as all their dealings were consistent only with the existence of partnership. On appeal Master's report varied on different items. *Beattie* v. *Dickson* (1909), 14 O. W. R. 565.

Reputed partner Liability for moneys misappropriated by co-partner—Executors—Imputation of payments. *Askin* v. *Andrew*, 5 O. W. R. 294.

Reputed partner—Misappropriation by co-partner—Private bankers — Registration of partnership — Chartered bank — Moneys misappropriated by customer — Trust — Notice — Allocation of bank's position — Cheque. *Ontario Silver & Antimony Co.* v. *Andrew & Ontario Bank*, 5 O. W. R. 206, 6 O. W. R. 63.

Retiring partner—*Holding out that he was still a partner — Estoppel — Liability.*] — Defendant told plaintiffs that his daughter was to marry a third party, who would then become a partner in the business, and such events did take place, but later defendant sold his interest to said third party, who carried on the business under defendant's name and purchased goods from plaintiffs, but failed to pay for them:—*Held*, that defendant was estopped from denying his liability on the ground of holding out and failure to notify plaintiffs that he had retired from the business. Plaintiffs recovered judgment against the third party by default:—*Held*, that this was not a case of election, but that both were liable. Judgment for plaintiffs for $1,138.93 and interest. *Castle* v. *Baird* (1910), 15 O. W. R. 273. Affirmed by D. C. (1910), 1 O. W. N. 527.

Salary of one partner as government architect—*Right of co-partner to share in — Receiver—Book debts.*]—While C. and M. were in partnership as architects, M. received an appointment from the Dominion Government building being erected in Nelson, and for a time M. paid the salary of the office into the partnership funds. M. afterwards notified C. that the partnership was at an end, and thereafter refused to account for the salary. C. sued for a declaration that he was entitled to half the salary since the dissolution, and asked that a receiver be appointed of it, and also of the book debts of the firm, which he alleged M. had been collecting and not accounting for:—*Held*, by the full Court, that no receiver of the salary could be appointed; that, although the amount of the book debts was small, there should be a receiver in respect of them.—*Per* Hunter, C.J., at the trial:—Even if it were agreed that the appointment should be for the benefit of the firm, all the partners would not have any right to share in the salary after the dissolution of the firm, unless there was a special agreement to that effect. *Cane* v. *Macdonald*, 23 C. L. T. 32, 9 B. C. R. 297.

Sale of goods—Partners—Action against firm for price — Joinder of parties. *Albion Lumber Co.* v. *Brownell*, 3 E. L. R. 224.

Sale of interest of deceased partner —Executors—Action to set aside sale—Account—Reference for trial of whole action. *Shortreed* v. *Shortreed*, 3 O. W. R. 867.

Solicitors—*Use of firm's money by one of partners — Speculation.*] — The parties herein, solicitors, were partners. Defendant bought certain land, and without plaintiff's knowledge, gave a cheque on the firm's

account for the purchase money. He then sold at a profit:—*Held*, that the defendant must account for the profits. *Marice* v. *Hubbard*, 10 W. L. R. 703.

Special partner—Agreement—Construction—Liability for losses—Salary of active partner—Account — Dispensing with reference — Interest — Costs. *Fitzgerald* v. *McGill*, 5 O. W. R. 769.

Special partner—*Limited partnership — Partnership Act — Requirements of — General partner — Liability.*] — The defendant R. bought an interest in a partnership business carried on by his co-defendants under the name of "Winnipeg Shirt and Overall Manufacturing Company," and contributed $4,000 in cash to the funds of the partnership. It intended that he should be only a special partner, with liability limited to the amount he paid in, and the three signed a certificate in the form set out in s. 66 of the Partnership Act, R. S. M. 1902, c. 129, using the same firm name. The certificate was filed in the office of the prothonotary, who noted it in a book he kept, pursuant to s. 54, but it was not recorded "at large," as then required by s. 48:—*Held*, that, under s. 48, the intended limited partnership failed of formation, because the certificate had not been recorded at large, and, also, under s. 72, because the firm name did not contain the name of any of the general partners.—2. That R., having thus failed to form a limited partnership under the Act, was liable to the creditors of the firm as a general partner.—3. To render himself liable as a general partner, it is not necessary that one should be clothed with authority to bind his fellow partners as their agent. He may be a silent or dormant partner, and yet liable as a general partner. *Pooley* v. *Driver*, 5 Ch. D. 474, followed. *Slingsby Manufacturing Co.* v. *Gelter*, 5 W. L. R. 128, 6 W. L. R. 225, 17 Man. L. R. 120.

Style of cause — *Firm name — Amendment.*]—Summons by the plaintiff for summary judgment under Order XIV. Objection that Jacob Sehl was really the plaintiff, and he was suing in a firm name when he was the only member of it. (*Mason* v. *Mogridge*, 8 Times L. R. 805, upheld, and an adjournment to enable plaintiff to app. to amend the style of cause in the proceedings, refused). [*See also Lang* v. *Thompson*, 16 P. R. 516.] *British Columbia Furniture Co.* v. *Tugwell*, 20 C. L. T. 144, 7 B. C. L. R. 84.

Syndicate dealing in land—*Account—Profits of resale—Commission on sale charged by one partner—Disbursements to agents—Ascertainment of selling-price—Election to treat sale as cash transaction — Trustee — Right to account.*]—The plaintiff, by an arrangement with the defendant, became a member of a syndicate in the ownership of 10 acres of land, which had been previously purchased by the defendant for $12,500. The plaintiff was to have an undivided one-quarter interest, and the same interest in the profits of a resale. The property was resold at a profit by the defendant, without consulting the plaintiff, and a statement of the transaction was rendered to the plaintiff by the defendant, in which the original purchase-price was stated to be $14,500, and in which a commission of $1,000 was charged by the defendant. The plaintiff brought this action to recover $500, being his share of the extra $2,000 in the $14,500 stated to be the purchase-price, and also one-quarter of the $1,000 deducted for commission, and also for an inquiry as to the true selling-price:—*Held*, on the evidence, that for the purposes of this action the purchase-price was to be taken as $12,500; that the plaintiff and defendant were partners in the transaction; and the defendant was not entitled, in the absence of an agreement, to charge for his own time and trouble, though he should have credit for disbursements properly made in effecting the sale, including commissions paid or promised in good faith to outside agents.—*Held*, also, that the action was not premature, although the price of the resale was not all paid in cash, because the defendant, having rendered a final account and treated the transaction as closed, must be taken to have elected to treat the resale as a cash transaction.—*Held*, also, that the plaintiff was entitled to an account of the profits as prayed. Per Irving, J.A., that the defendant occupied the position of trustee for the plaintiff, and the plaintiff was entitled to have an account from the defendant of the whole matter, and then to contest such of the matters as he thought proper. *Smith* v. *Corbett* (1911), 16 W. L. R. 257. B. C. R.

Syndicate for promotion of joint stock company — *Trust agreement — Construction of contract—Administration by majority of partners—Lapse of time limit—Specific performance.*]—A syndicate consisting of seven members agreed to form a joint stock company for the development, etc., of properties owned by two of their number, the defendants, under patent rights belonging to two other members; the three remaining members, of whom the plaintiff was one, furnishing the capital; and all members agreeing to assist in the promotion of the proposed company. In the meantime the lands were acquired by the defendants, and patent rights were assigned to them in trust for the syndicate, and the lands and patent rights were to be transferred to the syndicate or to the company without any consideration save the allotment of shares proportionately to the interest of the parties. The stock in the proposed company was to be allotted, having in view the proprietary rights and moneys contributed by the syndicate members, in proportion as follows: 57½ per cent. to the defendants who held the property, 32½ per cent. to the owners of the patent rights; the other three members to receive each 10 per cent. of the total stock. A time limit was fixed within which the company was to be formed, and, in default of its incorporation within that time, the lands were to remain the property of the defendants, the transfers of the patent rights were to become void, and all parties were to be in the same position as if the agreement had never been made. The 10th clause of the agreement provided that, in case of difference of opinion, three-fourths in value should control. Owing to differences in opinion, the proposed company was not formed, but, within the time limited, the plaintiff and the other members, holding together 30 per cent. interest in the syndicate, caused a company to be incorporated for the development and

exploitation of the enterprise, and demanded that the property and rights should be transferred to it under the agreement. This being refused, the plaintiff brought action against the trustees for specific performance of the agreement to convey the lands and transfer the patent rights to the company, so incorporated, or for damages:—*Held*, that the 10th clause of the agreement controlled the administration of the affairs of the syndicate, and that, as three-fourths in value of the members had not joined in the formation of a company, as proposed, within the time limited, the lands remained the property of the defendants, the patent rights had reverted to their original owners, and the plaintiff could not enforce specific performance. *Hopper* v. *Hoctor*, 25 C. L. T. 100, 35 S. C. R. 645.

Three persons who join together to search for gold under a written agreement that the profits will be divided into three equal shares, and that advances made by one for the share of the expenses of one of the others shall be reimbursed to him out of the first division of the profits, thereby created a partnership between them under Art. 1830 C. C. *Ollier* v. *Hadley* (1910), 17 R. L. n. s. 15, 39 Que. S. C. 196.

Trespass quare clausum fregit — *Partnership — Tenants in common — Fixtures.*]—Plaintiff sued defendant for trespass carrying away fixtures and other articles, and got a verdict of $20 for the fixtures and $2.75 for the other articles. The property was formerly owned by plaintiffs and R. as partners, who dissolved and the business was continued by R. At the dissolution F. sold his interest to McD. The articles not fixtures passed to R. who gave a bill-of-sale of them to defendant. On motion to set aside the verdict:—*Held*, Peters, J., that plaintiffs were tenants in common, and the verdict was right. *Fraser* v. *Westaway* (1879), 2 P. E. I. R. 289.

Verbal agreement — *Accounting — Abandonment — Laches.*]—Action claiming an account and an interest in certain North-West lands:—*Held*, that plaintiff had never paid any money for a share or interest and had, in fact, abandoned the speculation. Action dismissed. *Pugsley* v. *Fowler*, 6 E. L. R. 465.

Voluntary liquidation — *Discharge of liquidator.*] — When all the parties have themselves liquidated the partnership heretofore existing between them, the functions of the liquidator having terminated, he will be discharged on a petition to that effect. *Pepin* v. *Lamouche*, 7 Que. P. R. 430.

Winding-up—Assets—Sale of partnership lands—Foreign judgment—Jurisdiction—Amendment—Deed *pendente lite*—Notice—Lien—Dower—Partition. *McGregor* v. *McGregor*, 2 O. W. R. 96.

Winding-up—*Powers of liquidators — Actions — Authorization.*] — Liquidators named under Art. 1893a, C. C., to liquidate the property of a dissolved partnership, may sue a debtor of the partnership for rent and damages, and claim in the same action the cancellation of the lease, without first obtaining the authorisation of the Court or a Judge or of the members of the partnership. *Robert* v. *Gagon*, 10 Que. K. B. 237.

Winding-up — *Receiver—Costs—Landlord's lien—Rents paid by sub-tenants — Priority.*]—A liquidator or a receiver of a partnership cannot be ordered personally to pay costs, when such order is not asked for, and there has been no negligence or misconduct on his part which would justify such an order.—The principal landlord has no lien upon the moneys which the sub-tenant has paid to the principal tenant; his lien extends to the goods of the sub-tenants up to the amount of the rent which they owe, but not the rent which they have paid.—The costs and expenses of the receiver or liquidator, as well as those of his advocates, must be paid in preference to the claim of the owner upon the moneys representing the rents of the sub-tenants. *Bédard* v. *Ottawa*, 8 Que. P. R. 81.

Work supplied to firm — *Withdrawal from partnership with knowledge of plaintiffs—Liability of withdrawing partner.*]—Plaintiffs brought action to recover from defendant, sued as a partner in "Non-Alcoholic Beverage Co." for $238.47, claimed to be balance due for lithographing work. Defendant denied that he was a partner and averred that plaintiffs, with knowledge that he had ceased to be such a partner, accepted the promise of the remaining partner or partners for the debt sued on. At the trial the action was dismissed with costs. Divisional Court *held*, that defendant was primarily liable, as he ordered and procured delivery of the goods in the name of Non-Alcoholic Beverage Co., and for the purpose of the company, which was then about to be formed by the junction of three others with himself. But the company never came into existence, therefore the original claim was in no sense affected as against the defendant by a judgment on the note against another also jointly liable. Judgment at trial reversed and entered for plaintiffs, with costs below and on appeal. *Hough Lithographing Co.* v. *Morley* (1910) 15 O. W. R. 571, 20 O. L. R. 484.

See ALIEN—APPEAL—BANKRUPTCY AND INSOLVENCY—BILLS AND NOTES—CONTRACT—COSTS—COVENANT — DOWER — EXECUTORS AND ADMINISTRATORS — INJUNCTION — LAND TITLES ACT—LANDLORD AND TENANT—LIMITATION OF ACTIONS — MASTER AND SERVANT—MONEY IN COURT—NEGLIGENCE—PARTIES—PRINCIPAL AND AGENT—RECEIVER—SALE OF GOODS—SHIP — WRIT OF SUMMONS.

PARTY WALL.

Contract as to—*Survey made of town—Building encroaching on public street—Survey sanction by special Act—47 Vict. c. 50 (Ont.)—Building destroyed by fire—Being rebuilt—Town council required new building to conform to statute—No right to demolish party wall.*]—Plaintiffs and defendants owned a party wall. By a survey of the town it was found to encroach 20 inches on the public street. The survey was sanctioned by 47 Vict. c. 50 (Ont.) which per-

mitted then existing buildings to remain until they were rebuilt, etc. Defendant's building having been destroyed by fire she desired to rebuild, and the town council required her to conform to the statute. Defendant desired to remove 20 inches of the party wall standing on the highway in front of her new premises so as to enable her to extend the front of her new building across the full width of her lot. Plaintiffs asked for injunction to restrain defendant from interfering with said wall.—Middleton, J., *held* (16 O. W. R. 887, 2 O. W. N. 13), that the wall in question constituted an integral part of each building and could be maintained so long as either building is entitled to remain upon the highway. Injunction granted plaintiffs with $80 costs.—*Toronto* v. *Loach*, 21 O. R. 227, and *Williams* v. *Cornwall*, 32 O. R. 255, specially referred to. — Divisional Court dismissed defendant's appeal from above judgment with costs, Clute, J., dissenting. *Sterling Bank* v. *Ross* (1910), 17 O. W. R. 284, 2 O. W. N. 13.

Erection of building—*Right to build into party wall—Deed—Restrictive covenant — Compensation — Easement — "Assigns" — "Privilege"—Application to remove action into High Court after final judgment — County Courts Act, (1910), s. 29.*]—An action for a mandatory injunction to compel defendant, an adjoining property owner, to remove an encroaching frame structure, alleged to encroach 11 inches on plaintiff's land, and for damages for trespass. At trial Co. C.J., dismissed the action with costs.—Divisional Court allowed plaintiff's appeal in part, ordering that a declaration consented to by defendant should be made. No costs of action or appeal.—Boyd, C., dissenting, holding that the appeal should be allowed and judgment entered for plaintiff. —Divisional Court *held*, there is no jurisdiction in a Divisional Court or a Judge, under County Courts Act, 1910, s. 29, to remove an action into the High Court after final judgment has been pronounced. *Roche* v. *Allan* (1911), 18 O. W. R. 749, 2 O. W. N. 787, 913. O. L. R.

Excavations under—Rights of adjoining owners—Reversioners—Landlord and tenant —Injunction. *St. Leger* v. *T. Eaton Co.*, 4 O. W. R. 205.

Mitoyennete — *Acquisition — Independent walls—C. C. 518.*]—*Held*, that a proprietor who builds a wall along that of his neighbour leaving a small space between the two, without resting it on this latter and without penetrating it, does not use this wall as if it were a common wall and is not bound to pay the proportion of its value, even if its own wall was built with terra cotta (poreus stone) and was only covered with building paper, the proximity of the neighbouring property preventing him from covering it with metal. *Arcuse Realty Co.* v. *Morgan* (1911), R. L. n. s. 283.

Appeal to Supreme Court of Can. pending.

Original party wall—*External wall — Derogation from method of construction— Contract—Injunction.*]—Parties to the action agreed that a certain wall should be a party wall. Either party was to have right to build upon this wall after it was completed, but it was to retain its character of a party wall.—Boyd, C., granted an injunction restraining defendant from placing windows in the wall, holding that that was a derogation from the method of its construction according to the meaning of the contract.—*Sproule* v. *Stratford*, 1 O. R. 329, followed. *Brennan* v. *Ross* (1910), 16 O. W. R. 583, 1 O. W. N. 1044.

Raising—*Damage to adjoining house — Cause of—Liability—Damages.*]—The owner of a house who wishes to raise the party wall must give previous notice thereof to the owner of the adjoining house, in order to give him time to prepare for the work, and thus avoid all responsibility other than that proceeding from his negligence or want of care. 2. If the damages incurred by the co-owner of the party wall are the result not of the raising of the wall but of the pulling down of the house adjoining the party wall, the one who has done the work of raising is not responsible for these damages. In other words, the co-owner of the party wall has no recourse against the one who raises the wall when the damages which he suffers are the result of faulty construction of his own building. *Demers* v. *Lemieux*, 21 Que. S. C. 26.

Right to support — Lost grant — Injunction — Costs — Easement — Prescription. *McGuffgan* v. *Willett Fruit Co.* (1911), 9 E. L. R. 448.

Rights of neighbour — *Foundation — Caution.*]—The proprietor who first builds a house wall, intended to become common, has a right to establish the base of the wall on the first soil sufficiently strong to support the wall which he intends to construct, and is not obliged to go deeper, although his neighbour may require a greater depth, and may offer to bear the cost of the increased excavation and masonry. If the neighbour desires to have a heavier building, necessitating a deeper foundation, he must make the under structure at his own expense. 2. The proprietor first building a wall destined to become common, has a right to extend the footing courses more than 9 inches on his neighbour's land, where such extension is necessary to secure the solidity of his wall. 3. Article 520, C. C., has no application to house walls, but refers to fence walls only; house walls being governed, not by positive law, but entirely by custom, which varies according to local conditions and usages, which, in the city of Montreal, require a footing course wider than the body of the wall, where the same is necessary for the solidity of the wall. *Roy* v. *Strubbe*, 24 Que. S. C. 520.

See BUILDINGS—COURTS—CRIMINAL LAW —EASEMENTS—FENCES—VENDOR AND PURCHASER—TRUSTS AND TRUSTEES.

PASSENGERS.

See CARRIERS—NEGLIGENCE—RAILWAYS AND RAILWAY COMPANIES.

PATENT.

See CROWN LANDS.

PATENT FOR INVENTION.

Action for infringement—*Colourable imitation—Pleading—Particulars.*] — Order made for particulars of a paragraph in the statement of claim before delivery of statement of defence, the Master being bound to follow a decision of the senior registrar. *Shroeder* v. *Donatt* (1909) 14 O. W. R. 103.

Action in Superior Court, Quebec—*Stay of—Action in Exchequer Court.*]—In an action based upon a patent of invention, proceedings will be stayed on the demand of one of the parties, if a like cause between the same parties, based upon the same facts, is upon the point of being fixed for final hearing before the Exchequer Court of Canada. *American Stoker Co.* v. *General Engineering Co. of Ontario* 5, Que. P. R. 73.

Agreement to transfer—*Allotment of shares—Concurrent conditions.*]—The plaintiffs and defendant entered into an agreement in writing for the assignment by the defendant to the plaintiffs of all his rights in a gold separator of which he was the inventor, upon receiving a certain number of shares in a company to be organised for the purpose of obtaining a patent for the separator and for other purposes in connection therewith. Prior to the incorporation of the company a patent obtained in Canada was assigned to the plaintiffs, and an action was brought for an injunction to prevent the defendant from dealing as his own, with a patent obtained in the United States, and which was included within the terms of the agreement:—*Held*, that the obligation to transfer the invention on the one side and to allot the shares on the other were concurrent conditions, and that the plaintiffs had no right to ask for a transfer of the invention until they were ready to deliver the shares:—*Held*, also, that, in the absence of any indication of readiness or willingness on the part of plaintiffs to perform their part of the agreement, they were not in a position to come in to a Court of equity and ask for an injunction against the defendant to restrain him from selling the American patent, or for a declaration as to their interest in it. *Sutherland* v. *Westhaver*, 39 N. S. R. 52, 1 E. L. R. 102.

Anticipation—*Novelty.*]—A patent for prisms intended for use in deflecting the course of rays of light falling obliquely or horizontally on glass placed vertically, as in the ordinary windows of houses or shops, is not void for anticipation by reason of prior patents for prisms for use where the light falls vertically or obliquely on glass placed horizontally, as in pavements. *Semble*, that if the former patent were to be broadly construed as for a device for deflecting the course of light passing through glass, it would fail for want of novelty. *Luxfer Prism Co.* v. *Webster*, 22 C. L. T. 426, 8 Ex. C. R. 59.

Assignment—*Presumption of agency — Privity of contract—Warranty of validity—Presumption that subject-matter patentable—Patent Act—"Composition of matter."*]—When a New York company assigns a patent to S. and H., part of the consideration being bonds to be issued by a Canadian company to be incorporated at a future date, and the Canadian company is so incorporated, and, upon an assignment to it of the patent by S. and H., it issues its bonds to them, who, under the terms of the former assignment, hand them over to the New York company, there is no presumption that S. and H. were mere agents for the New York company, and there is therefore no privity of contract between the latter and the Canadian company. Hence, to an action brought by the New York company to recover interest on the bonds from the Canadian company it cannot set up, as a ground of defence, that the assignment by S. and H. is invalid because the patent is void.—2. An assignment of letters patent of invention contains no implied warranty that they are valid.—3. The issue of letters patent of invention raises a presumption in favour of the patentee that the subject-matter is patentable.—4. The words "composition of matter" in s. 7 of the Patent Act, R. S. C. c. 69, include all composite matter, whether the result of chemical reaction or of mechanical mixture; and the latter may therefore be the subject-matter of a patent.—Judgment in 31 Que. S. C. 34 affirmed. *Electric Fire-proofing Co.* v. *Electric Fire-proofing Co. of Canada*, 34 Que. S. C. 388.

Assignment for limited period—*Sale thereafter.*]—A person who is the assignee of a patented right for a limited period, with a right of purchase, but who at the expiration of such period elects not to purchase, and reassigns the patent, cannot thereafter sell the patented article, though made during the time he was assignee, his right to make and sell being restricted to such limited period; and under the powers conferred on the Court by s. 31 of the Patent Act, R. S. C. c. 61, an injunction may be issued restraining such sale. *Bennett* v. *Wortman*, 21 C. L. T. 527, 2 O. L. R. 292.

Assignment of rights—*Condition — Account of sales—Covenant—Termination—Notice.*]—A contract by which rights in a patent for an invention are assigned, on condition, among other considerations, that the assignee shall account for his sales of the invention, with a covenant that the lapse of the patent shall give him the right to terminate the contract forthwith, is binding up to the time of notice by him to so terminate it for that reason. To an action, therefore, by the assignor for an account under the contract, the lapse of the patent and its not being in force during the period for which the account is called, is no valid answer, in the absence of notice by the assignee of his intention to terminate the contract. *Mergenthaler Linotype Co.* v. *Donald*, 32 Que. S. C. 187, 3 E. L. R. 202.

Canadian Patent Act — *Manufacture—Sale—Lease or license.*]—Under the Canadian Patent Act the holder of a patent is obliged, after the expiration of two years from its date, or an authorised extension of that period, to sell his invention to any person desiring to obtain it, and cannot claim the right merely to lease it or license its use. —Judgment of the Exchequer Court, 10 Ex. C. R. 378, affirmed. *Hildreth* v. *McCormick Manufacturing Co.*, 39 S. C. R. 499.

Claim—*Patentability.*]—The application of well-known things to a new analogous use is not properly the subject of a patent. The defendants employed a solution of hydrochloric acid to remove from pickled eggs the deposit of carbonate of lime that forms upon them while being preserved in a pickle of lime-water. From the known properties of the acid and its use for analogous purposes it was to be expected that it would accomplish the purpose to which it was put. The purpose was new, and the defendants were the first to use the process and to discover that it could be practised safely and with advantage in the business of preserving and marketing eggs, but there was nothing in the mode of employing such solution demanding the exercise of the inventive faculties:—*Held*, that there was no invention, and that a patent for the process could not be sustained. *Meldrum* v. *Wilson*, 21 C. L. T. 549, 7 Ex. C. R. 198.

Combination — Absence of novelty — Device—Want of inventive merit. *Cooper* v. *Jacobi*, 7 O. W. R. 36.

Combination — *Construction—Infringement — Essentiality of elements claimed — Equivalents — Harmony between English and American decisions—Public use and sale outside Canada before application made — R. S. Can. 1886, c. 61, s. 7 — Interpretation — Disclosure of invention in plans for construction—Effect of.*]—In the case of a combination patent construing the claim reference must be had to the preceding specification and the state of the art, and the patentee is entitled to a fair and liberal construction. If on a proper construction of the claim and specification having regard to the state of the art, it is determined that an element forms part of the combination, the patentee cannot get rid of this element as being an immaterial or non-essential element. No such thing as an immaterial or non-essential element in a combination is recognised in the patent law. Having regard to the essentials of a combination, the admission that an element is not material is an admission that the combination claimed is an invalid combination and the claim is bad. It follows that if the alleged infringer omits one element of the combination he does not infringe the combination. But if instead of omitting an element he substitutes a well-known equivalent he, in fact, uses the combination. 2. There is no real distinction as regards combination claims and the infringement thereof between the decisions of the Courts in England and the Courts of the United States. 3. By s. 7, c. 61, R. S. Can., 1886, it is provided that "Any person who has invented any new and useful art, machine, &c., which was not known or used by any other person before his invention thereof, and which has not been in public use or on sale with the consent or allowance of the inventor thereof, for more than one year previously to his application for a patent therefor in Canada, "may [upon his complying with certain requirements] obtain a patent granting to such person an exclusive property in such invention:"—*Held*, that the words "in Canada," as used in this enactment, are to be construed as referable to the application for the patent, and not to the public use or sale of the invention; and if the invention has been in public use or sale with the consent or allowance of the inventor anywhere for more than one year previously to the application for a patent in Canada, by reason of such use or sale the applicant is disentitled to a patent. *Smith* v. *Goldie* (9 S. C. R. 46) explained and distinguished; *The Queen* v. *Laforce* (4 Ex. C. R. 14) not followed. 4. The inventor of certain improvements in storage elevators, more than one year before a patent was applied for in Canada, entered into contract in the United States for the construction of an elevator embodying such improvements, and prepared, and exhibited to the parties with whom he contracted, plans for such construction which were a complete disclosure of the invention.—*Held*, that the facts established a "sale" of the invention within the meaning of s. 7, c. 61, R. S. Can., 1886. *Dittsen* v. *Racine Paper Goods Co.*, (181 Fed. Rep. 394) referred to. *Barnett-McQueen Co.* v. *Can. Stewart Co.* (1910), 13 Ex. C. R. 186.

Combination — *Novelty—Infringement.*]—A patent for a mechanical combination is not infringed unless the combination is taken in essence and in substance. *Jones* v. *Galbraith*, 9 E. C. R. 521.

Combination — *Novelty—Infringement.*]—The judgment of the Supreme Court of British Columbia, 7 B. C. R. 197, holding that the plaintiff's patent for a mechanical combination was infringed by the defendant, was affirmed on appeal. *Federation Brand Salmon Canning Co.* v. *Short*, 31 S. C. R. 378.

Conflicting applications—*Arbitration—Appointment of arbitrators—Prohibition.*]—When there are more than two conflicting applications for any patent, and one of the applicants has intimated to the commissioner or the deputy commissioner or person appointed to perform the duty of that officer, that he will not unite with the other applicants in appointing arbitrators, the appointment may be made by that official without notice to or consultation of the wishes of the other applicants; and he has the absolute right to decide, without possibility of his decision being reviewed by prohibition or injunction, whether the conditions exist in which he should proceed to exercise the power of appointment. *Valley* v. *Aylen*, 24 C. L. T. 322, 8 O. L. R. 79, 4 O. W. R. 97.

Construction of articles previous to patent—*Right to sell after patent—Consent of inventor.*]—The defendants bought from the plaintiffs a punching bag, which had on it the words "Pat. applied for," and, before the issue of the patent, manufactured and advertised for sale a number of similar bags in spite of the plaintiffs' remonstrances; and, after patent obtained by the plaintiffs, nevertheless continued to sell the bags which they had manufactured:—*Held*, that the defendants were entitled to do so under s. 46 of the Patent Act, R. S. C. 1886, c. 61; and that it made no difference that they had sold without the consent of the inventor. *Powell* v. *Chown*, 25 O. R. 71, distinguished. *Lean* v. *Huston*, 8 O. R. 521, distinguished.

Sporting Goods Co. v. *Harold A. Co.*, 24 C. L. T. 211, 7 O. L. R. 570, W. R. 465, 3 O. W. R. 496.

ontract—*Assignment of patent rights—ied warranty — Validity of patent — city — Combination producing new and ful results.*]—Where no express agree- t or special circumstances exist which ht give rise to an implied warranty, an gnment of "all the right, title and in- st" of the assignor in a patent of in- tion does not import any warranty on the t of the assignor as to the validity of patent. Judgment appealed from (34 . S. C. 388, 2 E. L. R. 532), affirmed. Idington, J.—In the present case the ents were valid.—Appeal dismissed with ts. *Electric Fireproofing Co. of Canada* v. *ctric Fireproofing Co.* (1910), 39 C. L. 632, 43 S. C. R. 182.

Contract — *Sale of patent—Future im- ovements—Money paid—Recovery back.*]— contract under seal M. agreed to sell to and S. the patent for an acetylene gas chine, for which he had applied, and a ent had been filed, and also all improve- nts and patents for such machine that he ght thereafter make, and covenanted that would procure patents in Canada and United States and assign the same to and S. The latter received an assign- nt of the Canadian patent, and paid a rtion of the purchase money, but when e American patent was issued it was nd to contain a variation from the de- ription of the machine in the caveat, and ey refused to pay the balance, and in an tion by M. to recover the same they de- anded, by counterclaim, a return of what d been paid on account:—*Held*, that the greement was not satisfied by an assign- nt of any patent that M. might after- ards obtain; that he was bound to obtain ad assign a patent for the machine de- ribed in the caveat referred to in the agree- ent; and that, as the evidence showed the ariation therefrom in the American patent o be most material, and to deprive the pur- hasers of a feature in the machine which hey deemed essential, M. was not entitled o recover:—*Held*, further, that, as B. and . accepted the Canadian patent and paid portion of the purchase money in con- ideration thereof, and as they took the enefit of it, worked for their own profit, nd sold rights under it, they were not ntitled to recover back the money so paid s money had and received by M. to their se. *McMurray* v. *Bingham*, 29 C. L. T. 50, 0 S. C. R. 159.

Crown's right to use—*Compensation— ondition precedent to right of action.*]— 1. Apart from statute, the Crown has power, if it sees fit to do so, to use a patented in- ention without the assent of the patentee and without making any compensation to him therefor.—2. By s. 44 of the Patent Act the government of Canada may at any time use the patented invention, paying to the patentee such sum as the Commissioner of Patents reports to be a reasonable com- pensation therefor:—*Held*, that a report by the Commissioner is a condition precedent to any right of action for such compensa- tion. *McDonald* v. *The King*, 26 C. L. T. 779, 10 Ex. C. R. 338.

Currycomb — *Infringement—Injunction —Damages.*]—Plaintiff brought action for an injunction, account, and $2,000 damages for infringement of plaintiff's patent, for cer- tain improvements in currycombs. Defend- ant denied infringement, pleaded that the in- vention was not new nor useful and denied that plaintiff was the true inventor thereof. Anglin, J., at trial, gave plaintiff judgment for $20.80 for damages and granted an in- junction restraining further manufacture by defendants during currency of plaintiff's pat- ent, with costs. Court of Appeal dismissed an appeal therefrom with costs. *Overend* v. *Burrow Stewart & Co.* (1909), 14 O. W. R. 961, 1 O. W. N. 156.

Dispute as to true inventor—Joint invention of plaintiff and defendant—Declara- tion—Trust—Assignment for use in mas- ter's business. *Piper* v. *Piper*, 3 O. W. R. 451.

Expiry of foreign patent — *British patent.*]—By the true construction of s. 8 of the Canadian Patent Act, R. S. C. c. 61, as amended by 55 & 56 V. c. 24, s. 1, a Canadian patent expires as soon as any for- eign patent for the same invention existing at any time during the continuance of the Canadian patent expires. A British patent is a foreign patent within the meaning of the Canadian Patent Act. Judgment in 31 S. C. R. reversed, and that in 29 C. L. T. 274, 6 Ex. C. R. 357, restored. *Dominion Cotton Mills Co.* v. *General Engineering Co. of Ontario*, [1902] A. C. 570.

Expiry of foreign patent—*Meaning of "foreign patent" — "Exists."*]—J. filed an application for a Canadian patent for new and useful improvements in boiler and other furnaces on the 1st March, 1892. On the same day he applied for a British patent and also for an Italian patent in respect of the same invention. The British application was accepted on the 30th April, 1892, and the patent issued on the 12th July, but was dated, as is the practice in England, as of the date of the application, viz., the 1st March, 1892. The Italian patent was issued on the 19th March, 1892, and was granted for a term of six years from that date. The Canadian patent was granted on the 15th October, 1892. The British patent became forfeited for non-payment of cer- tain fees and annuities due thereon on the 1st March, 1897. The inventor was in de- fault in respect of payment of fees on the Italian patent in 1895, and while there was some doubt whether such default operated as a forfeiture *ipso facto* under the Italian law, there was no doubt that it expired at the end of the six years when no steps were taken by the inventor for its renewal:—*Held*, that the Canadian patent was void. 2. That the words "foreign patent" as used in R. S. C. c. 61, s. 8, as amended by 55 & 56 V. s. 24, s. 1, include all patents that are not Canadian. 3. That the word "exists" therein has reference to the date or time when the Canadian patent is granted, not when it is applied for. 4. That the words "shall expire at the earliest date on which any foreign patent for the same invention expires" are not to be limited to the expir- ation by lapse of time of the potential term of the foreign patent, but include any end-

ing at a time earli term for which the *eral Engineering Co. Cotton Mills Co.*, 2 C. R. 357.

Fireproofing de signment—Principal patents—Warranty. *Co.* v. *Electric Fire Limited, & Fadum,*

Furnace stoker *ringement.*]—On 11 J. obtained a patent new and useful imp naces. The distinct tion was that, instea ber or magazine hou that claimed in Wor patent, he employe bath-tub shaped fuel and outwardly incli form of fuel chambe Worthington patent, out by its inventor, parently, that several bowl-like in shape c trough-shaped chamb patent was not comm using an oblong or was the first to ma stoker that was comm tween Worthington's was all the differen success:—*Held*, that *General Engineering minion Cotton Mills* Ex. C. R. 309.

Importation and *Patent Act, s. 37.*]- default for not manu unless or until there with which he has fai some person has de it and has been unab able price; and wher cess only, the patent and the condition o ready to allow the anyone for a reasonal *Co. of Toronto* v. *Am* 5 Ex. C. R. 100, ref s. 31 of the Pate patent void only as to son importing or can article made accordi ented; and importati not avoid the patent s the owner is concerne importation of an inv ance with a process is an importation o *quare*, whether the p Patent Act, requirin Canada of the invent expiry of two years patent, applied to th an art or process. C. L. T. 201, 7 Ex. C

Improvement in turners — Patentabi a motive power — No New combination of o ment — Colourable in *Oke*, 7 O. W. R. 881.

ing at a time earlier than the end of the term for which the patent is granted. *General Engineering Co. of Ontario* v. *Dominion Cotton Mills Co.*, 20 C. L. T. 274, 6 Ex. C. R. 357.

Fireproofing device — Process — Assignment—Principal and agent—Validity of patents—Warranty. *Electric Fireproofing Co.* v. *Electric Fireproofing Co. of Canada, Limited, & Eadam*, 5 E. L. R. 295.

Furnace stoker — *Combination — Infringement.*]—On the 15th October, 1892, J. obtained a patent in Canada for alleged new and useful improvements in boiler furnaces. The distinctive feature of J.'s invention was that, instead of using a fuel chamber or magazine bowl-like in shape, such as that claimed in Worthington's United States patent, he employed an oblong trough or bath-tub shaped fuel chamber, with upwardly and outwardly inclined closed sides. This form of fuel chamber was suggested in the Worthington patent, but was not worked out by its inventor, it being his view, apparently, that several magazines or chambers bowl-like in shape could be used within the trough-shaped chamber. The Worthington patent was not commercially successful. J., using an oblong or trough-shaped chamber, was the first to manufacture a mechanical stoker that was commercially successful. Between Worthington's and J.'s patents there was all the difference between failure and success:—*Held*, that J.'s patent was valid. *General Engineering Co. of Ontario* v. *Dominion Cotton Mills Co.*, 20 C. L. T. 52, 6 Ex. C. R. 309.

Importation and non-manufacture—*Patent Act, s.* 37.]—A patentee is not in default for not manufacturing his invention, unless or until there is some demand for it with which he has failed to comply, or unless some person has desired to use or obtain it and has been unable to do so at a reasonable price; and where the invention is a process only, the patentee satisfies the statute and the condition of his patent by being ready to allow the process to be used by anyone for a reasonable sum. *Anderson Tire Co. of Toronto* v. *American Dunlop Tire Co.*, 5 Ex. C. R. 100, referred to. 2. The effect of s. 31 of the Patent Act is to make the patent void only as to the interest of the person importing or causing to be imported the article made according to the process patented; and importation by a licensee will not avoid the patent so far as the interest of the owner is concerned. 3. *Semble*, that the importation of an invention made in accordance with a process protected by a patent, is an importation of the invention. But, *quære*, whether the provision of s. 37 of the Patent Act, requiring the manufacture in Canada of the invention patented, after the expiry of two years from the date of the patent, applied to the case of a patent for an art or process. *Hambly* v. *Albright*, 22 C. L. T. 201, 7 Ex. C. R. 353.

Improvement in automatic drill turners — Patentability—Use of friction as a motive power — Novelty — Anticipation—New combination of old elements — Infringement — Colourable imitation. *Woodward* v. *Oke*, 7 O. W. R. 881.

Infringement — Action for — Motion to stay — Counsel to proceed in Exchequer Court to avoid patent. *Parramore* v. *Boston Wire Co.*, 4 O. L. R. 627, 1 O. W. R. 643, 716.

Infringement.]—As a defence to an action for infringement of a patent of invention it was pleaded that the patent was the property of certain joint-owners who were not plaintiffs:—*Held*, that this was in effect pleading a *jus tertii*, and was not a good defence in law to the action. *Toronto Type Foundry* v. *Reid* (1898), 12 Ex. C. R. 8.

Infringement—*Assignee and assignor—Estoppel — Construction.*]—Where the original owner of a patent had assigned it, and was subsequently proceeded against by the assignee for infringement thereof, the assignor was held to be estopped from denying the validity thereof; but, inasmuch as he was in no worse position than any independent person who admitted the validity of the patent, he was allowed to shew that, on a fair construction of the patent, he had not infringed. *Indiana Manufacturing Co.* v. *Smith*, 24 C. L. T. 387, 9 Ex. C. R. 154.

Infringement — Colourable imitation—Pleading — Statement of claim—Particulars. *Shroeder* v. *Donatt*, 14 O. W. R. 103.

Infringement — Colourable imitation—Pleading statement of claim — Particulars—Breaches — Assignments of patent—Time and place of invention. *Kleinert Rubber Co.* v. *Eisman Rubber Co.*, 12 O. W. R. 60.

Infringement — *Departure from specifications in manufacture — Lack of invention.*]—Action for infringement of a patent for an car-covering for cars:—*Held*, on appeal, that as there is nothing in the specifications indicating any peculiarity of shape in these car-coverings, there is no novelty. Appeal allowed and action dismissed. *Eastern Hat and Cap Co.* v. *Walmsley* (N.S.), 5 E. L. R. 538, 6 E. L. R. 525.

Infringement — Foreign patent—Application for Canadian patent — Time—Evidence. *Milner* v. *Kay*, 1 O. W. R. 200.

Infringement — *Improvements in car wheels — Combination — Utility.*] — The plaintiffs were owners of Canadian letters patent numbered 63,908 for improved abrading shoes for truing up car wheels. The improvement consisted in the use of an abrading shoe in which there were a number of pockets filled with abrading material. Between the pockets were spaces or cavities to receive the material worn from the wheel, the spaces having openings in them to facilitate the discharge of such material. Prior to the alleged invention abrading shoes had been used in which there were similar pockets filled with abrading material; and other shoes had been used in which there were similar spaces or cavities. The plaintiffs' abrading shoe, however, was the first in which these two features were combined, or used together:—*Held*, that there was invention in the idea or conception of combining these two features for the purpose of truing

up car wheels. 2. That the invention was useful. *Griffin* v. *Toronto Ry. Co.*, 7 Ex. C. R. 411.

Infringement — *Interlocutory injunction — Discretion — Appeal.*]—An interlocutory injunction to restrain the defendant from using a patented device, will not be granted in a suit for damages arising from infringement and for a perpetual injunction, when the patent is recent and has not been established by a judgment at law.—2. The Court is at all times very reluctant to interfere in appeal with the discretionary power of the Court and Judges of original jurisdiction in issuing an injunction, and will only do so to avoid some grave injustice or to conform to an established rule of law. *Ottawa and Hull Power and Manufacturing Co.* v. *Murphy*, 15 Que. K. B. 230.

Infringement—*Lantern globe—Want of element of inventiveness.*]—In an action for infringement of letters patent for improvements in lanterns, one feature only of the lantern, the globe of which could be lifted vertically for the purpose of lighting the lamps, came in question; and as to that, one issue was whether or not in the idea or conception that if the bail of the lantern was made of the right length to drop under the guard or plate of the globe, the bail would hold up the globe while the lantern was being lit, or in the working out of that idea or conception, there was invention to sustain a patent:—*Held*, that there was no invention to constitute a valid patent. *Kemp* v. *Chown*, 22 C. L. T. 89, 7 Ex. C. R. 306.

Infringement — *Manifold sheets—Disclaimer after action — Validity of remaining claims — Novelty.*]—The first claim in the specification in the patent sued on was disclaimed after action brought. It was as follows: "1. A manifold sheet having an original leaf and a duplicate leaf connected at a score line and folded together, the duplicate leaf having an apertured binding margin which makes it of greater actual area than the original leaf, whereby when detached the duplicate leaf may be filled by means of its apertured margin." The second claim, the validity of which was in issue, was in these terms: "2. A manifold sheet having an original leaf and a duplicate connected at a score line and folded together, the duplicate leaf having an apertured binding margin which makes it of greater actual area than the original leaf, the duplicate leaf having its binding margin folded over, whereby when the duplicate leaf is detached its margin may be unfolded for filing:" — *Held*, that there was no difference in fact between the sheet described in the first claim, which was disclaimed, and that described in the second claim.—2. In view of the disclaimer of the first claim above mentioned, there is no novelty or invention in placing the score line in one particular place in the plane of the original leaf so that one half of the binding margin of the duplicate leaf will, before the leaves are separated from each other, lie in such plane. *Copeland-Chatterson Co.* v. *Paquette*, 10 Ex. C. R. 410.

Infringement—*Metal weather strips — Prior American patent — Narrow construction.*]—The defendants had manufactured a form of metallic weather strip in Canada very much nearer to that shewn and described in an American patent to a date prior to the Canadian patent owned by the plaintiffs than it was to any of the forms shewn and described in the plaintiffs' patent:—*Held*, that if the plaintiffs' patent was good, it was good only for the particular forms of weather strips shewn and described therein; and that upon the facts proved the defendants had not infringed. *Chamberlin Metal Weather Strip Co. of Detroit* v. *Peace*, 25 C. L. T. 144, 9 Ex. C. R. 399.

Infringement—Novelty — Onus. *Lang* v. *McAllister*, 1 O. W. R. 455, 2 O. W. R. 148.

Infringement—*Parties to action—Service out of the jurisdiction — Domicil.*] — To an action by the holder of a patent of invention against persons resident within the jurisdiction for an injunction against infringement of the patent and damages, other persons not within the jurisdiction, who make and sell to the defendants the goods which are the subject of the plaintiff's complaint under another patent which the plaintiff alleges to be null and void, are neither necessary nor proper parties, and service upon them of an amended statement of claim asking for damages and an injunction against them and for a declaration that their patent is null and void, will be set aside with costs. The statement of claim will not allege that the non-resident parties had done anything as to which an injunction could be asked against them in Manitoba, and upon its allegations the only relief the plaintiffs could possibly claim against them would be a declaration that their patent was null and void, thus raising two distinct and separate causes of action, one against the parties within the jurisdiction and the other against the non-resident parties, both of which issues should not be tried in one action. Under the Patent Act, R. S. c. 61, as amended by 53 V. c. 13, the Court has no jurisdiction to impeach a patent held by a person whose domicil is in another province, but could only, on the application of a defendant sued in this province for an infringement of such a patent, declare it to be void as against him, leaving it *primâ facie* valid as against everyone else. *Maw* v. *Massey-Harris Co.*, 23 C. L. T. 28, 14 Man. L. R. 252.

Infringement—*Prior foreign patent.*]—Judgment of the Exchequer Court of Canada, 9 Ex. C. R. 396, affirmed. *Chamberlain Metal Weather Strip Co.* v. *Peace*, 37 S. C. R. 590.

Infringement — *Sale for a reasonable price — Use of patented device — Contract — Patent Act, R. S. C. c. 61, s. 37 — Evidence.*]—The patentee of a device for binding loose sheets sold the defendant binders, subject to the condition that they should be used only in connection with sheets supplied by or under the authority of the patentee. H. used the binders with sheets obtained from the other defendants, contrary to the condition. In an action for infringement of the patent:—*Held*, that the condition in the contract with H. imposing the restriction upon the manner in which he should use the binders was not a contravention of the pre-

visions of s. 37 of the Patent Act, R. S. C. c. 61, in respect to supplying the patented invention at a reasonable price to persons desiring to use it, and that the use so made of the binders by H. was in breach of the condition of the contract licensing him to make use of the patented device and an infringement of the patent. —Judgment appealed from, 10 Ex. C. R. 224, 26 C. L. T. 528, affirmed. *Hutton* v. *Copeland-Chatterson Co.*, 26 C. L. T. 846, 37 S. C. R. 651.

Infringement—*Want of novelty—New and beneficial results — Subject matter of invention — Purchase of patented device—Estoppel.*]—The plaintiffs were patentees of an alleged device intended to cheapen and simplify former methods of keeping and rendering statements of accounts by merchants and others, as was claimed, by providing for making entries and invoices by one and the same act, on manifolding sheets so folded as to occupy the entire platen of standard typewriters, and, at the same time, without waste, to provide a binding margin for the leaf with the bookkeeping entry to utilize it as a page in a permanently bound book. The sheets manufactured and sold by the plaintiffs accomplished these ends through being folded so as to form two or three leaves, as required, with two-leaf sheets, the upper leaf forming an original or invoice and the lower sheet the duplicate and bookkeeping entry; with three-leaf sheets, the third leaf serving either as a duplicate or to be used as an original duplicated on the reverse side of the centre leaf. In each case the leaves are connected together so as to form one integral sheet with vertical and transverse score lines enabling the invoices, etc., to be easily detached, leaving the permanently retained page and folded margin with perforations to fit binders. The specifications of the patented device succinctly described and illustrated various forms of folding the sheets to secure its advantages. An action for infringement by the defendants manufacturing and selling sheets similar to the above described device was dismissed in the Exchequer Court; —*Held*, affirming the judgment appealed from, 10 Ex. C. R. 410, that there was neither subject nor novelty in the device claimed as an invention, and consequently that it was not patentable. *Copeland-Chatterson Co.* v. *Paquette*, 27 C. L. T. 311, 38 S. C. R. 451.

Infringement — *Wire fences — Electrical welding — Pioneer invention—Broad construction.*]—The defendants had made for them and had used a machine for making wire fences, the wires being, by the use of electrical currents, welded automatically at their points of intersection. It differed in a number of details from the machine described in the plaintiff's patent, but it made the same product in a similar manner and with similar devices:—*Held*, that, giving a broad construction to the plaintiffs' patent as being the first in which a successful method was devised and pointed out of making wire fences and other like products in the way described in such patent, the defendants had infringed the same. *Clinton Wire Cloth Co.* v. *Dominion Fence Co.*, 27 C. L. T. 340, 11 Ex. C. R. 103.

Interpretation of letters patent — *Infringement—Combination of old elements.*]—The rules of interpretation to be applied to a patent, which is a contract between the Government or the public and the patentee, are those which are applied to all other contracts. The intention of the parties must be found in the contract itself, and the interpretation of its several clauses is a question of law which is left to the Court. In case of doubt, the contract is interpreted against him who has stipulated, *i.e.*, the patentee. 2. In a patent for a combination of old elements, the subject-matter of the patent is the combination itself taken as a whole, which cannot be infringed unless the whole combination be used, without omitting any element which the inventor himself considered material. 3. In the present case, the hinge joint was a material part of a patent for a hose coupler, and as this was not used by the respondent, there was no infringement. Judgment in 18 Que. S. C. 14, reversed. *Côme* v. *Consolidated Car Heating Co.*, 11 Que. K. B. 166.

License — *Alterations and improvements —Rights of licensee.*]—The plaintiff granted to the defendants a license under seal to use a patented invention of his, being an automatic air brake, and to manufacture and equip their rolling stock with the same. He complained that, though the object of his agreement was that his brake might be advertised by its user on the defendants' road in the form in which he had patented it, the defendants were injuring his invention by substituting in part a different unpatented mechanical device of their own, and using the brake as thus altered to his detriment; and contended that, if the defendants used his invention at all, they must use it in accordance with the form described in his patent, and ask for an injunction:—*Held*, Armour, C.J.O., dissenting, that, in the absence of agreement to the contrary, as here, there is nothing to prevent a licensee from making such changes or alterations as he thinks proper in the patented invention. Judgment of Meredith, C.J., 2 O. L. R. 190, 21 C. L. T. 493, reversed. *MacLaughlin* v. *Lake Erie and Detroit River Ry. Co.*, 22 C. L. T. 202, 3 O. L. R. 703, 1 O. W. R. 295, 428.

License — Royalties — Assignment of license by licensees—Formation of company —Contract to pay royalties — Statute of Frauds—Consideration. *Woodruff* v. *Eclipse Office Furniture Co.*, 2 O. W. R. 35, 114, 691, 4 O. W. R. 165.

Machine — Infringement — Novelty — Anticipation — Utility. *Larose* v. *Aubertin*, 4 E. L. R. 82.

Manufacture — *Extension of time.*]—A patent of invention expires in two years from its date, or at the expiration of a lawful extension thereof, if the inventor has not commenced and continuously carried on its construction or manufacture so that any person desiring to use it could obtain it or cause it to be made. A patent is not kept alive after two years have expired by the fact that the patentee was always ready to furnish the article or license the use of it to any person desiring to use it, if he has not commenced to manufacture. *Smith* v. *Barter*, 2 Ex. C. R. 474, overruled on this point. The power

of extension beyond the two years given to the commissioner of patents, or his deputy, can only be exercised once.—*Quære*: Can it be exercised by an acting deputy commissioner?—*Power* v. *Griffin*, 23 C. L. T. 79, 33 S. C. R. 39.

Manufacture and sale—*Patent Act, s. 37 — Unconditional sale — License.*]—The condition in s. 37 of the Patent Act [now s. 38 of R. S. C. 1906 c. 69] that a patent shall become void if the patentee does not within two years of the date of the patent, or any authorised extension of such period, commence, and after such commencement continuously carry on in Canada, the construction or manufacture of the invention patented, in such a manner that any person desiring to use it may obtain it or cause it to be made for him at a reasonable price at some manufactory or establishment for making or constructing it in Canada, should be construed to mean that the patentee must not only manufacture his invention in Canada, but manufacture it in such a manner that any person who desires to use it may buy or obtain an unconditional title to it at a reasonable price.—It is not a compliance with the above condition that a person who desires to buy or obtain an unconditional title to the patented invention is put in a position to obtain the use of it at a reasonable rental. *Hildreth* v. *McCormick Manufacturing Co.*, 26 C. L. T. 782, 10 Ex. C. R. 378.

Mechanical contrivance — *Utility — Novelty — Patentability.*] — A mechanical contrivance, to be good subject-matter of a patent, must, besides utility, possess the incident of novelty and be the result of some ingenuity or invention. Letters patent, therefore, for a contrivance already known, or consisting merely in the substitution of metal for wood to reduce size and volume, which any mechanic would suggest, are void, and give no right of action for infringement. *Larose* v. *Aubertin*, 32 Que. S. C. 430.

New devices — *Improvements—Patentability — Description.*]—The application of new parts to a known machine is patentable only in so far as it constitutes an improvement or produces a useful result and a different one from that obtained by the original machine.—2. Not only the application of new parts, but improvements, advantages, or bringing to perfection the parts which already exist, resulting therefrom, must be set out in the patent or in the descriptive memorandum which forms part of it. Judgment in 31 Que. S. C. 112 affirmed. *Lair* v. *Authier*, 33 Que. S. C. 64.

Novelty—*Combination of known elements —Infringement — Mechanical equivalents.*] —A device resulting in the first useful and successful application of certain known arts and processes in a new combination for manufacturing purposes is not unpatentable for want of novelty, merely because some of the elements so combined have been previously used with other manufacturing devices. — Judgment in *Clinton Wire Cloth Co.* v. *Dominion Fence Co.*, 27 C. L. T. 340, 11 Ex. C. R. 103 (*ante* 7), affirmed. *Dominion Fence Co.* v. *Clinton Wire Cloth Co.*, 39 S. C. R. 535.

Novelty — *New combination of well known devices.*]—Although all the individual parts of a machine may lack novelty, yet if, by a new combination of them, a decided improvement in the working is attained, that is sufficient to support a patent of invention, and the Courts look with favour upon any slight change whereby an improvement is effected, and find invention in it if they can.—The plaintiff's patented grain pickling machine was constructed upon lines similar to those of two other such machines that had been previously patented. In all these the grain was fed into a hopper, on the top of a box containing a revolving worm or screw, and the pickling liquid was in a bog so placed that it would fall into the box containing the worm so as to mix with the grain in its progress to the discharging end of the box; but in the plaintiff's machine the liquid was conveyed through a lead tube into the side of the box containing the worm to a point underneath the opening in the hopper, so that the liquid and the grain ran through together, and much space was saved. The mixing of the grain and the pickling fluid was, owing to the use of the lead tube and the peculiar arrangement of the parts, more thoroughly done by the plaintiff's machine than by either of the others; and, though of the same size as they, its capacity was considerably greater: — *Held*, that there was sufficient novelty and improvement in the plaintiff's machine to support his patent, and that he was entitled to the usual order for an injunction and damages against the defendants for infringing upon it. *Mattice* v. *Brandon Machine Works Co.*, 5 W. L. R. 416, 17 Man. L. R. 105.

Novelty — *Patentability — Pleading — Amendment — Costs.*] — S., the plaintiffs' predecessor in title, obtained Canadian letters patent No. 29566, for certain improvements in wear plates for railway ties, which, according to the specification of the patent, consisted in a flat body-portion, provided at its opposite sides with defending flat-edge flanges, adapted to enter the wooden body of the cross-ties without injuring it, the flanges being relatively parallel and lying in planes approximately at right angles to that of the body-portion. The inventor claimed: (1) a wear plate for railway ties consisting of a body having projecting flanges at its side edges; (2) the combination with a railway rail and supporting cross-tie of a wear-plate consisting of a body having projecting side flanges; the plate being interposed between the rail and tie with its flanges entered into the tie longitudinally or parallel with the grain or fibres of the tie. The substance of the invention was the projecting or defending flanges at the edges of the plate, adapted to enter the wooden body of the cross-tie without injuring it. S. had also obtained an earlier patent, in 1882, which differed from the one above set out only in having one or more flanges or ribs placed under the plate for insertion into the tie, its object being the durability of railway ties. Prior to S.'s improvements, iron or steel plates had been used as tie plates, and it was common knowledge that the insertion of such a plate between an iron or steel rail and a wooden tie would give greater durability to the rail; that reduction of the weight of the plate without loss of strength

could be effected by using channel iron or angle iron or by having the plate made with flanges or ribs; and that if such flanges or ribs were sharpened they could be driven into the tie, and that such flanges or ribs would in that position assist in holding the plate in place:—*Held*, that there was no invention in either of the improvements for which S.'s patents were granted. 2. Costs were withheld because the judgment proceeded upon a defence not raised in the pleadings, but in respect of which the defendants were allowed to amend after the trial. *Servis Railroad Tie Plate Co. of Canada* v. *Hamilton Steel and Iron Co.*, 8 Ex. C. R. 381.

Patentable improvements in machinery — *Anticipation.*]—Canadian patent No. 79,392 for improvements in candy-pulling machines, granted on the 17th February, 1903, declared void for want of invention, having been anticipated by earlier inventions in the United States.—Judgment of the Exchequer Court, 10 Ex. C. R. 378, reversed on this point, *Hildreth* v. *McCormick Manufacturing Co.*, 31 S. C. R. 246.

Patentable improvements in machinery—*New invention—Combination.*]—In order that there may be patentable improvements in a patented machine, a simple change of form or substance is not sufficient, *e.g.*, the substitution of iron for wood to lessen the volume; the element of new invention is necessary, as well, whether in the combination of the organs or in the simplification of the mechanism, etc. *Larose* v. *Aubertin*, 34 Que. S. C. 422.

Pneumatic straw stackers—*Combination — Assignment — Right of assignor to impeach validity of patent — Right to limit construction — Estoppel.*]—The assignor of a patent, sued as an infringer by his assignees, is estopped from saying that the patent is not good; but he is not estopped from shewing what it is good for, *i.e.*, he can shew the state of the art or manufacture at the time of the invention, with a view to limiting the construction of the patent.—2. In an action for infringement against the assignor of a patent for improvements in pneumatic straw stackers, it appeared that an earlier patent assigned by the defendant to the plaintiff excluded everything but the narrowest possible construction of the claims of the second patent. In the latter, speaking generally, the combination was old, each element was old, and no new result was produced; but in respect of one of the elements of the combination there was a change of form that was said to possess some merit. Beyond that there was no substantial difference between the earlier and later patents: —*Held*, that while, as between the plaintiff and any one at liberty to dispute the validity of the later patent; it might be impossible on these facts to sustain the patent — as against the assignor, who was estopped from impeaching it, it must be taken to be good for a combination of which the element mentioned was a feature. *Indiana Manufacturing Co.* v. *Smith*, 26 C. L. T. 458, 10 Ex. C. R. 17.

Prior public user—*Experiments—Dedication to public.*]—The use of an invention by the inventor, or by other persons under his direction, by way of experiment, and in order to bring the invention to perfection, is not such a public use as, under the statute, defeats his right to a patent. But such use of the invention must be experimental, and what is done in that way must be reasonable and necessary and done in good faith for the purpose of perfecting the device or testing the merits of the invention; otherwise, the use in public of the device or invention for a time longer than the statute prescribes, will be a dedication of it to the public; and when that happens the inventor cannot recall the gift. *Cagney* v. *Ottawa Electric Ry. Co.*, 8 Ex. C. R. 432.

Sale of patented article — Condition restricting use — Sale subject to—Evidence —Waiver of condition — Issue of fact — Finding in favour of condition — Injunction against breach of negative contract — Attacking validity of patent — Status of licensees — Novelty — Utility — Onus — Invention — Combination of old elements— Forfeiture for refusal to sell — Failure to establish refusal — Patent Act—"Reasonable price" — Restriction as to part of price. *Copeland-Chatterson Co.* v. *Lyman Bros.*, 11 O. W. R. 70.

Sale of patented article — Condition restricting use — Sale subject to—Evidence —Waiver of condition — Issue of fact — Finding in favour of condition — Injunction —Costs — Attacking validity of patent — Status of licenses — Novelty — Utility— Onus — Invention — Combination of old elements — Forfeiture for refusal to sell— Failure to establish refusal — Patent Act— "Reasonable price" — Restriction as part of price. *Copeland-Chatterson Co.* v. *Lyman Bros. Co.*, 9 O. W. R. 908.

Sale of rights—*Exploitation in common —Transfer by vendor to third person—Action by purchaser to rescind — Material furnished.*]—The vendor of a patented process under condition of its exploitation by the purchaser for their common profit, who agrees to furnish the material necessary for that purpose, and who sues to set aside a transfer made by the purchaser to a third person of his rights, the subject of the sale, is not confined in his demand to the patented process, but has the right to include the material furnished. *Mergenthaler Linotype Co.* v. *Toronto Type Foundry Co.*, 14 Que. K. B. 438.

Scire facias to repeal — *Expiry of foreign patent — "Cause as aforesaid."*]—Upon a proceeding by *scire facias* to set aside a patent for invention because of an alleged expiry of a foreign patent under the provisions of s. 8 of the Patent Act:—*Held*, that there was so much doubt as to that being one of the clauses included in the expression "for cause as aforesaid" in clause 2 of s. 34 of the Act, that the action should be dismissed. *Regina ex rel. American Stoker Co.* v. *General Engineering Co. of Ontario*, 20 C. L. T. 53, 6 Ex. C. R. 328.

Solicitor — *Professional fees—Quantum.*] —Action by a patent solicitor to recover professional fees. Following fees allowed: two consultations, $20; preparation of case for trial, $50; two days' attendance at trial, $100. He was not called as a witness, the

trial Judge holding it would be unnecessary to call him. *Riches* v. *Business Systems* (1909), 14 O. W. R. 377.

Steadying device in cream separators — *Improvement — Narrow construction.*]—The invention in question consisted in the substitution of an improved device for one formerly in use as part of a machine, in this case a tubular cream separator:—*Held*, that the patent must be given a narrow construction, and be limited to a device substantially in the form described in this patent and specification. *Sharples* v. *National Manufacturing Co.*, 25 C. L. T. 146.

Steadying device in cream separators — *Improvement — Narrow construction — Writ of sequestration.*]—The invention in question consisted in the substitution of an improved device for one formerly in use as part of a machine (in this case a tubular cream separator):—*Held*, that the patent must be given a narrow construction and be limited to a device substantially in the form described in the patent and specification.—The plaintiffs after judgment applied for a writ of sequestration to enforce compliance with an injunction restraining further infringement by the defendants of the patent. The writ was refused. *Sharples* v. *National Manufacturing Co.*, 25 C. L. T. 146, 9 Ex. C. R. 469.

Storage elevators — Improvements — Anticipation — Prior use and sale—Canadian and foreign patent law discussed — *Smith* v. *Goldie* discussed and explained. *Barnett, McQueen Co.* v. *Can. Stewart Co.* (Ex. C. 1910), 9 E. L. R. 46.

Validity — *Infringement — Onus — Improvements in machinery — Different and useful results — Description in patent — False representations.*]—Where in an action for infringement of a patent for invention the validity of the patent is attacked upon the ground that the invention is not patentable, the onus of proving that it is, is upon the patentee.—The application of new powers to a new machine is only patentable so far as they constitute an improvement or produce a useful result, and different from that obtained by the primitive machine.—Not only the application of new powers, but the improvement, the advantages, or the perfecting which result from them, must be set out in the patent or the description which forms part of it.—A patent for invention obtained by means of false representations is void. *Lair* v. *Authier*, 31 Que. S. C. 112.

Validity — *Presumption—Onus—"Composition of matter"—R. S. C. c. 69, s. 7—Novelty—Combination—Novel process.*]—The issue of a patent of invention raises a presumption in favour of the patentee that the article is a valid subject-matter of a patent. The onus of proof is on the party who attacks the patent to establish the contrary.—The words "composition of matter" in s. 7 of the Patent Act (R. S. C. c. 69) include all composite articles, whether they be the result of chemical union or of mechanical mixture, and the latter may therefore be the subject-matter of a patent.—A novel and useful combination of old and well known things may be the subject-matter of a patent.—Any novel process for overcoming a difficulty in the way of applying an old process may be the subject-matter of a patent. *Electric Fireproofing Co.* v. *Electric Fireproofing Co. of Canada*, 31 Que. S. C. 34.

Wearing apparel—*Infringement — Patentability of device.*]—Plaintiff company applied for and obtained a patent for an improvement in the manufacture of caps, the object, as stated, being to provide a cap containing on its interior an efficient and comfortable covering for the ears, which, when turned outward or downward, could be used for that purpose without in any way changing the proper fit of the cap. The specification shewed that the object was attained by the attachment of an elastic band to the interior of the cap as illustrated in accompanying drawings. There being nothing in the specifications to indicate that there was any peculiarity of shape in connection with the band, which would have the effect of improving upon ear coverings already in use in caps, or that would indicate to a maker of caps what peculiarity of shape he must avoid so as not to infringe upon plaintiff's patent, and the attachment of a band of flexible material to caps to serve as a protection for the ears being an old and well known device:—*Held*, setting aside the judgment of the trial Judge in plaintiff's favour, that the device claimed to have been infringed was not one of a patentable character. *Walmsley* v. *Eastern Hat & Cap Mfg. Co.*, 43 N. S. R. 452.

See CONTRACT—COURTS — DISCOVERY — HIRE OF CHATTELS—PARTICULARS.

PATENT FOR LAND.

See CROWN — DOMINION LANDS ACT—FISHERIES—TRUSTS AND TRUSTEES—VENDOR AND PURCHASER—WATER AND WATERCOURSES—WAY.

PATHMASTER.

See WAY.

PAUPER.

Leave of appeal in forma pauperis.]—While no precise or definite rule can be laid down as to the proof to be adduced in support of applications for leave to proceed before the Court of King's Bench *in formâ pauperis*, the Court will be more exacting in a case like the present, where the appellant, claiming a share of an estate, is appealing from a unanimous adverse judgment of the Court of Review, and is, moreover, still capable of earning a livelihood, than it would be in an action for an alimentary allowance, or for damages by a person incapacitated for work by an accident, and particularly where the judgment appealed from has been in favour of the party making the application. *Boucher* v. *Morrison*, 11 Que. K. B. 129.

Leave to sue as—*Requisites—Frivolous action.*]—Permission to proceed *in formâ pauperis* ought not to be refused by a Judge unless he is convinced that the party applying has the necessary means for payment of disbursements, or unless her demand is plainly frivolous and vexatious.—A demand is not necessarily frivolous and vexatious because the party has signed a writing releasing it, where he declares on oath that he was induced to do so by false representations. *Paquette* v. *Pyke*, 2 Que. P. R. 364.

Maintenance—*Liability of overseers — "Expenses necessarily incurred" — Notice.*]—The defendants declined to pay expenses incurred by the plaintiff in connection with the support and maintenance of C. and her infant child, paupers chargeable to the district, or the ground that the paupers in question had been placed with D. by the overseers, and that they were removed by the plaintiff from the house where they had been placed to his own house, without the knowledge and consent of the overseers:—*Held*, assuming this to be the case, and that the plaintiff had acted improperly in connection with the removal of the paupers, he was under no obligation to support them longer than he chose to do; that the paupers remained chargeable to the district; and that the defendants, after notice from the plaintiff, must remove the paupers, and provide for them, or pay all charges thereafter necessarily incurred for their support. The care of C., while ill and confined to bed, charges for medical attendance, and expenses of burial, were all necessary expenses, for which the plaintiff was entitled to recover. Medical attendance was an expense necessarily incurred, for which the plaintiff was entitled to recover, although he had not actually paid the bill, such attendance having been furnished at the plaintiff's request, and on his responsibility. The notice given by the plaintiff to the overseers to provide for C., must be held to apply to and include her infant child, who, to the defendants' knowledge, was living with her, although the child was not specially mentioned in the notice. *Naas* v. *Overseers of the Poor for District No. 3*, 35 N. S. Reps. 316.

Relief — *Expenses necessarily incurred—Proceedings to recover—Examination — Notice—Pleading—Reduction of amount.*]—In an action by the overseers of the poor district of one county against the treasurer of another county, to recover expenses incurred in and about the removal of a pauper, pursuant to an order for removal, and of the relief, on examination, of the pauper, previous to such removal, the order for removal was impeached, on the ground that it did not shew, on its face, that the pauper was examined previous to such removal:—*Held*, following *Rex* v. *Tavistock*, 3 D. & R. 431, that this was unnecessary. The defendant, having had notice of the amount claimed, should have pleaded, if he considered the amount excessive. A statement of claim was good which set out the following particulars, viz., the application to the plaintiffs for relief, that the pauper had no settlement there; examination of the pauper under oath; transmission to the defendant of copies of the depositions; neglect to remove; the making of the order for removal; the amount of expenses necessarily incurred; demand for payment, and refusal. Nevertheless, as the amount claimed appeared to be excessive, the order for judgment for the plaintiffs should be conditioned upon an undertaking on the part of the plaintiffs to reduce the amount. *Cumberland Overseers of the Poor* v. *McDonald*, 35 N. S. Reps. 394.

Relief and maintenance — *Place of settlement—Statute changing boundaries of districts—Uncertainty in description—Right of action.*]—By an Act defining the boundaries of polling districts in the county of Antigonish, the division line between district No. 1 (defendants) and district No. 4, was changed in such a way as to take an area from the former and transfer it to the latter district, but there was an *hiatus* in the description contained in the Act which left it uncertain whether a farm upon which a pauper, to whom the plaintiffs afforded relief and maintenance, had a settlement, and which, prior to the Act, was situated in the defendant district, had been transferred or not.—In an action to recover for the relief and maintenance afforded the Court was equally divided:—*Held*, *per* Townshend and Fraser, JJ., affirming the judgment appealed from, that the pauper having acquired a settlement in the defendant district would retain it until she gained another in some way pointed out by the statute; that the Act relied upon by the defendants was ineffective for this purpose, and the defect could only be remedied by further legislation. —*Per* Graham, E.J., and Russell, J., that, as the farm upon which the pauper had her settlement could only be brought within the defendant district by applying the description in the Act in such a way as to divide the farm diagonally into two parts, and make the owner pay taxes on each part in a different district, such an intention on the part of the legislature would not be assumed; also that while, as a matter of construction, legislation annexing part of one polling district to another, for the convenience of voters, will not effect a similar transfer in respect to poor districts, the question in this case was controlled by an admission, made for the purposes of the trial, that the polling districts and poor districts were co-terminous, and that, in such case the area being transferred, the burden of supporting the poor settled in the portion of the district from which the area was taken, would be transferred with it.—*Per* Townshend, J. (other members of the Court expressing no opinion on the point), that since R. S. N. S. 1900 c. 50 the only right of action for necessary expenses of removal of a pauper, and for relief prior to such removal, is against the treasurer of the municipality in which such pauper has a settlement. *Town of Antigonish* v. *Arisaig Overseers of the Poor*, 38 N. S. R. 112.

Settlement — *Medical services rendered by direction of one overseer—Liability of parish—Jury—Determination of status of person as pauper — New trial.*] — A physician who renders professional services to an indigent person injured while a resident of the parish of S., by the direction of P., one of the overseers of the parish, can maintain an action for such services against the overseers of the parish in their corporate name; *per* Hanington, Landry, Barker, and McLeod, JJ.—*Per* Tuck, C.J., that the overseers are not liable until notice and request is made

pursuant to s. 12 of the Act relating to the support of the poor (C. S. N. B. 1903 c. 179), and, as the notice (if any) in this case was not given to the overseers, but to P., one of them, there was no liability.—The question whether a person relieved is a pauper or not is a question of fact for the jury, and, if not passed upon by them, a new trial will be granted to have the question determined. *Irvine* v. *Stanley Overseers*, 2 E. L. R. 5, 37 N. B. R. 572.

Settlement — Medical services rendered by direction of one overseer—Overseers liable in their corporate capacity. *Irvine* v. *Stanley Overseers*, 2 E. L. R. 5.

See ALIMENTARY ALLOWANCE — ATTACHMENT OF DEBTS—COSTS—DEED—GUARDIAN —HUSBAND AND WIFE—SOLICITOR.

PAWN.

See PLEDGE.

PAWNBROKERS ACT.

See PLEDGE.

PAYMENT.

1. GENERALLY, 3351.
2. INTO COURT, 3353.
3. OUT OF COURT, 3354.

1. GENERALLY.

Action to recover what has been paid in error will lie when payment has been made upon the representations made by a pretended creditor of the existence of a civil debt, when, in fact, there was neither an existing civil or natural obligation at the date of the payment in question. *Daoust* v. *Boileau* (1910), 17 R. de J. 8.

Appropriation of payments — *Commercial accounts — Promissory note—Guaranty.*]—The rules governing appropriation of payments provided by the Civil Code are not applicable to commercial accounts current. Therefore, a third person who has signed a promissory note for accommodation, the amount of which forms part of a debt arising out of an account current, is held bound as guarantor of the payment of a definite sum up to the amount of the note, and it is not open to him to allege that the first payments following the maturity of the note have extinguished a part of the debt. *Rousseau* v. *Marcotte*, 30 Que. S. C. 175.

Appropriation of payments — *Illegal contract.*]—When a debtor pays money on account to his creditor, and makes no appropriation, the creditor has the right of appropriation and may exercise the right up to the last moment by action or otherwise; he may even appropriate in satisfaction of a debt for which no action would lie by reason of the illegality of the transaction out of which the debt originated. *Mayberry* v. *Hunt*, 34 N. B. Reps. 628.

Appropriation of payments — Mortgage — Principal or interest — Variation. *Deacon* v. *Webb*, 2 O. W. R. 110.

Appropriation of payments — *Payments on account—Several debts.*]—The debtor who owes two or more debts to the same person, may pay in full any one of them he chooses and so extinguish it, but he cannot compel his creditor to impute on any one of them specially, a payment that is only in part satisfaction of it. The ordinary rules as to the imputation of payments take effect in such a case. *Kent* v. *Brosseau*, 30 Que. S. C. 443.

Appropriation of payments—Statute-barred debt — Debtor's intention not communicated — Creditor's right to apply. *Charles* v. *Stewart*, 11 O. W. R. 421.

Cheque—*Delivery to agent of creditor—Revocation of authority.*]—A dispute having arisen in connection with the purchase by the defendant from the plaintiff of a cargo of potatoes and turnips, the defendant set up that a compromise had been arranged, and that, in pursuance of it, he had paid the amount agreed upon:—*Held*, that the delivery of a cheque by the defendant to a bank, the agent of the plaintiff, and the entry of the amount in the defendant's account with the bank, did not constitute payment, when, before the bank credited the amount to its principal, or advised him of the fact that it had been received, the defendant recalled the authority and had himself credited with the amount of the cheque. *Neilly* v. *Bearns*, 40 N. S. R. 102.

Motion for leave—Interest on mortgage—Claimed by two persons—Doubt as to whom mortgagor should pay—Order granted. *Trebilcock* v. *Trebilcock* (1910), 17 O. W. R. 509, 2 O. W. N. 303.

No action lies to recover amount of payment made voluntarily without error of law or fact. Payment is made voluntarily though the amount is claimed under an executory title (i.e., municipal taxes), so long as no execution has issued. *Scott* v. *Hull* (1910), 39 Que. S. C. 207.

Payment into Court—*Condition of payment out—Counterclaim—Costs — Trial Practice.*]—In an action for the price of land under an agreement for sale, or in the alternative for possession, the defendant filed a counterclaim for specific performance, and paid into Court the amount of the purchase money and interest, demanding therewith a deed with covenants of warranty of title. The plaintiff proceeded with his action, and recovered judgment at the trial for the amount claimed and costs, including costs of the counterclaim, the decree directing him to give the deed demanded by the defendant as soon as the costs were paid. The verdict was affirmed by the Court *en banc*; 33 N. S. Reps. 334:—*Held*, that, as the defendant had succeeded on his counterclaim, he should not have been ordered to pay the costs before receiving his deed; and the decree was varied

by a direction that he was entitled to his deed at once with costs of appeal to the Court below and to the Supreme Court of Canada against the plaintiff. Parties to pay their own costs in Court of first instance:—*Held, per* Gwynne, J., that the defendant should have all costs subsequent to the payment into Court. *Darrow* v. *Millard*, 21 C. L. T. 255, 31 S. C. R. 196.

Proof of—*Possession by debtor of documents evidencing debt—Voluntary return — Presumption—Rebuttal — Oral testimony — Admissibility — Commercial matter.*]—It is not sufficient proof of discharge that the debtor has in his possession the documents constituting the evidence of his debt; it must be shewn, in addition, that he has acquired possession of them by a voluntary handing-over: Art. 1181, C. C.—2. The presumption of a voluntary handing-over arising from the possession of the documents may be rebutted by proof to the contrary, which may be given by oral testimony in a commercial matter. *Lewis Bros. Limited* v. *Moore*, 34 Que. S. C. 109.

Recovery back — *Illegal license fee — Municipal corporations—By-law.*]—A municipal corporation passed a by-law providing that (subject to certain exceptions) no butcher should, without being duly licensed, sell any fresh meat in any part of the municipality. The fee was fixed at $10, and the by-law provided that a penalty of not exceeding $50 might be imposed upon summary prosecution. The plaintiff, after some demur, took out licenses for two years, but in the third year refused to do so, and upon appeal by him from his summary conviction for a breach of the by-law, the by-law was held to be invalid, and the conviction was quashed:—*Held*, in an action brought by him to recover back the fees paid by him, and by other butchers whose rights had been assigned to him, that the fees having been paid under a claim of right, without fraud or imposition, and without actual interference with the business of the butchers, or compulsion exercised upon them, could not be recovered back. *Cushen* v. *City of Hamilton*, 22 C. L. T. 282, 4 O. L. R. 265, 1 O. W. R. 441.

See Bills of Exchange and Promissory Notes—Bond — Company — Contract — Guaranty—Illegal Distress—Mechanics' Liens—Mortgage — Parent and Child—Partnership — Principal and Surety — Ship—Vendor and Purchaser.

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2. Into Court.

Funds in hands of trustee de son tort—Constructive or express trustee—Trustee Relief Act—Infant *cestui que trust*—Jurisdiction of Court to order infant's money into Court on summary application — Contract between original trustee and transferee of fund. *Re Preston*, 8 O. W. R. 828.

Pleading — *Defence of payment in — Money paid in for another purpose.*]—Where an order for summary judgment in favour of the plaintiff is set aside upon payment into Court by the defendant of a specified amount as part security for the plaintiff's claim, the defendant cannot make the money available for the purpose of a plea of payment in, in satisfaction of the plaintiff's claim. *Mendels* v. *Gibson*, 7 O. L. R. 611, 2 O. W. R. 857, 3 O. W. R. 531, 4 O. W. R. 336, 5 O. W. R. 225.

Pleading — *Defence of tender and payment in—Motion by plaintiff for payment out—Security for costs—Motion to rescind order after compliance with.*]—The plaintiffs, resident in the United States, in compliance with an order for security for costs, paid $200 into Court. The defendants in their defence set up tender before action and paid into Court $189.52, in full of plaintiffs' claim of $353.89 and costs. On an application by the plaintiffs for an order either for payment out of the money paid in by the defendants or for an order rescinding the order for security for costs and repayment of the $200 paid in by the plaintiffs:—*Held*, following *Griffiths* v. *School Board of Ystradyfodwg*, 24 Q. B. D. 307, that if the plaintiffs elected to take out the money paid in with the plea of tenders, they must take it out in full of their claim, and the defendants would be entitled to their costs:—*Held*, also, that the order for security for costs having been regularly issued and acted on, it was too late to set it aside; and the motion was dismissed. *American Aristotype Co.* v. *Eakins*, 24 C. L. T. 133, 7 O. L. R. 127, 3 O. W. R. 256, 536.

Tender — *Payment out—Acceptance in full.*]—Where a tender is made by the defendant of payment in full of the claim of the plaintiff, the moneys deposited by the defendant with his defence cannot be withdrawn by the plaintiff unless he accepts them unreservedly. *Marazza* v. *O'Brien*, 8 Que. P. R. 427.

Trustee Relief Act—Moneys of intestate inmate of county house of refuge — Moneys in hands of county treasurer—Claim under assignment—Representation of estate of intestate. *Re Garrison*, 12 O. W. R. 282.

See Attachment of Debts—Bankruptcy and Insolvency—Company—Contract — Costs—Execution—Infant — Insurance —Judgment — Landlord and Tenant — Money in Court—Mortgage—Physicians and Surgeons—Sale of Goods—Solicitor —Vendor and Purchaser.

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3. Out of Court.

Dismissal of action — *Money paid in with defence.*]—The defendant has a right, after a judgment dismissing *in toto* the action against him, to withdraw the amount deposited by him in the course of the action, and not withdrawn by the plaintiff. *Amiot* v. *Marsan dit Lapierre*, 6 Que. P. R. 461.

Money paid in as security for costs of appeal—*Surplus—Execution creditor — Stop order—Agreement with solicitors.*] — The defendants, having in the hands of the sheriff an unsatisfied execution against the plaintiff for the costs of the action, and having obtained a stop order against the sum of $200 paid into Court by the plaintiff as security for the costs of an appeal to the Court of Appeal, which had been dismissed

with costs, were held entitled to payment of the surplus of the $200, after satisfying their costs of appeal, to be applied on their costs of the action, an agreement alleged by the plaintiff between him and his solicitors, that the surplus should belong to them to be applied upon their costs, not having been satisfactorily established. *Evans* v. *Huntsville*, 24 C. L. T. 297, 7 O. L. R. 540, 3 O. W. R. 423.

Money paid in by defendant in satisfaction of part of cause of action —*Acceptance—Condition — Rule 530—Practice.*]—When a defendant, under Rule 530 of the King's Bench Act, pays money into Court in satisfaction of a specified part of the plaintiff's cause of action, he cannot by his pleading impose a condition on the plaintiff getting the money out of Court under Rule 532, "in satisfaction of the very cause of action for which it was paid in," that the defendant's costs of action should be paid out of the money, and the plaintiff will be entitled to an order for payment of the money out free from such condition. *Wheeler* v. *United Telephone Co.*, 13 Q. B. D. 597, followed. *Canada Elevator Co.* v. *Kaminski*, 7 W. L. R. 129, 17 Man. L. R. 298.

Money paid in by defendant with defence — Rule 133—Indebtedness not denied—Application for payment out to plaintiff—Refusal—Discretion—Circumstances of new territory. *McCann* v. *Dolan* (Y.T.), 5 W. L. R. 197.

Money paid in by defendants to represent subject matter of action—*Appeal to Supreme Court—Supreme Court Act, s. 69—Abandonment of appeal.*] — Appeal to Supreme Court of Canada not having been taken within required sixty days, defendants moved for payment out of Court; order made, four months having elapsed since judgment pronounced and the possibility that time for appealing might be extended is no ground for refusing to direct payment out. *Huggard* v. *Ontario and Saskatchewan Land Corporation*, 9 W. L. R. 432.

Proof of age of applicant—*Majority.*]—By decree of the 18th September, 1878, in a partition action, it was directed that the share of an infant defendant, J. F. M., should remain in Court, and the interest thereon should be paid to his father, a co-defendant, as tenant by the curtesy. On the 24th September, 1900, J. F. M. and his father moved for payment out of J. F. M.'s share, upon the father's affidavit identifying the infant defendant as his son, J. F. M., and stating that J. F. M. was of age, having reached the age of twenty-one years on the 5th February, 1899, and that the father consented to payment out and released all his rights in the fund:—*Held*, that the proof of the age was not sufficient, the father not having stated his reasons for believing that the son was of age or referred to any family or other records in support of his statement, and the fact that the son was named as a party in the decree of the 18th September, 1878, was not conclusive proof that he was now of age. *Tolton* v. *MacGregor*, 20 C. L. T. 391.

See APPEAL—ATTACHMENT OF DEBTS — COMPANY—CONTRACT — COSTS — DISMISSAL OF ACTION—EXECUTION—INFANT — INSURANCE—JUDGMENT—LIMITATION OF ACTIONS—MONEY IN COURT—PLEADING—RAILWAY—SOLICITOR—WILL.

PAWNBROKER.

Pledge — *Duties of the depositary—Duty to permit deposit to be seen, or to give a copy under his private seal of the thing held as a deposit—Action, summons as witness.*]—No one, unless he is a public official, can be compelled to permit a deposit in his possession to be seen, or a copy of a writing under a private seal of which he is the legal depositary. This power can be exercised only by course of law, and summoning the depositary as witness under *subpœna duces tecum*. *Massé* v. *Trudel*, 1909, 36 Que. S. C. 501.

PEACE OFFICER.

See CONTEMPT OF COURT—NOTICE OF ACTION.

PEDLARS.

See HAWKERS AND PEDLARS — MUNICIPAL CORPORATIONS.

PEDIGREE.

See EVIDENCE.

PENALTY.

Action — *Non-registration of declaration—Agent of insurance company—Registration on day of service of writ—Institution of action.*] — The institution of an action dates from the service of the writ, and not from the issue of the writ, and hence, in a *qui tam* action against the agent of an insurance company to recover a penalty for failure to register the declaration required by Art. 4754, R. S. Q., a certificate shewing that the declaration had not been registered within sixty days nor up to the date of issue of the writ, is insufficient to establish default, where it appears that the writ was not served until four days after its issue and that the declaration was duly made and registered on the day of such service. If the writ was served before registration, the burden of proving that fact was on the plaintiff, which proof he had not made. *Inglis* v. *Aitken*, 23 Que. S. C. 528.

Action—*Parties — Association—Crown.*]—A suit under s. 12 of 62 V. c. 90 (Q.), which makes liable to a penalty of not more than $10 every person who, without a license of the barbers' association of the province of Quebec, shaves or trims the beard or cuts the hair of any person for payment or promise of payment, cannot be begun in the name of the association, but must be in the name of the Crown or of some person suing as well in the name of the Crown as in his own name. *Barbers' Association of the Province of Quebec* v. *Blanchard*, 21 Que. S. C. 201.

Action against company — *Non-registration of declaration—Prescription — Computation of time.*]—A penal action by a private person against a company who have neglected to register the declaration required by law, must be begun within a year, counting from the expiration of 60 days from the commencement of the operations and affairs of the company; if not, a plea of prescription will be maintained; for there is not a fresh offence for each day that the company neglected to register such declaration. *Craysdill* v. *Anglo-American Telegraph Co.*, 10 Que. P. R. 37.

Action for — *Deposit—Order nunc pro tunc—Terms.*]—Where a plaintiff has neglected to make the deposit of $10 required in order to bring a suit for a penalty under Art. 753, C. M., against a municipal corporation within the limits of whose territory he does not reside, the Court, after contestation and hearing on the merits, will permit the plaintiff to make such deposit, upon the terms of his paying the costs of the motion to obtain such permission, and the defendant will be at liberty to plead *de novo* after notice that the deposit has been made. *Patterson* v. *Corporation of Nelson*, 4 Que. P. R. 21.

Action for — *Forum — Statute — Superior Court — Jurisdiction—Evidence—Order of Board of Health—Proof of—Contravention by municipal corporation.*]—A statute with penal clauses which declares that a suit for the recovery of the penalties prescribed may be begun before a named court, is in this respect permissive only, and does not take away the jurisdiction of the ordinary courts. Therefore, a penalty recoverable by virtue of such a statute in the Circuit Court is equally recoverable in the Superior Court, if it exceeds $100 or $200.—In a suit to recover a penalty for contravention of a statute resulting from the neglect of a municipal corporation to conform to an order of the board of health, it is sufficient to produce a copy, certified by the secretary of the board, of the notice served upon the corporation containing the order issued. It is not necessary to add thereto a copy of the resolution by which the board decided to issue it. *St. Denis* v. *Benoit*, 15 Que. K. B. 278.

Action for — *Statute—Parties.*]—Where a special statute, or the Consolidated Statutes of Quebec, or the Municipal Code, authorizes any one to institute an action for a penalty in his own name, he may do so, although the penalty for which he sues is payable half to himself and half to the Crown. *Poirier* v. *Boursier*, 7 Que. P. R. 10.

Action for—*Violation of Public Health Act—Ratepayer — Qui tam action — Affidavit.*]—A plaintiff who sues to recover penalties for violation of the Public Health Act, is not subject to have his action dismissed upon exception to the form for having declared that he sues as well in his own name as in the name of the Provincial Board of Health.—An affidavit of the plaintiff alone is sufficient to sustain such an action.—Every ratepayer has a sufficient interest to claim penalties for violation of the Provincial Health Act. *Benoit* v. *St. Denis*, 7 Que. P. R. 424.

Action for penalty—*Notice to Attorney-General—Failure to give—Effect of—Stay of proceedings—Exception to form.*]—The effect of non-observance of the statute which prescribes that in a penal action notice shall be given to the Attorney-General, and that a return of such service shall be made with the return of service of the writ of summons, is that all further proceedings are suspended. Such default of service has only the effect of delaying the proceedings and is not a ground for an exception to the form. *Boucher* v. *Lavallée*, 10 Que. P. R. 85.

Affidavit—*Commissioner — Form.*]—The affidavit required for the institution of an action for a penalty under the provisions of the charter of the city of Montreal, may be made before a commissioner of the Superior Court, as well as before a justice of the peace. 2. The defendant suffers no prejudice in fact if the affidavit of the sureties is not in the first person. *Lapointe* v. *Berthiaume*, 6 Que. P. R. 217.

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

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

Commissioner of schools — *Contract with corporation.*]—The defendant, a commissioner of schools for his parish, had undertaken to warm the school of his precinct, in consideration of $10 a year:—*Held*, that this trivial contract was not a violation of the spirit of the law, and therefore an action for a penalty brought against him should be dismissed. *Castin* v. *Lachance*, 19 Que. S. C. 144.

Company — Extra-provincial corporation —Neglect to furnish statement required by R. S. N. S. 1900 c. 127, s. 18. *Porter* v. *Gold Eagle Mining Co.*, 40 N. S. R. 625.

Compounding action for—*Promissory note for costs—Failure of consideration.*]—The plaintiffs instituted an action *qui tam* for a penalty, and, further, asking for the confiscation of certain pictures. He also lodged a list for a writ in an action to recover damages. The penal action was subsequently discontinued, and the plaintiff received from the defendant two promissory notes, in the consideration of which the costs

of the action *qui tam* were included. In an action on the promissory notes:—*Held*, that the discontinuance or suspension or compounding of a popular or *qui tam* action, without the consent of the Crown or of the Court, is prohibited by law, and such prohibition applies from the amount of the issuance of the writ in such action. 2. The fact that the plaintiff prayed for the confiscation of the pictures, in addition to a condemnation for penalties in favour of the Crown and himself, did not make it less impossible for him to discontinue or compound the action so far as the recovery of penalties shareable with the Crown was concerned. 3. A promissory note given by the defendant in settlement of such action is null and void, but where the settlement of the penal action formed only part of the consideration, and the settlement of the damages claimed by the plaintiff in the other action was the consideration for the rest of the amount, the note was held good so far as regarded the settlement of damages. *Lapres* v. *Busse*, 19 Que. S. C. 275.

Fishing license.] — Inasmuch as provision is made by Art. 2249 R. S. Q., for the granting of leases and the issuing of licenses to fish, only where the exclusive right to fish does not exist, it would constitute a defence sufficient in law, to an action against a non-resident for recovery of penalties for having fished without a license, to plead that being owner of a tract of land in this province, which bordered upon a non-navigable river, his property extended to the middle line of the river and that he had fished inside such line on his own property, and not in water in which the exclusive right to fish did not exist. *Belisle & Mowat* (1910), 16 R. de J. 375.

Informer—*Right to sue — Company — "Limited."*]—Any person has a right to bring an action to recover the penalty provided by s. 79 of R. S. C. c. 119, for neglecting to have the word "limited" printed after the name of the company on the outside of the company's office. *Lamalice* v. *Electric Printing Co.*, 4 Que. P. R. 266.

Joinder of causes of action—*Several penalties — Statute — Method of trial.*]—More than one penalty may be sued for in the same action, provided it is not forbidden by statute, and provided the same method of trial is applicable to each. *Leduc* v. *Barthe*, *Leduc* v. *Chronicle Printing Co.*, 32 Que. S. C. 525.

Municipal Clauses Act — *Alderman—Contract with corporation—Debt due to corporation — Compromise — Disqualification — Bona fides — Supreme Court Act — Discretion — Relief.*] — The defendant, having a judgment against him recovered by a city corporation for taxes in a test case, entered into an understanding with the corporation whereby, in consideration of a promise to pay, and an extension of time for payment, a release of one-half the amount of such taxes was given. He was afterwards nominated and elected an alderman:—*Held*, that this agreement came within the disqualification clause of the Municipal Clauses Act.—*Held*, further, that, as in this case the defendant had acted *bona fide*, the Court would exercise its discretion under the Supreme Court Act, to relieve against the penalty. *Mason* v. *Weston*, 14 B. C. R. 22, 9 W. L. R. 113.

Municipal corporation—*Action by informer — Crown — Writ of summons — Necessary averments.*]—A person of full age who brings against a municipal corporation an action to recover the penalty provided by Art. 793 of the Municipal Code, suing in his own name, must state in the writ of summons that he is suing for the Crown, to whom the penalty belongs; he must claim the penalty, not for whomsoever has a right to it, but for the Crown by name. *Duval* v. *Corp. of St. Alexandre*, 24 Que. S. C. 271.

Municipal corporation—*Right of action against — Resident of municipality.*]—By virtue of s. 335 of 54 V. c. 86, a statute incorporating the town of Drummondville, any adult person residing in the said town may begin in his own name a penal action such as is mentioned in s. 330 of that Act, or such an action as is authorised by s. 4857, R. S. Que., and Art. 1046, C. M. *Poirier* v. *Cusson*, 21 Que. S. C. 407.

Newspaper—*R. S. Q. Arts. 2924, 2934.*]—To incur the penalties prescribed by Arts. 2924 and 2934, R. S. Q., it is sufficient, when the provisions of the law have not been followed, that the publication shall have the form, appearance, and character of a newspaper. *Leduc* v. *Barthe*, *Leduc* v. *Chronicle Printing Co.*, 32 Que. S. C. 525.

Non-registration of partnership — *Foreign partners — Factor — Firm name.*]—In an action for a penalty brought against C., doing business as C. & Son, for failure to register his business as required by law, it was proved that C. was not carrying on business alone, but was in partnership with another person, and that both partners resided in a foreign country:—*Held*, that laws imposing penalties cannot be extended beyond their clear provisions, and that the court cannot extend the scope of the plaintiff's allegation, viz., that the defendant was carrying on business alone under a certain firm name, so as to include the case of the defendant doing business with another person under such name without legal registration. 2. The law requiring registration of partnerships does not apply to the case where a business is carried on by a factor in the Province of Quebec in behalf of persons none of whom are domiciled or resident in the province of Quebec. *Ridgeway* v. *Collier*, 21 Que. S. C. 473.

Notice to Attorney-General — *Violation of a federal statute—Dilatory exception.*]—In an action for recovery of a penalty, even for the violation of a Dominion statute, a notice must be served upon the Attorney-General; otherwise the delays for pleading shall only begin to run from the date the defendant is notified that such notice has been served on Attorney-General and that return of said service has been filed. *Lamontagne* v. *Heney & Co.*, 11 Que. P. R. 22.

Nova Scotia Elections Act — *Action to recover penalty — Pleading — Particulars — Insufficiency — Construction of penal statutes.*]—The plaintiff sought to recover a penalty of $400 from the defendant in respect of an offence against the provisions of the Nova Scotia Elections Act, the ground alleged being a promise by the defendant of valuable consideration to a male person entitled to vote at an election in order to induce such person to vote at such election, etc. In response to a demand by the defendant for particulars of the name, residence, and occupation of the person referred to, the place where the offence was committed, and the date of the making of the promise and the giving of the valuable consideration alleged, the plaintiff furnished particulars charging the defendant with having promised valuable consideration to one or other of twelve persons named:—*Held*, that the particulars given were insufficient.—*Semble*, that where the seat is attacked, the policy of the law is to favour and promote a thorough investigation into the circumstances attending the election, but where that course is not adopted, and particular offences against the law are singled out for punishment, the general principles adopted in the interpretation and application of all criminal and penal statutes must be applied. *Patriquin* v. *Covert*, 42 N. S. R. 66.

Nova Scotia Towns Incorporation Act—*Qui tam action—Right of informer to bring — Stay — Statute of limitations — Interpretation Act.*]—A *qui tam* action for the recovery of the penalties prescribed by the Towns Incorporation Act, R. S. N. S. c. 71, in the case of a person who acts as mayor after becoming disqualified. Section 56, s.-s. 3, of the Act prescribes the penalty, namely, $20 for each time he so acts. Section 238 provides that "all actions and prosecutions for penalties for breach of any of the provisions of this chapter may, when not otherwise therein provided, be prosecuted by the town or any officer thereof, or any person who prosecutes therefor, and shall be begun by information laid before the stipendiary magistrate of the town." Section 238, s.-s. 2, gives the stipendiary magistrate jurisdiction to enforce such penalties, and s.-s. 3 makes the Summary Convictions Act applicable. Section 242 states that all penalties collected shall form part of the revenue of the town. The plaintiff claimed the right to bring the action as a common informer under s. 23, s.-s. 45, of the Interpretation Act, R. S. N. S. c. 1. The defendant took out a summons to stay the action:—*Held*, that the action must be stayed. The penalty is not given to a person aggrieved. But for the provisions in the Interpretation Act, the Crown alone could sue thereunder: *Bradlaugh* v. *Clark*, 8 App. Cas. 354. But the Interpretation Act does not allow the action to be maintained. Another mode of enforcing the penalty is provided in the Towns Incorporation Act, and if that does not apply, the penalty can be recovered under the Summary Convictions Act. *McDonald* v. *Robertson*, 22 C. L. T. 450.

Ontario Election Act — *Bribery—Recovery by action — Agent at poll — Certificate — Neglect to take oath — Reduction of penalty.*]—An action will not lie under s. 195 of the Ontario Election Act, R. S. O. 1897 c. 9, for the pecuniary penalty for the offence of bribery prescribed by s. 159, s.-s. 2, as amended by 63 V. c. 4, s. 21, until after conviction. The defendant was found guilty of bribery, on the evidence, and the claim for a penalty was dismissed without costs. The defendant was held liable to a penalty of $400 under s. 94, s.-s. 5, of the Act, for voting at a polling place where he was acting as an agent of a candidate, under a certificate of the returning officer, without having taken the oath of qualification, but the penalty was reduced to $40, as in the preceding case. *Carey* v. *Smith*, 23 C. L. T. 94, 5 O. L. R. 260, 2 O. W. R. 16.

Ontario Election Act — *Bribery—Recovery of penalty by action.*]—The effect of the amendment of s. 159 (2) of R. S. O. 1897 c. 9, made by 63 V. c. 4 (O.), by which persons committing various forms of bribery enumerated in the section (a to e inclusive) become on conviction liable to a fine of $200 and imprisonment, is to take the penalties imposed by the amended clause out of the category of those which may be recovered by action under s. 195. Only one proceeding is contemplated by the amended section, and that is one in which both the penalty may be recovered and the imprisonment imposed. Both must follow on the conviction in one and the same proceeding taken to enforce them. Imprisonment cannot be adjudged in an action under s. 195, which intends a proceeding by action to recover the money penalty only. Judgment of Boyd, C., which followed that of Britton, J., in *Carey* v. *Smith*, 5 O. L. R. 269, 2 O. W. R. 16, in dismissing the action, varied; and the action held maintainable under s. 195 only for penalties imposed by ss. 162, 163, 165, 166, 168. *Asselstine* v. *Shibley*, 9 O. L. R. 327, 5 O. W. R. 109.

Ontario Election Act — *Disqualified person voting — "Postmasters in cities"—Sub-postmaster.*] — A sub-postmaster appointed by the Postmaster-General to the charge of a sub-post office in a city is not a "postmaster," within the meaning of s. 4 of the Ontario Election Act, and is not liable to the penalty imposed by that section if he votes at an election for the Legislative Assembly.—Judgment of Meredith, J., 10 O. L. R. 604, reversed. *Lancaster* v. *Shaw*, 12 O. L. R. 66, 7 O. W. R. 502.

Ontario Election Act—*Voting without right — Agent at poll — Reduction of penalty.*]—The defendant applied for and obtained registration as a city voter, not knowing that his name was still on the voters' list for the township in which he had formerly resided. Afterwards he agreed to act as agent at the poll for one of the candidates for the electoral district in which the township was situated, at a polling place other than that for the sub-division in which he had formerly resided, and received from the returning officer a certificate entitling him to vote at the place where he was to be stationed. He acted as agent there, took the oath of secrecy, and voted there. No other oath than that of secrecy was administered or tendered or discussed. He was not aware that a non-resident could

not vote:—*Held*, that the defendant was not liable to the penalty imposed by s. 168 of the Ontario Election Act, R. S. O. 1897 c. 9, for voting knowing that he had no right to vote.—South Riding County of Perth, 2 Ont. Elec. Cas. 30, followed. 2. That the defendant was not liable to the penalty imposed by s. 181 of the Act for wilfully voting without having at the time all the qualifications required by law. "Wilfully voting" as in this section, and applying to the facts of the case, was practically the same as voting knowing that he had no right to vote. 3. That the defendant was liable to the penalty of $400 imposed by s. 9, s-s. 5, of the Act, for not having taken the oath of qualification required to be taken by agents voting under certificate; but, as the defendant was not asked to take the oath, the deputy returning officer not having been aware that it was necessary, and the plaintiff himself was present when the defendant voted, and did not object, the provisions of R. S. O. 1897 c. 108 should be applied, and the penalty reduced to $40. *Smith* v. *Carey*, 23 C. L. T. 93, 5 O. L. R. 203, 2 O. W. R. 13.

Penal action—*Notice to the Attorney-General — Violation of a federal law.*] — Plaintiff in a penal action ought to give notice of the suit to the Attorney-General even though the action had been brought on account of the violation of a federal law. On an exception for delay to effect this, the proceedings will be delayed long enough for the notice to be given. *La Montagne & Grosvenor Apartments* (1909), 10 Que. P. R. 424.

Penal action — *Writ of summons — Præcipe — Affidavit — Crown — Parties — Fines — Municipality — Watercourse.*] —The filing of a *præcipe* and of an affidavit to obtain a writ of summons in a penal action, such as is mentioned in Art. 5716, R. S. Q., is only necessary in the causes in which the Crown has an interest.—An action for a penalty for neglect to maintain a watercourse may be brought by the plaintiff alone in his own name.—All the fines imposed by the Municipal Code belong to the corporation alone, when such fines are not due by the corporation, and to the Crown, when they are due by the corporation. *Lalumière* v. *Bouthillier*, 8 Que. P. R. 47.

Practising dentistry without registration—*6 Edw. VII, c. 22, Alberta—Action brought in name of Crown — Informer.*] —Action to recover damages against defendant for practising dentistry, he not being duly qualified under the above Act. Leave to amend granted, action having been brought in the name of the King. The Dental Association was not intended by the Act to be complainant or prosecutor. The informer must sue either in person or by attorney. This action cannot be successful, having been brought in the name of the King on the information of the Denial Association. *Rex ex rel. Dental Association of Alberta* v. *Austin*, 10 W. L. R. 387.

Procedure to be strictly followed — *Suit in the name of the Crown as well as in the name of the plaintiff — Dominion Act —Exception to the form.*]—C. P., 174; R. S. C. c. 79, s. 33, 114; Crim. C. s. 1038; 2 Edw. VII. c. 15, s. 25; 6 Edw. VII. (Q.), c. 37, s. 2.—Penal actions are of the nature of criminal proceedings. To succeed in such actions it is necessary to faithfully observe all the rules of procedure prescribed by law. The *qui tam* action, properly so called, no longer exists in the province of Quebec; in cases of suit for penalties, it is necessary to sue either in the name of the Crown or in the name of some private citizen only. The law does not distinguish between suits taken either under the Dominion law or under a provincial law. *Lamontagne* v. *Grosvenor Apartments* (1910), 11 Que. P. R. 329, 16 R. L. N. S. 274.

Qui tam action—*Form of writ of summons — Name of plaintiff and of Crown — Status of alien as plaintiff — Pleading.*]—In a penal action brought by a plaintiff, as well in his own name as in the name of His Majesty, against a company for want of registration, it is not necessary to add, in the writ, after the name of the plaintiff, the words, "*Prosecution as well in his own name as for us.*"—2. It is not sufficient to allege that it does not appear in the writ of summons that the plaintiff is a British subject, but the defendant must specifically allege that the plaintiff is not *de facto* a British subject.—*Quære*, must one be a British subject to bring a *qui tam* action? *Croysdill* v. *Shawinigan Carbide Co.*, 10 Que. P. R. 67.

Qui tam action—*Status of plaintiff — Alien — Pleading — Deposit in Court — Payment to Crown — Use of name of Crown — Attorney-General — Notice of action — Failure to give — Stay of proceedings.*]—Actions *qui tam* for a penalty may be brought by any person, whether a British subject or not.—2. The conclusions are sufficient that the defendant be condemned to pay, and need not be for an order to deposit the amount in Court, nor need they mention the officer entitled to receive the portion payable to the Crown.—3. The action is properly brought by the plaintiff suing as well in his own name, as in the name of the Crown.—4. Notice of action to the Attorney-General is not a condition precedent; failure to give it only involves a suspension of proceedings. *Stewart* v. *Colonial Engineering Co.*, 33 Que. S. C. 420, 9 Que. P. R. 194.

Security for costs—*Is defendant obliged to notify the Attorney-General?—C. P. 189; R. S. Q. 5671.*]—*Held*, in a penal action, the law does not impose on the defendant the obligation of notifying the Attorney-General; the obligation is on plaintiff. Defendant's default to notify the Attorney-General is therefore no answer to a motion for the dismissal of plaintiff's action for want of security. *Lamontagne* v. *La Maison Carli Freres*, 11 Que. P. R. 161.

Use of firm name by trader—*Omission of "registered" — Articles 1834a and 1834b, C. C.*]—A trader who carries on business under a firm name, of which his own name forms part, and who makes the declaration required by Art. 1834a, C. C., is not "a person who uses in business the name of another person," within the meaning of Art. 1834b, C. C. Therefore, the omission to

add after the firm name the word "registered," or an abbreviation thereof, does not render him liable to the penalty prescribed by that article. *Gendron* v. *Benault*, 16 Que. K. B. 330.

See ALIENS — CONSTITUTIONAL LAW — CONTRACT — CRIMINAL LAW — LIQUOR LICENSES — PRAIRIE FIRE ORDINANCE — SCHOOLS — SHIP — VENDOR AND PURCHASER.

PENSION.

See APPEAL—BENEFIT SOCIETY — COSTS—RECEIVER—TRIAL.

PENSIONER.

See MUNICIPAL ELECTIONS.

PENSION ALIMENTAIRE.

Gift—*Rights of prior creditors of donee—Execution.*]—A creditor whose debt accrued before the making to his debtor of a gift by way of *aliments* cannot seize the property comprised in the gift; subsequent creditors only have that right. *Bernier* v. *Leblanc*, 8 Que. P. R. 316.

Interim order in action.]—In an action for an *alimentary* pension by daughter-in-law against father-in-law, a provisional or interim allowance will not be ordered. *Leclerc* v. *Gaucin*, 8 Que. P. R. 363.

Nor in an action by grandchild against grandmother. *Henault* v. *Fauteux*, 8 Que. P. R. 363.

See VACATION—WILL.

PEREMPTION.

Action in warranty — *Intervention.*]—Even if a principal plaintiff, in an action where there is an intervention and a demand in warranty, would be entitled to have any part of the instance perempted, such as the intervention, he cannot obtain such peremption on a motion whereby he simply asks that the present instance be declared perempted. 2. A principal plaintiff has no interest in moving for the peremption of the action in warranty. 3. The service of such motion is a useful proceeding to interrupt the peremption as regards the intervenant, even if the latter can be considered as a defendant. *Lonsdale* v. *Lesage*, 3 Que. P. R. 364.

Action united with another.] — A motion for peremption cannot be granted in a case which has been united with another for the purpose of proof, when the latter is still pending. *Cardinal* v. *Brodeur*, 4 Que. P. R. 171.

Appeal—*Useful proceeding.*]—An appeal from a judgment declaring a cause perempted, and the judgment allowing such appeal, are useful proceedings stopping the peremption. *Wright* v. *Can. Pac. Ry. Co.*, 4 Que. P. R. 152.

Applicant—*Defendant who has not appeared — Attorney.*]—A defendant who has not appeared in a suit, either personally or by attorney, has no right to move for peremption through an attorney who is a stranger to the record. *Dumoulin* v. *Lapointe*, 7 Que. P. R. 150.

Application for rule to return property—*Guardian.*]—Peremption applies to all proceedings whose object is the settlement of matters in controversy by a judgment, and therefore, can be invoked with regard to a rule *nisi* taken out against a guardian who has failed to produce goods seized and placed in his charge. *Dupont* v. *Lacoste*, 25 Que. S. C. 33.

Capias after judgment — *Service — Delay in execution — Waiver — Pleading.*]—A writ of *capias* after judgment, is a mode of executing a judgment, and is not affected by Art. 120, C. C. P., but remains valid beyond the delay of 6 months therein mentioned, until it is executed.—2. Even if it be a writ of summons, the peremption in the above article is not absolute, and is waived by failure of the defendant to plead it in the manner and within the delay prescribed in the case of irregularities in such writs. *Demers* v. *Girard*, 28 Que. S. C. 542, 7 Que P. R. 347.

Certificate of state of cause — *Contradicting.*]—A certificate shewing the last step taken in the cause, signed by the prothonotary, is an authentic document, which can only be contradicted by inscription *en faux*. *Donnelly* v. *Ratter*, 5 Que. P. R. 62.

Commencement of period.]—The time required for the peremption of a suit after the issues are joined does not begin to run until three days have elapsed after issue joined. *Castelli* v. *Lumkin*, 4 Que. P. R. 32.

Counterclaim.] — An incidental cross-demand is subject to a peremption distinct from the principal demand. *Comte* v. *Pfister*, 3 Que. P. R. 182.

Cross-demand — *Common issues.*]—A cross-demand cannot be perempted, while the principal demand subsists, if this cross-action arises out of the same cause as the principal action, and when the proof in both cases will in large part be the same; then the cross-demand is not a separate instance. *Jolicœur* v. *Corbeil*, 9 Que. P. R. 387.

Date of last filing—*How determined.*]—A motion for peremption will not be granted although the procedure book states that the filing of the last document took place more than two years before, if the date appearing on the document itself states the contrary. *Ross* v. *Phibé*, 5 Que. P. R. 254.

Death of plaintiff — *Parties.*]—When, upon notice of the motion for peremption

of a suit, but before such motion is taken into consideration, the attorneys of the plaintiff produce a declaration of his death, judgment cannot be given upon the motion for peremption until the representatives of the plaintiff have been added as parties. *Macadam* v. *Thompson*, 16 Que. S. C. 362.

Demand of—*Peremption of demand — Useful proceeding — Stay.*]—A demand of peremption is itself a proceeding susceptible of peremption. Such a demand arrests the proceedings and hinders the peremption from running until the decision upon such demand. A motion to declare perempted the demand of peremption is a useful proceeding which covers the peremption. *Reid* v. *Merizzi*, 19 Que. S. C. 428, 4 Que. P. R. 150.

Discontinuance—*New Code, P. Q.*]—When the discontinuance of proceedings in a cause has commenced while the old Code of Civil Procedure is in force, the suit is not barred until this interruption has lasted for three years, even when the two years required by Art. 279 of the new Code have completely passed since the coming into force of that Code. *Chanteloup Mfg. Co.* v. *Berger*, 16 Que. S. C. 482.

Erroneous certificate.] — The Court will not declare a suit perempted upon the faith of a certificate which is evidently erroneous, even when it forms part of the record. *Leguerrier* v. *Montreal*, 5 Que. P. R. 440.

Incidental demand — *Attorneys of record—Encumbered list of cases — Putting case on list — Interruption — C. P. 279, 280.*]—An incidental demand is distinct from the principal action and is independently subject to peremption. A motion for peremption is valid if served at the office of the plaintiff's attorneys, even when, during suit, two of the attorneys have left the firm whose name has since been changed, if no notice of such change has been given in pursuance of Articles 200 and 201 C. P. (*Duperrault* v. *Miron*, 8 Que. P. R. 150). An encumbered list of cases which has prevented plaintiff from proceeding with the hearing of the case is something which has forcibly suspended further proceedings and interrupts peremption, following Article 280 C. P. Inscribing a case upon the list interrupts peremption, particularly when it is the invariable custom, on the part of members of the Bar, to inscribe a case for proof and hearing without fixing any date for trial, leaving it to the prothonotary to insert the trial day, by reason of the encumbered state of the list of cases. Hence, peremption of a suit, which is inscribed on the 5th February, 1909, and is set down by the prothonotary for trial on the 11th March, 1911, commences to run from the latter date. *Vigeant* v. *Picotte* (1911), 12 Que. P. R. 343.

Incidental demand — *Cross-demand — Contract — Common issues.*]—When the principal demand is to have a contract fulfilled, while the incidental demand is founded on an alleged breach of it, and asks consequent damages, this cross-demand arises out of the same cause as the principal demand, and does not constitute a separate instance.—Such cross-demand cannot be perempted while the principal demand subsists. *Dauphin* v. *Starke Cooperage Co.*, 7 Que. P. R. 454.

"Instance" — *Proceedings in improbation.*]—Proceedings in improbation constitute a suit or an instance within the meaning of the Code of Civil Procedure, and peremption applies to them as to ordinary suits. *Cameron* v. *Westmount*, 8 Que. P. R. 306.

Interruption — *Actions ordered to be tried together — Inscription in one — Effect as to both.*] — Where a cause has been by order of the Court joined with another cause for the purpose of proof and hearing on the merits, the inscription of one of the causes for proof and hearing has the effect of interrupting peremption in both. *Paterson* v. *Chandler & Massey Limited*, 10 Que. P. R. 89.

Interruption—*Application to fix day for trial.*]—The order of a Judge, on a motion by the defendant to fix a day for the continuation of the interrupted hearing, drawn up in these terms: "Motion to fix a date for the continuation of the hearing of the case—the Judge will inform the advocates as soon as he shall be free;" is an incident which suspends the course of peremption, and prevents it taking effect. *Teolo* v. *Cordasco*, 35 Que. S. C. 227, 9 Que. P. R. 414, 10 Que. P. R. 54.

Interruption — *Assignment—Notice.*]—An assignment of property made by the plaintiff after the commencement of an action, and the sale of the plaintiff's assets by the curator to the assignment, do not interrupt peremption, especially if notice had not been given to the parties to the action. *Dufour* v. *Harvey*, 6 Que. P. R. 110.

Interruption — *Certificate of state of cause.*]—The fact that the certificate of inscription was not filed at the time of the service of the notice of motion for peremption does not prevent the proceedings taken by the plaintiff between the service of the notice of motion and the filing of the certificate, the effect of interrupting peremption. *Brunet* v. *Duperrault*, 6 Que. P. R. 125.

Interruption—*Inscription—Defect in.*]—The filing with the clerk of the Court of an inscription for trial of a cause upon the merits, is a useful proceeding which interrupts prescription, and that is so even where the party filing the inscription does not at the same time file the pleadings upon which issue has been joined, for the use of the trial Judge. *Martin* v. *Gosselin*, 6 Que. P. R. 116.

Interruption — *Negotiations for settlement—Change of state of party—Knowledge of attorney ad litem — Notice—Interdiction.*]—In order that negotiations for a friendly settlement may have the effect of preventing the action being dismissed on *peremption d'instance*, they must be put in writing, as, for example, by letters from the party seeking such settlement. A change in the state of a party, unknown to her attorney *ad litem*, will prevent peremption, even although no notice was given of such change of state.

In this case the attorney *ad litem*, filing his own affidavit that he did not know of the change of state (a party becoming interdict) when the notice of motion for peremption was served, was absolved from giving notice to the opposite party; and the filing of the service of interdiction obliges the Court to take judicial notice of it and justifies a declaration that the action is not perempted. *Guénard* v. *Poitras*, 27 Que. S. C. 41.

Interruption — *Useful proceeding — Erroneous certificate.*]—A certificate of the prothonotary of the non-filing of a pleading, when in fact one has been filed, is not a useful proceeding which will interrupt peremption. *Dagenais* v. *Ouellette*, 8 Que. P. R. 362.

Interruption — *Useful proceeding — Motion to amend — Prescription—Pleading —Exception — Litigious rights.*]—A motion to amend the declaration is a useful proceeding, and interrupts peremption. 2. The respondents sued the appellant and one C. L., the latter as carrying on business in the firm name of "C. L. & Co." upon a promissory note. Process in the action was served on the day before the day of the expiry of the period for prescription. C. L. by his defence submitted that the action as against him should be dismissed, alleging that his wife, and not himself, carried on business under the name of "C. L. & Co." After this plea, the respondents desisted as against C. L., and obtained leave to amend the declaration by alleging that the note was signed by C. L.'s wife, carrying on business under the name of "C. L. & Co." but she was not added as a defendant:—*Held*, that, in these circumstances, the amendment related back to the date of the commencement of the action, and that it was not prescribed. 3. An exception of litigious rights cannot be set up in answer to an action for a claim included in a general sale of all property and claims, even when the claim in question is in its nature litigious. *Brossard* v. *People's Bank*, 13 Que. K. B. 148.

Interruption — *Useful proceeding — Motion to withdraw deposit.*]—A motion to withdraw a deposit made with a plea is not a useful proceeding susceptible of preventing peremption. *Primeau* v. *Richard*, 6 Que. P. R. 46.

Interruption — *Useful proceeding — Opposition — Judicial sale — Transfer of purchaser's rights.*] — The transfer of the rights of the purchaser of a property sold by the sheriff is a useful proceeding which interrupts peremption of an opposition *afin de conserver* in respect of moneys the proceeds of such sale. *Malhiuf* v. *Leduc*, 9 Que. P. R. 39.

Interruption — *Useful proceeding — Premature demand of peremption — Costs — New demand.* — A useful proceeding which may prevent or cover peremption must be a proceeding taken in order to promote the success on the merits of the claim of a party to the suspended cause. 2. A premature demand for peremption is not a useful proceeding to a party to the cause to advance his rights, and therefore it has not the effect of preventing or covering peremption. 3. A party who makes a demand for peremption, which is dismissed as premature, is not obliged to pay the costs incurred by his opponent upon such motion before making a new motion for peremption. *Clifford* v. *Beauport Brewery Co.*, 4 Que. P. R. 295, 324.

Interruption — *Useful proceeding — Subpœna — Examination of officer of corporation.*]—A subpœna served on the mayor of a municipal corporation in an action in which the municipality is a party defendant, requiring him to appear and give evidence in the case before it had been set down for hearing, was held a useful proceeding to interrupt peremption, the administration of preliminary interrogatories to the mayor of a defendant corporation being authorised by Art. 286, C. P. C. The fact that the witness subpœnaed did not appear on the day appointed would not take away from the subpœna its character as a useful proceeding. Article 286, C. P. C., which provides that when the opposite party is a corporation, the president, manager, treasurer, or secretary thereof may be examined, does not by this enumeration of officers limit the right to examine to them only. The registrar's certificate that no proceeding has been taken in the action for two years is only a ministerial act; this officer may shew whether any proceedings have in fact been taken or not within the time limited, but he has not power to decide whether such proceedings are useful or not. *Boas* v. *St. Hyacinthe*, 13 Que. K. B. 431.

Interruption — *Useful proceeding — Substitution of solicitors.*]—The substitution of solicitors, by adding to the firm name the name of a junior member who has recently joined the firm, is a useful proceeding to interrupt peremption. *Standard Trust Co.* v. *South Shore Ry. Co.*, 7 Que. P. R. 133.

Interruption — *Useful proceeding — Withdrawal of attorney — Petition to proceed in formâ pauperis.*]—The withdrawal of an attorney, not authorised by a Judge, is invalid, and a proceeding made by an attorney substituted without such authorisation, is not a useful proceeding having the effect of interrupting peremption:—*Quære*, is a petition for leave to continue proceedings *in formâ pauperis*, a useful proceeding? *Gingras* v. *Syndics of Parish of St. Antoine de Longueuil*, 5 Que. P. R. 300.

Interruption after time expired — *Advocates nominated to other offices—Judicial notice — Defendant's rights.*] — The Court, of its own motion, takes judicial notice of the nomination of advocates to offices incompatible with the exercise of their profession. 2. Differing from the prescription which gives to a debtor a right acquired from the time that the period has expired, the peremption of a suit does not exist until it is adjudged, and the plaintiff, up to the time of the service of the demand for peremption, even after the period set for peremption has expired, may interrupt such peremption by a useful proceeding. 3. A defendant who has only appeared may demand peremption of the suit. 4. One of several defendants may demand and obtain as to himself alone the peremption of the suit. 5.

The fact that the defendant has ceased to be represented by his advocates, who had been called to duties incompatible with the exercise of their profession, does not prevent the peremption from running; it is for the plaintiff to signify his wish to proceed by giving notice to the defendant to authorise a new solicitor. 6. The fact that, after six years having elapsed since the last proceeding, the attorney of the plaintiffs demands the record from the deputy-clerk, who tells her that it is in the hands of the defendant, is not an incident which arrests the proceeding in such a way as to prevent the peremption from taking place where the defendant had the record temporarily and returned it to the clerk upon the first demand. 7. A defendant who has ceased to be represented by his advocates on account of their nomination to positions incompatible with the exercise of their profession, is not obliged to file an appearance, but he may himself sign the demand of peremption, and serve it on the plaintiff, for the demand of peremption is a chief proceeding in itself, having an existence separate and distinct from the action. *People's Bank of Halifax* v. *Labrecque*, 20 Que. S. C. 263.

Motion — *Firm of attorneys—Incapacity of member.*] — A motion for peremption of suit, signed by the original attorneys of record, is not invalidated by the fact that one of the attorneys is now a practising advocate of the Bar of the province of Quebec. *Ross* v. *Elliott*, 5 Que. P. R. 47.

Motion for—*Bar—Exhibits—Stay of action.*]—The omission by the defendant to file with his plea the exhibits referred to does not compulsorily stay the prosecution of the plaintiff's demand, and is no bar to a motion for peremption. *Coté* v. *Simar*, 9 Que. P. R. 100.

Motion for—*Failure to file exhibits with defence.*]—The fact that a defendant failed to file with his defence the exhibits mentioned in support thereof, is no bar to a motion for peremption for want of proceedings during two years. *Leet* v. *Royal Bank of Canada*, 7 Que. P. R. 11.

Motion for — *Second motion after termination of first.*]—A motion for peremption which has been determined is not an obstacle in the way of the presentation of a second motion for peremption, neither is it a proceeding preventing peremption. *Slater* v. *Slater Shoe Co.*, 7 Que. P. R. 55.

Motion for—*Service — Change in firm of attorneys.*]—A motion for peremption is validly served at the office of the advocates of the plaintiff, even if one of such advocates has in the interval left the country and the firm has changed its name, so long as no public notice has been given of such change. *Duperrault* v. *Miron*, 8 Que. P. R. 158.

Motion for — *Service—Domicil.* —A notice of motion for peremption must be served upon the opposite party at the domicil elected by his attorney, and not at the record office. *St. Louis* v. *Montreal Street Ry. Co.*, 7 Que. P. R. 373.

Motion for — *Service — Change in firm of attorneys — Dismissal of motion—Useful proceeding — Interruption of peremption.*]— If a firm of attorneys is dissolved, and of its members two firms constituted with different offices, service of a notice of motion for peremption at both offices is sufficient.— A motion for peremption which is dismissed as premature is not a useful proceeding interrupting subsequent peremption. *Standard Trust Co.* v. *South Shore Ry. Co.*, 8 Que. P. R. 296.

Motion for — *Service of notice—Vacation.*]—A notice of motion for peremption may be validly served at a time during which the Courts are not obliged to sit. *Kimpton* v. *Deline*, 7 Que. P. R. 438.

Motion for — *Service on advocates — Appointment of advocate to public office.*]— The service of a notice of motion for peremption must be made upon all the advocates who acted for the opposite party, even upon one who has been appointed to a public office when not incompatible with the exercise of his profession—in this case that of law clerk of the Legislative Assembly of Quebec. *Martigny* v. *Bienvenu*, 9 Que. P. R. 97.

Motion for — *Solicitors — Change in firm.*]—A motion for peremption may be made in the name of a law firm which has represented the party making the motion, although one of the members thereof no longer practises as a solicitor, *utile per inutile non vitiatur*. *Hibbard* v. *Williamson*, 26 Que. S. C. 34.

Motion for substitution of attorneys made on behalf of plaintiff when the firm of lawyers representing him has been changed, is a useful proceeding which interrupts peremption, *Gorey* v. *Can. Pac. Ry. Co.* (1911), 12 Que. P. R. 230.

New code of procedure — *Pending action.*]—An action begun under the old Code of Procedure may be extinguished if the plaintiff has not taken any useful step in procedure for two years, the peremption having commenced under the new Code. *Lewis* v. *St. Louis*, 3 Que. P. R. 484.

New code, P.Q.—*Acquisition of peremption.*]—The provisions of the new Code of Procedure apply to a peremption entirely acquired since it came into force, especially in a case where no peremption had commenced to run prior to its coming into force. *Matte* v. *Massicotte*, 2 Que. P. R. 398.

New code, P.Q.]—The provision of Art. 259, C. C. P., concerning peremption, applies to a case which was pending at the time the present Code came into force, provided the entire time required by such article for the peremption has run after the coming into force of the new Code. *Couture* v. *Dudas*, 16 Que. S. C. 554.

Non-return of writ of summons.]— Where a suit lapses by the non-return of the writ of summons, there is no suit which can be declared perempted. *Ormstein* v. *Irvine*, 2 Que. P. R. 406, 16 Que. S. C. 624.

Notice of motion.]—A motion for *péremption d'instance* presented the day after notice thereof will be dismissed with costs, the notice being illegal and insufficient. *Archambault* v. *Grand Trunk Rw. Co.*, 2 Que. P. R. 407.

Notice of motion—*Attorneys—Signature—Partnership dissolved.*]—The signatures of two attorneys, being the remaining members of a legal partnership dissolved, is sufficient in a notice of motion for peremption. 2. The addition of the name of the attorney who has ceased to be a member of the partnership, does not render void the signatures of the other partners. *Cleve* v. *Rickerdike*, 5 Que. P. R. 391.

Notice of motion—*Service—Partnership—Solicitors.*]—In an action brought by a firm of attorneys, of which one member has died since the action was begun and been replaced by another advocate, service of a notice of motion for peremption made upon the partnership as it actually exists, is valid. *Hughes* v. *Montreal Herald Co.*, 5 Que. P. R. 449.

Notice of motion—*Service—Solicitors—Change in firm.*]—If a firm of advocates is dissolved, a motion for peremption will not be granted, unless it was served upon all of the late partners. *Glass* v. *Eveleigh*, 3 Que. P. R. 357, followed. *Lamourcux* v. *Johnston*, 7 Que. P. R. 56.

Notice of motion—*Service—Solicitors—Death of partner.*]—When one of the members of a law firm has died during the suit, service of a motion for peremption is validly made upon his surviving partner. *Lipshitz* v. *Montreal Street Rw. Co.*, 7 Que. P. R. 237.

Notice of motion—*Service—Solicitors—Partners.*]—The service of a motion for peremption upon a firm of solicitors whose members have dissolved partnership since the last proceeding must be made upon both partners, and not only upon one of them as representing the late firm. *Desrochers* v. *Martin*, 3 Que. P. R. 522.

Notice of motion—*Service—Solicitors—Change in firm.*] — A notice of motion for peremption is validly served at the office of a firm of solicitors who acted for the plaintiff, although there has been since the last step taken in the action a change in the composition of the firm. *Haggart* v. *Langlois*, 6 Que. P. R. 299.

Notice of motion—*Time.*]—The period between the service of a notice of motion for peremption and its presentation is one juridical day. *Barbeau* v. *Martin*, 6 Que. P. R. 303.

Onus — *Opposition to judgment.*]—The opposition to judgment being considered as a defence to the original suit, the opposant is the defendant in the cause, and it belongs to him to move for peremption, if no proceedings have been taken the under during the delay necessary to acquire peremption. *Gilmour* v. *Odell*, 17 Que. S. C. 237.

Opposition—*Motion for dismissal—Examination of opposant.*]—An opposition will be declared perempted, in a proper case, notwithstanding that the plaintiff has made a motion for the dismissal of the opposition and has examined the opposant, without, however, demanding a final adjudication upon his motion. *Bouchard* v. *Lambert*, 10 Que. P. R. 44.

Opposition—*Return.*]—A motion for the peremption of an opposition will not be granted, if at the time of the service of such motion, the original of the opposition had not been returned into Court. *Imperial Oil Co.* v. *County Club*, 8 Que. P. R. 371.

Peremption of demand for.]—A demand for peremption is susceptible of peremption. *Royal Electric Co.* v. *Corp. of Trois-Rivières*, 10 Que. P. R. 289.

Peremption of demand for — "*Instance*"—*Stay of proceedings* — *Prior demand.*]—1. An "instance" is a proceeding taken by a party to compel acknowledgment of the existence of a right or to demand the fulfilment of an obligation. The demand of peremption has not this character, for it has for its object only the defeat of a proceeding; it cannot then itself be perempted.—2. A motion for peremption will not be granted as long as a prior demand for peremption has not been disposed of; for this first demand is an incident which forcibly stops the proceeding, in the terms of Art. 280, C. P. *Morrison* v. *La Banque de St. Hyacinthe*, 10 Que. P. R. 151.

Petition for interlocutory injunction.] — Peremption of suit does not extinguish the right of action, but only the suit, or proceeding or *instance*; so a petition for an interlocutory injunction cannot be perempted, such a petition not being, before the issue of the writ of summons, an action, instance, or process. *Watson* v. *Massicotte*, 8 Que. P. R. 24.

Retrospective legislation.] — Where the period of peremption commenced after the promulgation of the new Code of Civil Procedure of the province of Quebec, the exceptions declared by the fourth paragraph of its first article do not prevent the peremption of a suit pending at the time it came into force under the limitations provided by Art. 279 of the new Code. *Cooke* v. *Millar*, 3 Rev. Leg. 446, 4 Rev. Leg. 240, referred to. Judgment in 21 Que. S. C. 521, affirmed. *Schwob* v. *Farnham*, 22 C. L. T. 4, 31 S. C. R. 471.

Rule against guardian.]—Peremption applies to all proceedings taken with the object of obtaining a judgment upon any issue whatever, and consequently to a rule against a guardian. *Dupont* v. *Lacoste*, 6 Que. P. R. 127.

Settlement of action — *Proof.*]—If a promissory note alleged to have been given to settle a case was never paid, and if no proceedings were ever held in Court or recognition of this settlement, peremption will be granted. *Goldwater* v. *Borganer*, 8 Que. P. R. 425.

Several defendants—*Motion by one.*]—One or more joint and several defendants, who have severed in their defence, may move for peremption after two years from the last proceeding as against them, although, since that time, proceedings have been had against some of their co-defendants. *Lett* v. *Montreal-Oregon Gold Mines Co.*, 5 Que. P. R. 174.

Suspension — *Proceeding* — *Agreement* —*Proof*—*Oral evidence.*]—An agreement between the parties, by virtue of which, at the request of the defendant, the plaintiff stayed his action in order to prosecute a claim, including that against the defendant, against a third party.—2. Such an agreement may be proved by witnesses in a commercial matter, and the provisions of Art. 1235 (11), C. C., which prohibits oral evidence of any acknowledgment or promise which has the effect of withdrawing a debt from the provisions of the statute relating to the prescription of actions, is not to be extended to peremption. *Hendershot* v. *Macfarlane*, 24 Que. S. C. 5, 5 Que. P. R. 215.

Suspension — *Infant attaining majority* —*Notice.*]—A change of condition by an infant attaining his majority, which has not been notified and which is not legally proved, cannot suspend peremption. *Elliott* v. *Fraser*, 5 Que. P. R. 5.

Time for—*Negotiations for settlement.*] —The time during which propositions of settlement, established in an affidavit, the contents of which are not denied, and further established by writings, were pending, must be deducted from the time elapsed between the last proceeding and the making of a motion for peremption. *Machabée* v. *McKerness*, 6 Que. P. R. 219.

Useful proceeding.]—The service of a notice of setting down for *enquête* when the cause cannot properly be set down except for *enquête et mérite*, is not a useful step in the cause sufficient to interrupt the *peremption d'instance*. *Barthe* v. *Genest*, 16 Que. S. C. 339.

Vacation—*New notice.*]—Where motion for peremption has been served with notice of its presentation during vacation, the Court will order that a new notice of its presentation for a day after vacation shall be given to the advocates of the opposite party. *Cleroux* v. *St. Charles*, 9 Que. P. R. 76.

See CERTIORARI — COSTS — JUDGMENT — OPPOSITION — PRACTICE — SOLICITOR— STATUTES—TRIAL.

PERJURY.

See BILLS AND NOTES—CONTRACT—CRIMINAL LAW — EVIDENCE — JUDGMENT —SETTLEMENT OF ACTIONS — VENDOR AND PURCHASER.

PERMANENT MILITIA.

See MILITARY LAW.

PERPETUATION OF TESTIMONY.

See CONTRACT—EVIDENCE.

PERPETUITIES.

See VENDOR AND PURCHASER—WILL.

PERSONA DESIGNATA.

See COURTS — LIQUOR LICENSES — QUIETING TITLES ACT—RAILWAY.

PERSONAL REPRESENTATIVES.

See DEVOLUTION OF ESTATES ACT—FATAL ACCIDENTS ACT.

PERSONATION.

See CRIMINAL LAW — LIQUOR ACT OF ONTARIO—MANDAMUS.

PETITION.

Demurrer — *Formal objection—Exception.*]—A person cannot, by way of demurrer, allege that a petition asking the revision of a sentence of interdiction pronounced by the prothonotary is not well founded, because the petitioner ought to have proceeded by writ of summons and not by petition, such a ground being a formal ground and such as can be set up only by way of exception to the form. *Bond* v. *Barry*, 16 Que. S. C. 364.

See COMPANY — DOWER — EVIDENCE — JUDGMENT — MUNICIPAL ELECTIONS—PARLIAMENTARY ELECTIONS — PLEADING—REVISOR.

PETITION OF RIGHT.

See APPEAL — CONSTITUTIONAL LAW — CROWN—PARTICULARS—PLEADING.

PEWS.

See CHURCH.

PHARMACY.

Quebec Pharmacy Act — *Practice of pharmacy* — *Selling drugs* — *License* — *Corporation*—*R. S. Q. Arts 4024, 4035.*]—1. Under Art. 4035 R. S. Q., no one has the right to keep a place of business for retailing drugs unless he is a member of the College of Physicians and Surgeons of the province, or unless he is a licensed pharmacist, hence, an incorporated company cannot keep

a drug store for the purpose of retailing drugs.—2. In an action for the recovery of fines imposed as a penalty for the illegal practice of a profession several offences can be joined and alleged in the same action. *The Pharmaceutical Association, etc.* v. *The Modern Drug Store* (1910), 16 R. L. n. s. 479.

Sale of poison—*Prescription for horse —Addition of poison to prescription.*]—Action for damages for death of defendant's horse, caused by administration of croton oil:—*Held*, that defendants are liable for having, through an assistant, compounded croton oil when a director, who was a chemist, was not personally managing the shop. *McGibbon* v. *Lawrason*, 13 O. W. R. 1168.

See DRUGGIST—STATUTES.

PHOTOGRAPHS.

See DISCOVERY.

PHYSICAL EXAMINATION.

See DISCOVERY.

PHYSICIANS AND SURGEONS.

See CONTRACT — DISCOVERY — INDIAN — LIMITATION OF ACTIONS — MASTER AND SERVANT — MEDICINE AND SURGERY — SOLICITOR — STATUTES.

PICKETTING.

See TRADE UNION.

PILOTAGE.

See SHIP.

PILOTAGE DUES.

See SHIP.

PILOTS.

Apprentice—*Payment for presentation to corporation — Contract — Illegality — Recovery of money paid.*]—A contract to pay a pilot for his presentation of an apprentice pilot to the corporation of pilots, is illegal and cannot be enforced.—2. Money paid on a contract null as being contrary to public order, can be recovered by an action *en répétition*. *Paquet* v. *Pepin dit Lachance*, 22 Que. S. C. 155.

Forfeiture of license — *Corporation of pilots—Acquiescence—Certiorari.*] —A pilot who, in consequence of a temporary forfeiture of his right to exercise his trade, by the Court of Pilots, remits his commission to the Court, thereby acquiesces in the sentence and cannot afterwards proceed against the Court by way of *certiorari*. *Frenette* v. *Montreal Court of Pilots*, 5 Que. P. R. 415.

Harbour Commissioner — *Corporation of pilots — Apprentices — Recommendation — Boucour — Illegality — Public policy.*] —The statutes concerning pilots and pilotage are of public order.—2. It is the harbour commission of Quebec which commissions the pilots, and from the time that a person is commissioner as a pilot he is a member of the corporation of pilots; it is the harbour commission which prescribes the number of candidates who may be apprenticed to the corporation of pilots; it is the corporation of pilots which chooses the apprentices, who are indentured not to the individual pilots but to the corporation of pilots, whose duty it is to see that they acquire the necessary knowledge.—3. A custom exists among the pilots of Quebec of recommending, each in his turn, an apprentice, and for such recommendation each pilot requires for his personal benefit a fee from the apprentice. Without such recommendation no person is accepted as an apprentice:—*Held*, that this custom is an abuse and contrary to the public interest, and, therefore, every contract made by a pilot who recommends an apprentice, by which the latter engages himself for such recommendation to pay a sum of money to a pilot, is illegal and contrary to public order. *Raymond* v. *Langlois*, 22 Que. S. C. 392.

Suspension — *Harbour Commissioners.*] —The commissioners of the harbour of Montreal have no right to suspend a licensed pilot, upon an irregular complaint, without summons and without notice. *Belisle* v. *Montreal Harbour Commissioners*, 6 Que. P. R. 363.

See CERTIORARI—CROWN.

PLACE OF TRIAL.

See VENUE.

PLACER MINING ACT.

See MINES AND MINERALS.

PLAN.

Amendment—"*Party concerned*" — *R. S. O. c. 136, s. 110.*]—A plan of subdivision of the land of adjoining owners, prepared and registered upon their joint request, may, upon compliance with the statutory conditions be amended upon the application of either owner as far as his own land is concerned, without the consent of the other owner, but that other owner is a "party concerned" within the meaning of s. 110 of the Registry Act, R. S. O. c. 136, and entitled to notice of the application. *In re Ontario Silver Co. & Bartle*, 21 C. L. T. 112, 1 O. L. R. 140.

Identity of island—Description—Acreage—Mistake in patent. *Holstein* v. *Cockburn*, 2 O. W. R. 998.

Subdivision of lot—*Necessity for filing plan—Judgment — Consent of stranger.*] — The owner of an immovable, situated in a town or village, who divides it into lots, is not bound, as against those to whom he sells these lots, to deposit at the office of the Commissioner of Crown Lands and to have approved by him a plan and book of reference of the division which he has made. The only effect of default to do so is that these lots will continue to be designated according to the provisions of Art. 2168, C. C., in place of being designated by the numbers which he has given them.—2. A defendant cannot be ordered by a judgment to do something which is subject to the consent of another person. *Bergeron* v. *Drolet*, 25 Que. S. C. 415.

See CONTRACT — EVIDENCE—MINES AND MINERALS—TRESPASS TO LAND.

PLEA.

See PLEADING.

PLEADING.

1. BILL OF COMPLAINT.

Demurrer.]—A bill is not demurrable unless it absolutely appears that on the facts disclosed in the bill being established at the hearing the bill must be dismissed; and where the case for relief contained in the bill depends upon facts admitting of variation in their proof from their statement in the bill, demurrer will not lie, though no relief, or relief in modified form, may be granted at the hearing. *Stewart* v. *Freeman*, 22 C. L. T. 399.

Multifariousness—*Demurrer — Joinder of causes of action—Convenience of parties.*] —G. died in 1902, leaving a will by which his property was bequeathed to his eight children, with a small annuity to his wife. This suit was brought to compel the cancellation of a mortgage given by the plaintiff to G., and the reconveyance to the plaintiff of a certain life insurance policy and other property, which were held by G. to secure certain moneys advanced by G. to the plaintiff; and also to compel the conveyance of two lots of land which the plaintiff alleged that he purchased from G. under an agreement that G. was to give him the deed for them whenever he demanded it:—*Held*, overruling a demurrer, that it was by no means certain that the defendants were not all necessary or proper parties, in regard to all the causes of action set out in the bill, or that they did not all have a common interest in them; but, if that were not so, there were no special circumstances in this case which rendered it either difficult or impossible to deal fully and properly with all the causes of action, without causing inconvenience to any one, and therefore any discretion which the Court had should be exercised in favour of continuing the suit in its present form. *Cummings* v. *Gibson*, 4 N. B. Eq. 55, 5 E. L. R. 170.

2. CLOSE OF PLEADINGS.

Lapse of time—*Direction of Court — Rules 263, 612.*]—The noting of the pleadings as closed being a mere preliminary step to a motion for judgment or other kindred relief to ensure thereupon, by analogy to the practice prescribed by Rule 612, the officer of the Court should not, notwithstanding the terms of Rule 263, in any case in which more than a year has expired since the time at which the party seeking to have the pleadings noted became entitled to that relief, note the pleadings closed without the direction of the Court or a Judge; and, unless in exceptional circumstances, that direction should not be given without notice to the party to be adversely affected by such noting. *Radford* v. *Barwick*, 10 O. L. R. 720, 6 O. W. R. 765.

3. CROSS-DEMAND.

Effect on principal demand — *Judgment — Consolidation.*] — The filing of a cross-demand, even if it arises from the same sources as the principal demand, does not hinder the plaintiff from proceeding to judgment upon the principal demand, unless there has been a consolidation of the two. *McLaughlin* v. *Mitchell*, 9 Que. P. R. 263.

Unconnected claims — *Defence.*] — A cross-demand must have for its object the defeating or at least the modifying of the principal demand; and therefore a cross-demand filed in answer to an action to set

aside an hypothecary inscription, and claiming from the plaintiff payment of a debt alleged to be privileged, does not flow from the same source as the principal demand, and cannot be maintained.—2. A ground of defence to a principal action cannot be set up by way of cross-demand. *Langlois* v. *Bayard*, 24 Que. S. C. 195.

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4. DECLARATION.

Absence of claim—*Parties.*] — Failure to make any claim against a *mis-en-cause* is a good ground for an *exception à la forme* by the *mis-en-cause*. *Chaussé* v. *Houle*, 3 Que. P. R. 179.

Action by company — *Allegation of incorporation.*]—In an action in a County Court by a company, it is sufficient to describe the plaintiffs as an incorporated company, and the mode of incorporation need not be stated. *Waterous Engine Works Co.* v. *Campbell*, 22 N. B. R. 503, distinguished. *McLaughlin Carriage Co.* v. *Quigg*, 37 N. B. R. 86.

Action by insnector for cost of public road — *By-law.*]—A road inspector who sues to recover the cost of materials used in and work done upon the public highway and sidewalk in front of the defendant's property, should make it appear in his declaration that the construction of the sidewalk was ordered by the municipal corporation, and if he does not allege the existence of a by-law to this effect his action will be dismissed on inscription in law. *Paré* v. *Deschamps*, 7 Que. P. R. 4.

Action for damages — *Influencing employers against plaintiff—Particulars.*] — A plaintiff who alleges that the defendant, an inspector of roads, used his influence maliciously and irregularly to prevent the plaintiff securing work from the municipal corporation, should state when and how the defendant so acted; but he is not obliged to say, when, how, or by whom the defendant endeavoured to bring a criminal prosecution against him nor to state the kind and nature of the damages which he claims to have sustained. *Simard* v. *Durocher*, 7 Que. P. R. 88.

Allegations as to defendant's right of property — *Exception to the form — Previous action for same cause—Irregular service — Appearance — Absence of prejudice.*]—Allegations in a declaration as to the right of property of the defendant (in this case in a vessel upon which the husband of the plaintiff was working when he was fatally injured), cannot be made the subject of an exception to the form.—2. The fact that the plaintiff has already sued certain persons for damages for a definite cause does not hinder her from beginning a second action against other persons for causes arising out of the same facts.—An exception to the form pleaded by the defendants, a foreign company, alleging that they were irregularly served with the writ of summons, will be dismissed, where the defendants have appeared and have shewn no prejudice. *Deschênes* v. *Donaldson*, 10 Que. P. R. 75.

Alternative claims—*Will—Usufruct — Substitution—Election.*]—In suing a person for maladministration of an estate of which he is in possession by a title the exact nature of which is ill-defined in the will which creates it, the plaintiff cannot make alternative claims in view of the Court construing the will as giving a usufruct, or a substitution, and the defendant has a right to require, by way of dilatory exception, that an election be made between such alternative demands, if made. *Hurtubise* v. *Decarie*, 6 Que. P. R. 333.

Amendment — *Costs of new defence.*]—Where the plaintiff by amendment changes his demand by reducing it, upon paying the costs of the motion, the other costs being reserved, the costs of filing a new defence will not be adjudged against the plaintiff until the trial, the trial Judge being left to decide whether the new defence was necessary. *Quinn* v. *Imperial Bank of Canada*, 6 Que. P. R. 352.

Amendment — *Discretion — Propriety —Appeal.*] — The discretion of the trial Judge to permit amendments of pleadings, even after trial and hearing, cannot properly be interfered with in appeal, unless the amendment is palpably futile, or a clear violation or abuse of right.—In an action to compel an agent (*prête-nom*) to surrender property of the plaintiff that he holds under a written promise to do so when called upon, an amendment of the conclusions of the declaration, so as to make the order of the Court contingent upon the defendant's being secured against any further liability, raises a sufficiently important question to take it out of the class of futile or improper amendments. *Demers* v. *Demers*, 17 Que. K. B. 50.

Amendment — *Facts arising since filing.*]—Incidents occurring subsequent to the date of the declaration cannot properly be inserted therein by way of amendment. *Vigeant* v. *Picotte*, 9 Que. P. R. 394.

Amendment — *Heirs—Costs.*] — When the declaration is not so defective as to justify dismissal of the action, a motion by the plaintiffs to put into the declaration information as to the manner in which they have become legal heirs will be granted with costs against them. *Mircault* v. *Parker*, 7 Que. P. R. 450.

Amendment — *New cause of action.*]—A plaintiff cannot be allowed to amend his declaration for the purpose of alleging a cause of action which did not accrue until after the institution of the action. *Ward* v. *Merchants Bank of Halifax*, 4 Que. P. R. 407.

Amendment — *Useless conclusions.*] — A plaintiff should not be allowed to amend his declaration by adding conclusions for coercive imprisonment against the defendant, such amendment serving no useful purpose. *Chartrand* v. *Smart*, 4 Que. P. R. 41.

Amendment — *Writ of attachment — Affidavit.*] — The plaintiff was allowed, on paying the costs of an exception to the form, to amend the conclusions of his de-

claration so as to make them conform to the allegations of the affidavit upon which the writ of *saisie-conservatoire* with which the action began was issued, and also to furnish the defendant with a copy of such affidavit. *Biron* v. *Tanguay*, 2 Que. P. R. 393.

Amendment at trial — *Specification of damage — Variance between declaration and evidence — Judgment.*]—Where, in an action for damages for breach of contract, the evidence as to the specification of damage is at variance with the statement in the declaration, the plaintiff will be allowed to amend the latter under Art. 522, C. P., but upon condition that the defendant be allowed to plead *de novo*. If, therefore, a motion for such leave is made at the final hearing, the Court cannot, without first pronouncing upon it, render judgment on the merits. *St. Pierre* v. *Dubé*, 34 Que. S. C. 211.

Answer—*New facts alleged — C. C. P. 198.*]—The declaration should contain all the facts necessary for the purposes of the action.—In answer to plea, new facts cannot be alleged which are more intended to set up a right of action than to destroy the allegations contained in the plea. *Can. Mutual Fire Ins. Co.* v. *La Cie Francaise de Tableterie*, 11 Que. P. R. 68.

Claim for relief — *Inconsistency — Real actions.*]—A real action in which only personal conclusions are made will be dismissed upon demurrer. *Drouin* v. *Laurier*, 4 Que. P. R. 343.

Contract for hire — *Promise to pay—Breach.*]—An allegation in a County Court writ that the defendant is indebted to the plaintiff in the sum of $400 for money payable by the defendant to the plaintiff for the use and hire of divers horses and divers carriages by the plaintiff let to hire to the defendant at his request, and containing the common counts, but which does not allege any promise to pay or conclude with the common breach and *ad damnum* clause, is good on demurrer. *Dubé* v. *Pand*, 37 N. B. R. 138.

Declinatory exception — *Jurisdiction —Allegations showing.*]—He who brings an action in one district against a person living in another, should allege in his declaration all the facts necessary to give jurisdiction to the Court in which the action is brought; the allegation of these facts in an answer to an exception *déclinatoire*, is irregular, and such answer will, on motion, be struck from the record. *McKenzie* v. *Person*, 26 Que. S. C. 521.

Demurrer to declaration allowed as plaintiff's cannot claim, as sisters of deceased, under Lord Campbell's Act. The declaration is not sustainable under Workmen's Compensation Act, C. S. N. B. 1903, c. 146. *Murray* v. *Miramichi*, 6 E. L. R. 247.

Demurrer to part of claim.] — Article 131, C. P., does not permit an inscription in law against a part of the claim which does not constitute, by itself, a distinct ground of action, but which, with the other allegations, serves to form an indivisible whole. *Eckels* v. *Piché*, 10 Que. P. R. 293.

Exception to form — *Summary action —Amendment.*]—An amendment to the declaration which changes the nature of the action and which renders it non-summary instead of summary will be refused upon motion to that effect. *Donnelly* v. *O'Connor*, 8 Que. P. R. 439.

Exception to form — *Summary action —Amendment — Costs.*]—An action brought in a summary way without a right to so bring it, may be attacked by exception to the form; a motion to amend the declaration will be granted, upon the plaintiff paying the costs of the motion and the disbursements of the exception to the form. *Condron* v. *Gibbons*, 8 Que. P. R. 438.

General allegation — *Admission of liability for class of accidents — Specific instances.*]—An allegation in the declaration of facts of a nature to establish by special instances the general allegation that the defendant has admitted liability for the same class of accidents as the accident in respect of which the action is brought, is legal and will not be rejected on an inscription in law. *Carter-White Lead Co. of Canada* v. *Employers Liability Assurance Co.*, 8 Que. P. R. 253.

Inconsistent allegations — *Motion to compel plaintiff to elect — Extension of time for pleading.*]—A motion that the plaintiff may be directed to elect between two contradictory allegations of his declaration, is a ground preliminary to the contestation, which has the effect of prolonging the time for pleading, which will not commence to run until judgment is given on such motion. *Blais* v. *Aubé*, 7 Que. P. R. 269.

Inconsistent claims — *Dilatory exception — Election.*]—Where a party to an action alleges contradictory grounds of action or defence, the course to be taken by the opposite party is not to inscribe in law, but to proceed by dilatory exception, in order to compel the party to elect: Art. 117, C. P. *Crépeau* v. *Bruneau*, 24 Que. S. C. 398.

Interest on promissory note — *Particularity.*]—An allegation in a declaration that the plaintiff claims a certain sum for interest due upon a promissory note, not otherwise described, is sufficient. *Brownell* v. *O'Farrell*, 5 Que. P. R. 85.

Irrelevant allegations — *Action by physician for fees — Cause of injury to defendant.*] — A physician who sues for the value of professional services, may not allege in his declaration, even in order to justify the amount of his claim, that the injury from which the patient suffered was mentioned in the newspapers, as well as the fact that the services of the plaintiff had been engaged; that the injury was caused by the son of the defendant, who was at the time in custody accused of injuring the defendant. *Marien* v. *Lussier*, 5 Que. P. R. 324.

Irrelevant matter — *Damages — Demurrer.*]—The allegation in the declaration in an action for damages that the plaintiff is the mother of two infant children whom she has to support, is useless, and will be struck out upon inscription in law. *Filion* v. *Linton*, 8 Que. P. R. 382.

Joinder of causes of action — *Annulment of municipal by-law—Damages caused by by-law — Separate condemnations — Incompatibility.*]—The plaintiff cannot by the same action ask for the annulment of a municipal by-law, and for damages caused by the passing of said by-law, and for a separate and distinct condemnation for each, especially when it appears by the declaration that the alleged claim for damages was not existent at the time of the institution of the action, but was dependent for its existence on the annulment of the by-law. *Simon* v. *Knowlton*, 9 Que. P. R. 343.

Joinder of causes of action—*Cancellation of deeds — Account — Injunction — Possession — Sequestration.*]—In the same action may be joined claims for the cancellation of certain deeds made by an inheritor for life, for an account of the rents and profits received by the grantees under these deeds by virtue thereof, for an injunction against the continuance of actions begun under these deeds, for terminating the possession of the inheritor for life, and to place the inheritance under sequestration unless the inheritor should furnish security. *Rexther* v. *Hebert*, 7 Que. P. R. 176.

Joinder of causes of action — *Misrepresentations — Sale — Setting aside — Abatement in price — Election.*]—A plaintiff who alleges that he was induced to make a contract by misrepresentations, cannot in his action claim the setting aside of the sale and a diminution in the price of the article sold; he must elect between these two grounds, upon dilatory exception to that effect. *Latourelle* v. *Charlebois*, 10 Que. P. R. 112.

Joinder of causes of action — *Sale of goods — Latent defects — Remedies of purchaser — Rescission — Abatement of price — Dilatory exception — Election.*]—Where the purchaser of goods joins in a single action claims for the two remedies which the law gives him in the case of concealed defects in the article sold, viz., cancelling the sale and reducing the price, the vendor may proceed by dilatory exception to obtain a stay of proceedings until the plaintiff elects which of the two remedies he will pursue. *Latourelle* v. *Charlebois*, 35 Que. S. C. 101.

Landlord and tenant — *Cancellation of lease.*]—In an action for the resiliation of a lease and for future rent, it is not necessary to allege specifically that the causes mentioned in the declaration entitle the plaintiff to the conclusions of his action. *Desautels* v. *Fortier*, 7 Que. P. R. 85.

Master and servant — *Injury to servant — Allegation of death of fellow-servant —Improvements in machinery — Relevancy.*]—In an action for damages for injury sustained by the plaintiff, when working on the roof of a building for the defendant, by reason, as charged, of the negligence of the defendant, the plaintiff may allege in his declaration that a fellow-workman, who was with him on the roof of the building, was killed, but it is irrelevant to mention the improvements made to the machinery since the accident. *Trainer* v. *Riordan Paper Mills Co.*, 9 Que. P. R. 267.

Matter for reply — *Moving against.*]—Where allegations necessary to sustain the demand are made in the reply instead of in the declaration, objection should be taken by way of exception to the form, and not by demurrer.—2. Upon a demurrer it was ordered that evidence should be given before the determination of the law. *Imperial Bank of Canada* v. *Quinn*, 2 Que. P. R. 386.

Matters arising after action — *Discharge of saisie-revendication — Final judgment.*]—The plaintiff cannot, by amending his declaration, allege facts arising subsequent to the commencement of the action. 2. In this case the plaintiff could not, in support of his action for damages for the issue without probable cause of a writ of *saisie-revendication*, allege the discharge of this writ by the Court, if the judgment discharging the writ had only become final after the institution of the action for damages and service of process therein. *Kaine* v. *Mathews*, 4 Que. P. R. 225.

Misjoinder of causes of action — *Breach of contract — Slander — Election.*]—Where the plaintiff in the same action claims damages for non-performance of a contract and for slander, he will be ordered to elect between these two causes of action; for a claim for a personal wrong must be tried before a jury, and upon it *contrainte par corps* may be ordered, and these remedies cannot be given upon a claim for damages for non-performance of a contract. *Bellerive* v. *Jodoin*, 8 Que. P. R. 194.

Misjoinder of causes of action — *Real and personal claims — Several defendants — Election.*]—When an action is personal as to one defendant and real as to other defendants, so that the remedies sought are cumulative and incompatible in regard to methods of defence and nature of condemnation, plaintiff will be ordered to elect between these two demands. *McCaskill* v. *Lariviere*, 9 Que. P. R. 53.

Misjoinder of causes of action — *Will — Community — Account — Election.*]—If the plaintiff asks by his action the annulment of a will and the dissolution of community and the rendering of an account, a motion to have him opt between these different heads of action will be granted. *Berger* v. *Clavel*, 8 Que. P. R. 274.

Motion to strike out — *Irrelevancy — Railway Act.*]—Allegations contained in a declaration in an action for damages for personal injuries, to the effect that the defendants, who were not a railway company, acted in contravention of the provisions of the Dominion Railway Act of 1903, are irrelevant and will be struck from the record on inscription in law. *Hence* v. *Standard Chemical Co.*, 7 Que. P. R. 451.

Necessity for plaintiff's signature—*Fraudulent deeds — Inscription en faux.*]—A plaintiff who begins a suit demanding that certain deeds mentioned in the declaration shall be declared fraudulent, is not obliged himself to sign the declaration, although he indicates in the declaration that he intends to inscribe *en faux* against such deeds. *Marcopostolos* v. *Fourcroy*, 5 Que. P. R. 315.

Negligence — *Bodily injuries — Allegations that persons dependent on plaintiff — Irrelevancy.*] — In an action for damages for bodily injuries, the plaintiff alleged that he was "the only support of a young wife, feeble and incapable of working, as well as of a mother 60 years old and having need of her son's assistance in order to live;" and that the defendants had put the plaintiff in a position in which he was not able to aid, sustain, and succour those of whom he had the charge as well by nature as by law:—*Held*, that these allegations should be struck out as irregular, useless, and having no connection with the liability of the defendants. *Lefrancois* v. *Dominion Bridge Co.*, 7 Que. P. R. 328.

Puis darrein continuance — *Aggravation of damages.*]—A plaintiff who complains of injuries caused to him a long time before the institution of the action, cannot, by a proceeding *puis darrein continuance*, on the eve of the hearing allege facts which would amount to an aggravation of damages. *Brunet* v. *Can. Pac. Rw. Co.*, 5 Que. P. R. 425.

Questions of fact and law—*Distress for rent — Seizure — Exemption.*]—Although a party cannot raise questions of fact in an inscription in law, he may, nevertheless, set up grounds of law in an exception or reply based upon facts set up. 2. In an action for rent and damages the plaintiff is not bound to allege in the declaration that the defendant has removed the greater part of his effects and that the effects seized were in fact seizable; this ground, which ought to be contested in law, should be set up by a pleading claiming exemption from seizure. *Beaubien* v. *Lynch*, 4 Que. P. R. 183.

Revendication of goods—*Purchase at assignee's sale—Signification of act of sale not alleged.*]—An action in revendication of goods purchased by the plaintiff at an assignee's sale, wherein it is not alleged that signification of the act of sale was made, nor that a copy of it was delivered to the debtor, nor that it is produced with the action, will be dismissed on an inscription in law. *Maller* v. *Levinton*, 7 Que. P. R. 17.

Sale of company shares—*Action to compel reduction of price—Necessary allegations.*]—In an action to compel a reduction in the price of shares in a joint stock company sold to the plaintiff, the failure to allege the proportion of the shares bought to the whole capital of the company is of importance only as regards the establishing of the amount of reduction of the price of the sale to which the plaintiff has a right, but does not prevent him from establishing his right to such reduction. *Strachan* v. *Gauvreau*, 8 Que. P. R. 197.

Service — *Time — Saisie-gagerie.*] — When a writ of *saisie-gagerie* is made returnable the second day after service, the declaration must be served at the same time as the writ. 2. When the service of a declaration may be made at the office of the clerk of the Court, there must be at least one clear day between such service and the return of the writ. *Dupuis* v. *Mathieu*, 24 Que. S. C. 136.

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

Time — *Saisie-gagerie — Exception — Service—Production.*] — In the case of a *saisie-gagerie* it is sufficient to file the declaration within three days after service of the writ, even if the writ is returnable and returned within two days after its execution. 2. The time allowed for the service of a preliminary exception in this case ran only from the day on which the plaintiff filed the contract of marriage establishing her status as a married women separate as to property. *Burcess* v. *Work Bulletin Printing Co.*, 6 Que. P. R. 442.

Title to note — *Particulars.*] — If a plaintiff does not set forth sufficiently in detail in his declaration the manner in which he became holder and owner of the note sued on, the defendant's recourse is by *exception à la forme* or motion for particulars and not by demurrer, if the allegations of the declarations are sufficient in law to justify the conclusions. *Abbott* v. *Jamieson*, 3 Que. P. R. 177.

Unnecessary counts — *Application to strike out — Grounds of general demurrer.*] —The Court will not, on a summary application before trial, strike out counts of a declaration merely because there are more than are necessary to sustain the action, or because they are repetitions of other counts, but will leave it to the Judge at the trial to compel the plaintiff to elect upon which count or counts he will take his verdict. An objection which is a ground of general demurrer can not be taken on a summary application to strike out or amend pleadings. *Babineau* v. *LaForest*, 37 N. B. R. 77.

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5. DEMURRER.

Action in damages — *Insurance policy — C. P. 191.*] — Whenever possible, it is desirable that the trial of a case should be proceeded with on its merits simultaneously with all the other questions raised in the pleadings, in order to obviate

multiplicity in the proceedings and upon appeals.—Thus, in an action in damages, the parties will be ordered to go to proof before the Court passes upon a demurrer praying for the rejection of an allegation of a plea in which it is stated that the plaintiff has already been compensated by receiving payment of the amount of an insurance policy. *Harwood* v. *The Canadian Northern Quebec Ry. Co.* (1910), 11 Que. P. R. 399.

Amendment — *Costs* — *Setting down*—*Waiver of objection.*]—A defendant may not answer and demur respectively to the whole bill, for thereby the demurrer is overruled, notwithstanding s. 47 of 53 V. c. 4. Consequently, where a demurrer professed to be to a part, and the answer professed to be to the residue, of a bill, but the demurrer was extended to the whole prayer of the bill, it was held that unless the answer was withdrawn, for which purpose leave of the Court was given, the demurrer should be overruled with costs, but that, if the answer was withdrawn, the demurrer being successful on the merits should be allowed with costs. The objection that an answer and demurrer are respectively to the whole bill, is not waived by the plaintiff setting the demurrer down for argument under s. 41 of 53 V. c. 4. A defendant cannot demur *ore tenus* where there is no demurrer on the record, as where the demurrer on the record is overruled by the answer. *Abell* v. *Anderson*, 21 C. L. T. 94, 2 N. B. Eq. Rcps. 136.

Grounds specified — *Receiver* — *Executors* — *Res judicata.*]—In adjudicating upon an inscription in law the Court will only take into consideration the grounds which are there specified. 2. A judgment rendered in an action *qui tam* may be set up by the defendants (executors) in an action brought for the purpose of forcing them to revive an action for damages, when the question in litigation is the same in the two cases. *Marshall* v. *MacDougall*, 5 Que. P. R. 186.

Parts of pleas — *Striking out.*]—It is not competent on a demurrer to a whole paragraph of a plea to strike out one or more words of it, in the same manner as on a general demurrer a part or parts, or one or more words, of a pleading cannot be struck out. *Gravel* v. *Quimet*, 8 Que. P. R. 240.

Question for decision — *Conclusions from facts* — *Logical sequence.*] — The only question to be decided upon a demurrer is not whether the facts alleged are true or false, not whether the plaintiff should have given to the writing upon which he bases his action a meaning different from that which he has alleged, but simply whether the conclusions of the plaintiff follow logically from the facts which serve as premises to the syllogism contained in the declaration. *Briggs* v. *Bourgie*, 8 Que. P. R. 261.

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6. EXCEPTION.

Action against married woman.]—In an action against a married woman, separate as to property, if a copy of the writ has not been served upon her husband, leave will be given plaintiff so to do, upon paying costs of exception to form. *Vacarezzo* v. *Charpentier* (1910), 12 Que. P. R. 38.

Amendment — *Change of plaintiff*—*Proceedings by attorney*—*Exception to the style of cause*—*Costs.*]—The plaintiff, who has proceeded irregularly as an attorney, will be permitted to amend the brief and the statement of claim by removing his name and leaving that of the real plaintiff. He will have a copy of this amendment sealed and pay the cost of the change in the style of cause. *Benoit* v. *O'Brien* (1909), 10 Que. P. R. 400.

Declinatory exception — *Affidavit in support* — *Reference to testimony of plaintiff*—*Acquiescence in jurisdiction*—*Request for bill of costs.*]—Where the defendant, in presenting a declinatory exception, declares that he refers to the testimony of the plaintiff as to the truth of the facts there alleged, it is not necessary to support the motion by an affidavit.—2. The fact that the defendant has written to the advocates of the plaintiff asking from them a copy of their bill of costs, for the purpose of examining it, does not import a promise to pay such costs and does not imply a recognition of the jurisdiction of the Court amounting to acquiescence which would bar the success of the exception to the jurisdiction. *Dostader* v. *Lachapelle*, 10 Que. P. R. 218.

Declinatory exception—*Can the Court extend the delay for filing it?*—*C. P. 170, 1154.*]—Permission given by the Court to serve the other party with a declinatory exception after the delay allowed by law, does not imply an extension of time to file it, and has no effect as to the jurisdiction of the Court. Want of notice within two days for filing preliminary exceptions in summary proceedings, Article 1154, C. P., is fatal; under no circumstances can this delay be prolonged by the Court. *Quinn* v. *Br. Col. Elec. Ry. Co.* (1911), 12 Que. P. R. 312.

Declinatory exception — *Deposit.*] — When a defendant by a declinatory exception demands simply the dismissal of the action, without complying with the terms of Art. 170, C. P., that is to say, without depositing the amount claimed, or the equivalent if it is something else than money which is claimed, his declinatory exception will be considered irregular and will be struck out with costs. *Garneau* v. *Gaudet*, 4 Que. P. R. 370.

Declinatory exception — *Jurisdiction*—*Plea on merits.*]—A party who complains, by way of declinatory exception, of a defect of jurisdiction *ratione personæ*, cannot afterwards complain of the same defect when pleading to the merits. *Lapierre* v. *Brunet*, 6 Que. P. R. 398.

Declinatory exception — *Reply* — *Account*—*Acknowledgment*—*Motion to strike out.*] — Where a declinatory exception is pleaded to an action upon an account, the plaintiff cannot, in replying to the exception, allege that the defendant has acknowledged owing the account in the district in which the action is brought. 2. Such an allegation may be struck out of reply by mo-

tion, and not by inscription in law, it being of a nature to justify the conclusions of the reply. *Theoret* v. *Brunet*, 6 Que. P. R. 441.

Declinatory exception—*Territorial jurisdiction of Superior Court—Practice—Payment into Court—Insufficiency of amount.*]—Where a defendant by a declinatory exception avails himself of Art. 170, C. P., which permits him to deposit the amount claimed and demand the dismissal of the action, he accepts the jurisdiction of the Court and consents to its disposing of the action. But he can escape from the action only by following strictly the terms of Art. 170, that is to say, by depositing the amount demanded, and not merely a part thereof. *Belleau* v. *Dufault*, 10 Que. P. R. 198.

Deposit — *Certificate—Service of notice—Insufficient deposit—Poundage payable to prothonotary.*]—A defendant who asserts a preliminary exception by way of motion is not obliged to serve upon the plaintiff a copy of the certificate of the prothonotary stating that the necessary deposit has been made; it is sufficient if he gives him notice of it.—The insufficiency of the deposit made when filing a declinatory exception in the case provided for by Art. 170, C. P. C., does not affect the validity of such a pleading, and, the action failing, it must be maintained if the deposit is completed before judgment.—The defendant in making such deposit is not bound to add the poundage payable to the prothonotary. *Rock City Cigar Co.* v. *Arpin*, 29 Que. S. C. 3.

Deposit—*Notice.*]—An exception to the form not accompanied by a notice that the necessary deposit has been made will be dismissed. *Garand* v. *Rolland*, 2 Que. P. R. 397.

Deposit—*Technical objection.*]—A motion to compel a party to number consecutively the allegations of a pleading is in the nature of a preliminary exception, and will be dismissed if it is not accompanied by the deposit required by Art. 165, C. P. *Le Blanc* v. *Pauzé*, 2 Que. P. R. 394.

Describing defendant as "Arthur W. Davidson," instead of "Archer W. Davidson," is not a ground for an exception to the form. *Quebec Bank* v. *Davidson* (1911), 12 Que. P. R. 231.

Dilatory exception — *Account* — *Default of service.*]—Default of service of an account upon which the action is based is ground for a dilatory exception, and not for an exception to the form. *Dubrule* v. *Leclaire*, 5 Que. P. R. 310.

Dilatory exception — *Agreement of third person.*]—A plaintiff, who has not been a party to an alleged agreement by which a third person undertook to pay him the amount of the notes upon which he sues, cannot be delayed in his recourse by a dilatory exception by reason thereof, and such exception must be dismissed. *Garand* v. *Caron*, 9 Que. P. R. 84.

Dilatory exception—*Beneficiary heir—Action against—Time for inventory.*]—The beneficiary heir cannot plead a dilatory exception to an action instituted against him in his quality of beneficiary heir, based upon the ground that the term for making inventory and deliberating has not expired. *Standard Drain Pipe Co.* v. *Robertson*, 5 Que. P. R. 70.

Dilatory exception—*Contractor—Warranty.*]—The owner of a property being sued for a fault of his contractor, is entitled to bring in the latter *en garantie* by a dilatory exception. *Flanigan* v. *Outremont*, 6 Que. P. R. 22.

Dilatory exception — *Fiduciary heir—Action against—Calling in widow and children of testator.*]—A fiduciary heir, who is sued for a debt of the *de cujus*, with the payment of which he was specially charged, having received funds therefor, has no dilatory exception to call in the widow, common as to property, and the minor children of the deceased. *Deguire* v. *Lanthier*, 7 Que. P. R. 112.

Dilatory exception — *Hypothecary action—Security—Defence au fonds.*]—A third party who has taken an immovable in payment of his hypothecary debt and who wishes to demand security, under Art. 2073, C. C. from a subsequent creditor who is suing him as hypothecary, should do so by defence on the merits and not by way of dilatory exception. *Bastien* v. *Desjardins*, 11 Que. K. B. 428.

Dilatory exception — *Inconsistent allegations — Motion to compel election—Deposit.*]—A motion to compel a defendant to elect between two allegations of his defence is in the nature of a dilatory exception, and must be accompanied by a deposit. *Martineau* v. *Pauzé*, 5 Que. P. R. 412.

Dilatory exception — *Parties—Amendment.*]—A motion to amend a dilatory exception, the object of which is to bring new contributories before the Court in respect of an assignment of property for the benefit of creditors, and which motion does not change the nature of the exception, will be granted. *Sleeper Engine Co.* v. *Jacobs*, 8 Que. P. R. 436.

Dilatory exception—*Right of plaintiff to file.*]—Although Arts. 177 and 183, C. P., speak only of the defendant, the plaintiff may demand by dilatory exception an extension of the time for replying to a plea of payment, when such plea renders it necessary to call in his landlord or others *en garantie*. *Dionne* v. *Ouellet*, 6 Que. P. R. 190.

Dilatory exception—*Simple warranty—Bringing in warrantor.*]—A dilatory exception is available in all cases where the defendant has a warranter to call in, even in simple warranty. *Simard* v. *Simard*, 9 Que. P. R. 172.

Dilatory exception — *Time — Particulars.*]—A dilatory exception served 6 days after the report of service of the writ cannot be received; the fact that grounds of exception to the form are raised by dilatory exception cannot change the nature thereof

nor render it receivable as a simple motion for particulars. *Whitworth* v. *Bergeron*, 9 Que. P. R. 120.

Dilatory exception — *Time—Service—Filing.*]—Service of notice of a motion in the nature of a dilatory exception made within 3 days of the entry of the cause, is sufficient; the law does not require the filing of the notice of motion within such time. *O'Brien* v. *Church*, 9 Que. P. R. 92.

Error in mentioning location of the head office of a bank is not a prejudice sufficient to justify an exception to the form. *Quebec Bank* v. *Davidson* (1911), 12 Que. P. R. 231.

Exception to form — *C. C. P. 174; 64 V., c. 32, s. 9.*]—A plaintiff suing to recover fees and who styles himself in the writ as a civil engineer is sufficiently described; the fact that he has not paid his annual fees and cannot exercise his profession cannot form the basis of an exception to the form and cannot be raised by a plea to the merits. *Ross* v. *West India Electric Co.*, 11 Que. P. R. 57.

Exception to form—*Conclusions—Dismissal of action.*]—Where in an exception to the form, the prayer was simply that the action should be dismissed, it was held improper, and the exception dismissed, the Court not being able to go beyond the prayer and reserve the remedy of the plaintiff. In this case the greater part of the grounds alleged in the exception to the form could have been pleaded to the merits. *Mondou* v. *Corp. of St. Francois du Lac*, 10 Que. P. R. 232.

Exception to form — *Notice — Irregularity—Time—Nullity of exception.*]—One who complains of the form must himself be without reproach in that regard. A notice of exception to the form given after three days from the entry of the cause is irregular, and such informality makes the exception itself void. *Bertrand* v. *Rainville*, 10 Que. P. R. 251.

Exception to form— *Plea to the merits —Res judicata — Appeal.*]—A question of form, submitted in a preliminary exception upon which judgment has been rendered, and from which no appeal has been taken, is *res judicata*, and the same point cannot be again raised in the plea to the merits.—C. C. 1241; C. C. P. 174. *Montreal Rolling Mills Co.* v. *Sambor* (1909), 16 R. de J. 80, 10 Que. K. B. 318.

Exception to form.]—1. The provisions of Art. 1150 C. P. (*summary matters*) do not apply to the lease of personal services.—2. When the main or principal object of a suit is subject to the ordinary rules of procedure it should be governed by such rules.—3. A motion whose object is only to determine the delays in which the pleadings are to be made and the case tried, *i.e.*, whether an action is summary or not, need not be an exception to the form. *Roller* v. *Waldman Co.*, 11 Que. P. R. 97.

Exception to form was filed by defendant. According to Art. 167, C. P., he was required to plead as to the merits of the action, but was estopped from so doing:—*Held*, that it was necessary for plaintiff to first proceed upon the exception to form before he could inscribe upon the merits. *Sterling* v. *Levine* (1910), 16 R. de J. 386.

Exception to form—*Writ served upon a person without interest in the suit—Prejudice—C. C. P. 174.*]—When the writ and declaration shew that the defendant is named Arthur Cote and that the writ was served upon Joseph Cote who has nothing in common with the defendant, the person thus served suffers a serious prejudice and may demand the dismissal of the action by an exception to the form. *Lazare* v. *Cote*, 11 Que. P. R. 83.

Exception to the form — *Action for a debt by insolvent after assignment—Defence on the merits.*]—The proper answer to an action by an insolvent who sues on an account forming part of his estate, after he has made an assignment, is by a defence on the merits and not by an exception to the form. *Cote* v. *Marinier*, 7 Que. P. R. 110.

Exception to the form—*Action in part summary and in part ordinary — Election.*]—Where the plaintiff's claim is in part summary and in part ordinary, the action as a whole is susceptible of different methods of procedure, and the defendant's remedy is to have the plaintiff *optate*, not to move for the dismissal of the action by exception to the form. *Sun Life Assce. Co.* v. *Piché*, 7 Que. P. R. 227.

Exception to the form—*Action in warranty with a further claim for damages and recovery of purchase price.*]—When, as a ground of defence to a petitory action, the defendant pleads possession and acquisitive prescription by thirty years, if the plaintiff sues his vendor in warranty for the purpose of having him take up the case with the defendant and to warrant him against such plea, he cannot, in addition to the ordinary conclusions of an action in real warranty, add conclusions to the effect that if the principal petitory action is maintained, the defendant in warranty be also condemned to reimburse him the purchase price and damages, and these latter allegations and conclusions will, upon exception to the form, be declared irregular. *Anderson* v. *Smith* (1910), 16 R. de J., 384.

Exception to the form—*Action to set aside a sheriff's sale—Particulars—Action or petition?—Delays—Beginning of a judicial demand—Affidavit—Costs—C. P. 76, 115, 123, 149 174, 785, 786, 1209; Rule of practice No. 47.*]—*Held*, 1. The absence of details in an action is a matter for a motion for particulars and not for an exception to the form.—2. The procedure by way of petition to annul a sheriff's sale provided by Art. 787 C. P. is not exclusive of the right to proceed by direct action, even if it cause more costs.—3. A judicial demand by a direct action is made by the issue of the writ of summons and the service thereof.—4. No affidavit is necessary in an action for the resolution of a sheriff's sale. *Trudeau* v. *La Banque Nationale, et al*, (1909), 11 Que. P. R. 310.

Exception to the form — *Defendant sued personally and in another capacity.*]— Where an exception to the form filed by a defendant sued personally is dismissed, the defendant, sued afterwards in another capacity, by an amendment, can offer the same objection in the character in which he is sued, but not personally. *Cantlie* v. *Cantlie*, 7 Que. P. R. 308.

Exception to the form—*Delay to file it—Appearance allowed by permission of the Court—Seizure for costs—Want of consent by the attorney of record—C. P. 174, 555.*]— A party who has obtained leave from the Court to appear and to contest a writ of attachment after judgment, has the right to file, within the ordinary delays, an exception to the form and this even when the writ has returned several days previously.— An attachment after judgment for the costs taken by the party himself, will be dismissed on an exception to the form, if it does not appear on the fiat that the attachment issued with the consent of the attorney for the seizing part and to whom the costs belong. *In re Penfold Advertising Agency, Wilks* v. *Weld Co. & Penfold*, 11 Que. P. R. 182.

Exception to the form—*Loss after filing — Record — Copy.*]—An exception to the form, accompanied by the deposit required in similar cases filed at the office of the Court within the time fixed by law, is regularly upon the record, and, therefore, before the Court, and if, in the time which elapses between its filing in the office and the day of its presentation before the Court, the original exception to the form is lost without any fault on the part of the party who filed it, the Court will order the filing, as part of the record, of a copy of such exception in place of the original. *Belanger* v. *Mercier*, 12 Que. K. B. 428.

Exception to the form — *Misnomer—Amendment.*]—A defendant who complains, by exception to the form, that the plaintiff does not describe himself under his true name, but without setting forth such true name, will not be allowed to amend his exception, after the delays within which it must be filed, by adding thereto an assertion of the true name of the plaintiff. *Dufour* v. *Portier*, 7 Que. P. R. 162.

Exception to the form — *Notice of deposit.*]—The Court will not hear an exception to the form when no notice of the deposit made therewith has been given to the opposite party. *Merchants Bank of Canada* v. *Republic Consolidated Gold Mining Co.*, 5 Que. P. R. 202.

Exception to the form — *Prejudice—Service.*]—No exception to the form will be entertained in the absence of an allegation and proof of prejudice; and in this case it did not appear that the service of process in the action after 7 o'clock in the evening (admitting that the delay was proved) had prejudiced the defendant. *Meunier dit Lapore* v. *Laurin*, 7 Que. P. R. 281.

Exception to the form—*Residence of defendant.*]—An exception to the form alleging that the defendant is described as being of the village of St. Louis, whereas he resides at Montreal, where process in the action has been served upon him, will be dismissed with costs. *Brunet* v. *Tison*, 5 Que. P. R. 459.

Exception to the form—*Service of the writ — Prejudice — C. P. 175, 559.*]—An exception to the form in which it is alleged that the writ was not served at the defendant's true domicil will be dismissed without costs, if the defendant himself admits that he has suffered no prejudice. *Benoit* v. *Parrieres*, 11 Que. P. R. 175.

Exception to the form—*Stamps—Particulars—C. P. 125, 175, 1150.*]—An exception to the form demanding the necessary details to enable the defendant to plead to an action should indicate such details.— Insufficiency of stamps upon judicial proceedings does not justify an exception to the form, if the party complaining has suffered no prejudice thereby and if, with the permission of the Court, such extra stamps have been placed upon the proceedings. *Weinstein* v. *Millman* (1910), 11 Que. P. R. 204.

Exception to the form—*Successive exceptions — Inadmissibility.*]—A party is entitled and bound to plead all his objections to the form at one and the same time. *Levy* v. *Levy*, 9 Que. P. R. 271.

Exception to the form — *Summary procedure — Time — Waiver.*]—A defendant sued in tort under the Summary Procedure Act, may proceed by way of exception to the form within the time limited and if he has pleaded to the merits he cannot complain of the defect of form at the time of the setting down of the cause for hearing. *Levy* v. *Strathcona Rubber Co.*, 5 Que. P. R. 341.

Exception to the form—*Writ issued in the name of a deceased sovereign—Prejudice —C. P. 174, R. S. C. c. 104, s. 3, s.-s. 2, s. 5.*]—An exception to the form founded upon the fact that the writ was issued in the name of a deceased sovereign (Edward VII.) and before his successor had been proclaimed, will be dismissed, in view of the fact that the defendant has thereby suffered no prejudice. *Rosenberg* v. *Millman* (1910), 11 Que. P. R. 358.

Exceptions to answer.] — Answers to interrogatories must be made substantially and fully, and not with a view to avoid giving information, but they need not be in strict or technical language. The rule in *Reade* v. *Woodroffe*, 24 Bea. 421, followed. *Pick* v. *Edwards* (1908), 4 N. R. Eq. 151.

Exceptions to answer — *Costs.*]—Exceptions to answer:—*Held*, that first exception must be overruled, the interrogatory having been substantially answered. The defendants' belief will, as against them, be accepted by the Court as its belief. Where the substantial information is given it is sufficient if nothing suggests any avoidance by defendant. Other five exceptions allowed. *Pick* v. *Edwards*, 7 E. L. R. 276.

Failure to call liquidator into a case —*Should it be raised by exception to the form? — Does failure to answer an excep-*

tion to the form constitute an admission?—C. P. 111, 174, 177, 521.]—It is not by an exception to the form but by a dilatory exception that the defendant should set up that the liquidator has not been called into the case.—Failure to answer an exception to the form does not constitute an admission of the allegations thereof; the party who makes the exception must prove that it is well-founded. *Royal Bank* v. *Mutual Assurance* Co. (1910), 11 Que. P. R. 265.

Form—*Action by advocate—Professional standing — Account — Change in details.*] — A plaintiff who is described in a writ as an advocate is sufficiently designated, and his good or bad standing at the bar is a matter for the merits of the case, not for an exception to the form.—Small changes made in the details between the account sent to the defendant before the action and the one filed with the declaration, cause no prejudice to the defendant, and do not justify an exception to the form. *Tucker* v. *Lidstone*, 8 Que. P. R. 220.

Form—*Name of plaintiff—Initial—Prejudice.*]—An exception to the form alleging that the plaintiff in the writ of summons describes himself by the initial letter only of his one Christian name will be struck out with costs if the defendant does not allege and prove prejudice to him thereby. *Huard* v. *Barthe*, 8 Que. P. R. 237.

Form — *Waiver—Appearance by another solicitor — Ground of exception — Particulars.*]—When a defendant appears separately by two solicitors and one of them files an exception to the form, the defendant is held to have waived, by reason of the other appearance, his objections to the form of the plaintiff's pleading. 2. It is not a ground of exception to the form that the pleading does not give sufficient particulars, but only a ground for asking further particulars. *Moreau* v. *Lamothe*, 18 Que. S. C. 34.

Hypothecary action — *Exception of discussion—Holder of immovable charged with the debt — Dilatory exception — Delay — Deposit — C. P. 164, 165, 177; C. C. 2065, 2066.*] — An exception of discussion is a dilatory one; it should therefore be filed within the delays and with the formalities required for preliminary pleas. The third party in possession of property who is personally liable for a debt claimed from him by an hypothecary action, cannot set up the benefit of discussion. *Trudel* v. *Briere* (1911), 12 Que. P. R. 334.

Inscription for hearing ex parte—*Preliminary exception not yet disposed of—C. P. 167, 207.*]—Court will not take cognizance of an inscription for hearing *ex parte* if there is an exception to form still pending and not yet inscribed, and this, even where defendant has been foreclosed from pleading to merits after being ordered by judgment so to do. *Serling* v. *Levine* (1910), 12 Que. P. R. 33.

Motion to reject answer to plea—*Delays to file it—C. P. 164, 198.*]—A motion to reject an answer to plea, being a matter of form, must be proposed within the delays of an exception to the form. *Croysdill* v. *Mark Brock Enterprises* (1910), 12 Que. P. R. 139.

Opposition to judgment — *Cross-demand — Set-off — Waiver — Jurisdiction.*] —In framing an opposition or petition in revocation of judgment, the defendant, in order to comply with Art. 1164, C. P. Q., is obliged to include therein any cross-demand he may have by way of set-off or in compensation of the plaintiff's claim, and, unless he does so, he cannot afterwards be permitted to file it as of right. A cross-demand, so filed with a petition for revision of judgment, is not a waiver of a declinatory exception previously pleaded therein, nor an acceptance of the jurisdiction of the Court. In order to take advantage of waiver of a preliminary exception to the competence of the tribunal over the cause of action on account of subsequent incompatible pleadings, the plaintiff must invoke the alleged waiver of the objection in his answers. *Magann* v. *Auger*, 21 C. L. T. 329, 31 S. C. R. 186.

Preliminary exception — *Deposit.*]—The requirements of Art. 165, C. P., as regards the deposit to be made with preliminary exceptions, are peremptory, and must be strictly complied with. *Leclerc* v. *Ayer*, 5 Que. P. R. 253.

Preliminary exception—*Deposit—Certificate — Filing of copy.*]—A copy of the prothonotary's certificate that the deposit required with a preliminary exception has been made, must be served with such exception, otherwise the exception will be rejected. *Karbage* v. *Malouf*, 9 Que. P. R. 305.

Preliminary exception—*Irregularities in procedure.*]—A general allegation of irregularities in a preliminary exception cannot be considered; it is necessary to set out in what respect the service and the designation of the defendant are irregular. *Agnew* v. *Gober*, 8 Que. P. R. 217.

Preliminary exception—*Long vacation —Computation.*]—Article 10, C. P., which dispenses with the necessity of proceeding during the long vacation, applies to preliminary exceptions. Thus, when an action has been commenced between the 30th June and the 1st September, it is deemed to have been so commenced on the 1st September, and preliminary exceptions can then be made on the 2nd, 3rd, or 4th September, or any juridical day immediately following the 4th September, if the latter is not a juridical day or a Saturday. *Trusts and Guarantee Co.* v. *Belanger*, 7 Que. P. R. 291.

Preliminary exception—*Order allowing after time expired — Appeal.*]—The Court has a discretionary power to allow the filing of preliminary exceptions, and particularly of an exception to the form, after the delays, when sufficient reason for the delay is shewn. 2. A judgment allowing a defendant to file an exception to the form after the delays, without adjudicating upon its merits, is not an interlocutory judgment from which leave to appeal can be granted. *Lefebvre* v. *Heirs of Everett*, 6 Que. P. R. 188.

Preliminary exception — *Plea to the merits — Inscription — C. P. 167, 207.*]— When a defendant has filed a preliminary exception and is called upon to plead to the merits and fails to do so and is foreclosed by the plaintiff, the latter cannot inscribe the case for judgment *ex parte* but must first inscribe for hearing on the preliminary exception. *Sterling* v. *Levine* (1910), 16 R. L. n. s., 494.

Preliminary exception — *Plea to the merits — Postponement.*]—To a demand for an assignment the debtor filed an exception and contested the demand upon the merits before adjudication upon the exception:—*Held*, that it is lawful for a party who had filed a preliminary exception to plead to the merits before the contention upon the exception is decided; but in this case the hearing upon the merits should be postponed until the exception should be decided, and if it should be maintained, the defendant would have no right to costs of the contestation; if the exception should be dismissed, the contestation would proceed in the ordinary way. A motion to set aside the contestation was dismissed. *McCall* v. *Godmaire*, 5 Que. P. R. 210.

Preliminary exception — *Service—Deposit — Notice.*]—It is not sufficient in the signification of an exception to the form, to serve notice that the certificate of the prothonotary as to the deposit will be filed at the time of the return of the motion, but a copy of the certificate itself ought to be served; and the defendant will not be allowed to serve such copy after the return of the motion. *Roberge* v. *Bélanger*, 7 Que. P. R. 80.

Preliminary exception — *Time—Computation — Vacation.*]—Although Art. 10, C. P., says that "in the computation of the time for pleading or for trial the first day of September is considered to be the day immediately following the 30th day of June," it does not follow that every day after the 30th June is to be considered as being the 1st September, and, therefore, the three days allowed by Art. 164, C. P., for the service of preliminary exceptions begins to run, in the case of an action brought during vacation, upon the first and not the second day of September. *Barbeau* v. *Jobin*, 5 Que. P. R. 457.

Preliminary exceptions — *Pleading to the merits.*]—The fact that a plaintiff has answered preliminary exceptions, does not prevent his requiring the defendant to plead to the merits in spite of such exceptions. *Roy* v. *Quesnel*, 7 Que. P. R. 148.

Procedure—*Motion to reject an opposition to judgment.*] — An opposition to a judgment is a defence to the action and it cannot be dismissed on motion, but it must be contested either by an exception to the form within the legal delays or by a plea according to the ordinary rules. *Page* v. *Trudeau* (1910), 16 R. de J. 422.

Procuration of a foreign plaintiff—*Exception to delay — Deposit.*]—A procuration can only be demanded of a foreign plaintiff, by an exception to the delay, and if this procedure is not accompanied by a deposit the Court will not grant him after the delays the permission to make such deposits. *Trinque* v. *Touzin* (1909), 10 Que. P. R. 396.

Seizure before trial—*Affidavit—Its insufficiency — May it be attacked by an inscription in law?*]—Inscription in law is a defence to the merits of a claim based on certain facts, when such facts are insufficient in law to give an opening for that demand. The affidavit for seizure before trial is not a claim giving place to an inscription in law; it constitutes only a formality demanded by the law to justify the exercise of an exceptional procedure, and the allegation may not be denied in the pleadings. *Provost* v. *Society of Art* (1909), 10 Que. P. R. 378.

Substitution of facts by affidavit—*Fact that should appear in the bailiff's return to the writ of summons — Time of presentation to the Court of a motion in the nature of an exception to the form.*]—A defendant who, in an exception to the form, states a fact that should be made to appear in the bailiff's return, to the writ of summons (*e.g.*, the distance from the place of service to the place where the Court is held), is not bound to substantiate it by affidavit.—When a motion in the nature of an exception to the form, is served within the proper delay, its presentation to the Court, pursuant to notice, on the second instead of the first possible day thereafter, is valid and does not amount to a violation of No. 2, Art. 164 C. P.—*Quære*, as to the binding force of the rule laid down in *Larue & Poulin*, 17 Que. K. B. 188; *Demers* v. *Forcier*, 19 Que. K. B. 174.

Summary procedure — *Damages for breach of conditions of lease — Particulars —Stamps — Exception to the form — C. P. 123, 174, 1150.*]—An action to recover damages arising out of a lease is summary.—An exception to the form which requires certain details to enable defendant to plead to the action should enumerate such details.—Insufficiency of stamps upon proceedings does not justify an exception to the form if no prejudice has been suffered thereby and if the required additional stamps have been since affixed to such proceedings with the permission of the Court. *Weinstein* v. *Mailman* (1910), 11 Que. P. R. 294.

Time for filing.]—When the time for the filing of a preliminary exception expires upon a Saturday, the exception may be validly served and filed on the Monday following. *Martin* v. *Drew*, 7 Que. P. R. 435.

Time for filing—*Interruption—Irregular motion.*]—A motion of the defendant to compel the plaintiff to produce a power of attorney, declared irregular because the notice was not stamped as required by law, does not interrupt the time allowed for pleading by way of preliminary exception or on the merits. *Duncan* v. *Payette*, 7 Que. P. R. 478.

Want of capacity in plaintiff decided upon an exception to the form—*Can the same defect be pleaded in a plea to the merits — Inscription in law.*]—(Confirming

Fortin, J., Lavergne, J., dissenting.) — When the Court has decided on an exception to the form, that the plaintiff had the capacity required to take his action, the same question cannot be raised in the plea to the merits. *Montreal Rolling Mills Co.* v. *Sambor*, 11 Que. P. R. 110.

See COMPANY — COSTS — COURTS—INFANT —LITIGIOUS RIGHTS—NOTICE OF ACTION —PENALTY — SALE OF GOODS—SCHOOLS —VENDOR AND PURCHASER—WARRANTY.

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7. INCIDENTAL DEMAND.

Action by husband and wife—*Joint cause — Separate cause — Joinder.*]—In an action brought by both husband and wife for attacks made upon them in common, whereby they jointly suffered, an incidental demand based upon the husband's dismissal, will be rejected upon exception to the form. *Villeneuve* v. *Anderson*, 7 Que. P. R. 290.

Exception to form—*Demurrer.*]—Upon an exception in the form, no decision can be given as to whether an incidental demand is well founded in law or not. *Vigeant* v. *Picotte*, 10 Que. P. R. 150.

Filing — *Amendment.*] — An incidental demand whereby a plaintiff claims something which he had omitted to ask for by his action, is not in the nature of an amendment, and leave to file it is not necessary. *Scottish Union Assurance Co.* v. *Quinn*, 5 Que. P. R. 262.

Incidental improbation—*Reasons of—C. P. 226, 227, 232.*]—A petition in improbation does not need to set forth the reasons for improbation. *Letang* v. *Décarie* (1910), 11 Que. P. R. 263.

Leave to present in forma pauperis—*Terms.*]—The authorisation to sue in an action for a certain sum, *in forma pauperis*, does not extend to a supplementary incidental demand, filed at a later stage in the same cause. 2. In such case the person making the incidental demand will be ordered to affix to his demand the necessary stamps, and to obtain permission to proceed *in forma pauperis* upon his incidental demand; upon his default to conform to such order within the time fixed by the judgment, his incidental demand will be dismissed upon exception to the form. *Vitale* v. *Canadian Pacific Ry. Co.*, 4 Que. P. R. 335.

Supplementary answer—*Rights arising since action.*]—An incidental demand does not lie where it claims a right which did not exist at the time of the institution of the action, especially if such right does not constitute an answer to the contentions of the adverse party, but may at the most serve as a basis for a new action on the part of the one who invokes it. 4. The supplementary answer to an action or to a plea, of which Art. 199, C. C. P., speaks, must consitute a good defence to such action or a good reply to such plea, and it must not be founded upon facts subsequent to the institution of the action which do not contribute a reply to the defendant's plea, but which might, at most, support a fresh action by the plaintiff against the defendant. *Dupuis* v. *Dupuis*, 19 Que. S. C. 500.

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8. INSCRIPTION IN LAW.

Allegations of fact—*Documents.*]—An inscription in law ought to be directed against the facts alleged, and the documents produced in support of the claim ought not to be taken into consideration. *Lewis* v. *Cunningham*, 7 Que. P. R. 238.

Amendment — *Leave.*]—An inscription in law, once served and filed, cannot thereafter be amended without leave of a Judge. *Grossman* v. *Cloman*, 7 Que. P. R. 281.

Answer to plea—*Amendment—Inscription in law — Time.*]—An inscription in law, coupled with an amendment of the plaintiff's answer to plea, being not an amendment to the answer originally filed, but a distinct plea, must be communicated and filed at the same time as the original answer. *Barber* v. *Grand Trunk Ry. Co.*, 8 Que. P. R. 8.

Conclusions.]—An inscription in law or demurrer must contain a conclusion or prayer. *Prefontaine* v. *Compagnie de Publication de la Patrie*, 6 Que. P. R. 183.

Filing — *Defence on merits.*] — An inscription in law must be filed at the same time as a defence on the merits, and the Court will not adjudicate upon such inscription until after the filing of the defence. *Leach* v. *Pelletier*, 8 Que. P. R. 71.

Grounds of—*Conclusions.*]—An inscription in law should contain not only grounds but conclusions of law. *Delisle* v. *McCrea*, 27 Que. S. C. 76.

Practice.]—An inscription in law founded on grounds which apply to several paragraphs of a pleading, should be directed against all of such paragraphs, and not against only one of them. *In re Victoria Montreal Fire Ins. Co.*, 6 Que. P. R. 302.

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9. INTERVENTION.

Preliminary plea—*Time for service of motion to strike out—Defences—Couverture—Absence of deposit.*]—A motion to strike out certain allegations of an intervention, as being in the nature of a preliminary plea, is itself a preliminary plea, and should be served within three days of the filing of the intervention. 2. An intervener may plead that the plaintiff, being *commune en biens*, is not entitled to the damages which she claims.—*Quære*, whether an intervener may set up the want of the deposit required by Art. 793, C. P., when the defendant has not set it up. *Prevost* v. *Ahuntsic*, 5 Que. P. R. 131.

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10. NOTICE OF DEFENCE.

County Courts—*Striking out.*]—In an action in a County Court the fact that the

special matters set out in a notice of defence could be given in evidence under the general issue, is not necessarily a good ground for an application to strike the notice out. *Bennett* v. *Cody*, 35 N. B. R. 277.

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11. PETITION.

Opening publication — *Necessary details — Exception — Amendment — Costs.*] —A petition to reopen the proceedings in an action for damages by reason of an accident, dismissed upon contradictory evidence, upon the ground that the plaintiff has discovered a new witness who can say how the accident happened, without alleging other details, should be attacked by exception to the form, and not by answer in law.—2. In such a case the plaintiff will be allowed to amend in order to shew, in substance, what the new witness can tell, and costs will be reserved. *Lefebvre* v. *Dominion Wire Mfg. Co.*, 2 Que. P. R. 497.

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12. PLEAS.

Acceptance of jurisdiction — *Subsequent declinatory exception—Bill of lading.*] —A defendant by pleading to the merits accepts the jurisdiction of the Court, and cannot afterwards maintain a declinatory exception.—The action was for the recovery of certain goods intrusted to a steamship company; the defendants pleaded to the merits; the plaintiff replied disputing the validity of certain clauses in the bill of lading; and the defendant then, by declinatory exception, objected to the jurisdiction on the ground that it was provided in the bill of lading that all disputes regarding it were to be decided before the Courts of a foreign country:—*Held*, that the exception was not maintainable. *Ramsay* v. *Hamburg-American Packet Co.*, 2 Que. P. R. 406.

Action for price of goods—*Plea of late delivery — Damages — Set-off — Incidental demand.*]—The allegations of a plea in which the defendant complains that the plaintiff has not delivered the goods sold in due time, which has occasioned the defendant damages, are valid in law; for they allege facts essential to establish the right of the defendant to refuse to pay because the contract has not been performed.—The conclusions of a plea demanding a set-off against the amount of an account, of the damages occasioned by delay in the delivery of the goods, will be struck out upon inscription in law; the defendant cannot plead set-off of damages without having recourse to an incidental demand, such claim not being liquidated in the same degree as the debt sought to be recovered. *Lamarche* v. *Grant*, 8 Que. P. R. 195.

Action on contract—*Reserving recourse for damages — Facts arising after action—Willingness to permit performance — Right of retention of guarantee deposit.*] — It is competent for a party pleading breach of the contract sued on to reserve his recourse for the damages resulting from such breach. —2. It is competent for the defendant, sometimes, to plead incidents which have occurred up to the time of his plea.—3. He may also plead that he has always been willing to permit the carrying on of the contract work, and pray *acte* of such willingness.—4. If a certain amount has been deposited in the hands of the defendant to guarantee the fulfilment of the contract, the latter is fully entitled to plead his right to retain said sum in whole or in part by reason of plaintiff's breach of contract. *Brazer* v. *Elkin*, 9 Que. P. R. 281.

Action to cancel a contract for fraud and conspiracy, the defendant cannot plead that the plaintiff is actuated by feelings of hatred and vengeance; these are not grounds of defence and they could be of no possible use in aiding to defeat the action. *Martineau* v. *School Commissioners* (1910), 12 Que. P. R. 201.

Against a plea in which a general denial and special grounds are set forth, the plaintiff should not demur, but he should move that the defendant be ordered to choose one of these contradictory grounds of defence. *Clavet* v. *Forgues* (1910), 17 R. de J. 92.

Action to recover shares of defendant's capital stock — Wrongfully transferred after death of owner — Defendant's belief that plaintiff might be estopped—Acted on representations of third parties—Amendment of statement of defence — Order for particulars after discovery.—*Townsend* v. *Northern Crown Bank*, 14 O. W. R. 727, followed. *Stuart* v. *Hamilton Jockey Club* (1910), 17 O. W. R. 195, 2 O. W. N. 107.

Admissions — *Retractation — Amendment — Denial — Error of fact.*]—Allegations in a plea containing admissions of facts alleged in the declaration, cannot, by amendment, be changed into denials of these same allegations, unless it is alleged that such admissions were made by error of fact. *Elliott* v. *Lynch*, 9 Que. P. R. 306.

Affirmative plea—*General denial—Election — Husband and wife — Separation.*]— When a defendant pleads an affirmative plea at the same time as a general denial, the plaintiff has no right to have the affirmative plea struck out; he must confine himself to a motion to make the defendant elect between the two pleas. 2. A defendant who denies only a part of the allegations of the declaration may plead at the same time an affirmative plea. 3. In an action for separation of persons or property, the defendant may plead at the same time a general denial and an affirmative plea. *Vachon* v. *Rochette*, 25 Que. S. C. 242.

Allegations of facts later in date than the action — *Inscription in law—C. P. 191.*]—Facts subsequent to the date upon which the action was taken cannot be pleaded when they have not for object the extinction of the obligation payment of which is claimed. *Labonte* v. *Desjardins* (1910), 11 Que. P. R. 326.

Amendment—*Exception to the form.*]— An amendment to a plea, which contains only matters of exception to the form, such as the

nullity of the writ for non-user during six months, will be rejected on motion to that effect. *Demers* v. *Girard*, 7 Que. P. R. 60.

Amendment—*Filing of new plea—Right to demand jury trial not asked by original plea.*]—Where a plea is amended by the permission of the Court, and on conditions imposed upon the defendant, he is remitted to the position in which he was at the time of the filing of his original plea. Therefore, where in a cause proper to be tried by a jury, a defendant, failing at first to assert his right to trial according to that method, obtains leave to file a new plea, he may therein demand a trial by jury as he might have done by his original plea. *Huard* v. *Landrieux*, 33 Que. S. C. 391.

Amendment — *Inscription for trial — Effect on.*]—A defendant's amendment to his plea does not discharge an inscription for *enquête* and merits previously made, or retard the cause, or affect it in any way beyond the terms of the judgment permitting such amendment. *Smith* v. *Remington-Martin Co.*, 9 Que. P. R. 375.

Amendment—*Must be before judgment.*]—A Judge is invested with a discretionary power, but he ought to exercise it within the limits of justice, and he cannot permit an amendment at the same time that he renders his final judgment; the amendment of any pleading should always be made before judgment; Arts. 516, 518, 520, and 522, C. P.; Hall, J., dissenting. *Guillot* v. *Garant*, 21 Que. S. C. 282.

Amendment — *Time—Reply.*]—The defendant has the right to file an amended plea without costs or leave of a Judge, before the plaintiff has served his reply, even if there is an order for particulars.—The delays for replying to the amended plea only run from the filing of the amendment. *Hudon* v. *McDonald*, 7 Que. P. R. 374.

Amendment after hearing.]—A motion to amend the conclusions of a plea in order to make them agree with the allegations of the plea and with the evidence adduced will be granted, when the plaintiff does not take exception to either the allegations or the evidence. *Campbell* v. *Eno*, 8 Que. P. R. 128.

Amendment after judgment—*Amount of damages — Petition — Clerical error — Procedure.*]—The advocate of the defendant had omitted to deny allegation 4 of the plaintiff, which was, that the damages caused by the defendant amounted to $200. The Judge, supposing that this allegation had not been denied, awarded the plaintiff the $200 as damages. Then the defendant's advocate for the first time perceived his omission and made an affidavit to that effect, adding that it was by error and inadvertence that he did not deny such allegation. He then presented, pursuant to notice, a petition to the Court:—*Held*, that the nine cases mentioned in Art. 1177, C. P., in which a petition lies, are not limitative. 2. That the defendant should not suffer from such an inadvertence, which is equivalent to a clerical error and affords ground for a petition. 3. That the petition should be received by the Court, in order that the petitioner might proceed upon it according to the ordinary rules of procedure. *Roy* v. *Davis*, 21 Que. S. C. 184.

Breach of contract — *Non-delivery of goods — Justification — Insolvency—Facts constituting.*]—An inscription in law is not well founded in spite of the fact that the allegations by which a vendor, being sued for cancellation of a contract of sale of goods for non-delivery, seeks to justify his refusal, do not contain the word "insolvent," when they sufficiently allege the facts to justify proof of insolvency within the meaning of Art. 1497, C. C. *Pineau* v. *Letellier*, 7 Que. P. R. 203.

Cause of action arising in another province—*Pleading not guilty by foreign law — Particulars.*]—Where a defendant is sued in the province of Quebec for damages on account of injuries sustained in another province, and pleads that according to the law of that province he is not liable, it is sufficient to indicate the fact in his pleading without giving the particulars of the law of that province. *Woronjuk* v. *Canadian Pacific Ry. Co.*, 9 Que. P. R. 274.

Cheque — *Consideration — Presentment for acceptance or payment.*]—An action on a cheque will not be dismissed on an inscription in law because the declaration does not allege the consideration nor presentation for acceptance or payment; and an allegation in a pleading setting up absence of consideration is not a good defence to the action; but an allegation of want of presentation for payment is good as a defence. *Aumont* v. *Massey*, 7 Que. P. R. 67.

Contentions in law — *Principal and agent.*]—In the Quebec system of procedure, the Courts having to adjudicate upon both fact and law, contentions of law are allowable in pleadings. 2. The allegations in a defence that the defendant has acted not personally but as mandatory of a third person, whom he names, are pertinent; the mandatory who acts in his own name within the limits of his authority, binding his principal as well as himself. *Dubois* v. *Gohier*, 5 Que. P. R. 228.

Contract — *Non-completion — Payments — Damages — Penalties.*]—A defendant is entitled to allege in his plea that the contract sued on has not been completed, and in what respects, and also any specific payments made to or on behalf of the plaintiff; but it is irrelevant to allege damages for the non-execution of the contract and penalties for delay. *Guimont* v. *Robillard*, 9 Que. P. R. 112.

Contradictory allegations — *Action premature and prescribed — Motion to optate.*]—A plea which alleges in one paragraph that the action is premature, and in another paragraph that plaintiff's right of action is prescribed, contains contradictory allegations; the defendant must optate between them upon motion to that effect. *Harrower* v. *Forbes*, 11 Que. P. R. 113.

Contradictory allegations — *Admissions.*]—The defendant, by his plea to an action in *saisie gagerie*, admitted that the

plaintiffs were the universal legatees of the deceased; but alleged that D. was the testamentary executor, and that an agreement existed between him and the defendant that no action would be brought pending certain negotiations:—*Held*, that these allegations were not contradictory, and would not be struck out on inscription in law. *St. Aubin* v. *Crevier*, 7 Que. P. R. 403.

Conversion—*Denial—Dates.*]—The statement of claim alleged that on or about a certain date the plaintiff was the owner of certain goods and chattels described, and that, on or about the date mentioned, the defendant converted them to his own use:—*Held*, that pleas which denied that the plaintiff was the owner of the goods and chattels described, without adding the words "or any of them," and which confined the denial of the plaintiff's ownership of the goods and chattels, and the defendant's conversion of them, to the dates mentioned in the statement of claim, were bad and must be set aside. *McDonald* v. *Lowe*, 34 N. S. R. 531.

County Court—*Action against administrator.*]—Where the defendant, being sued in the County Court as an administrator, pleaded that the intestate was never indebted, and for a second plea, *plene administravit*, the Court ordered the second plea to be struck out, on the ground that more than one plea can only be pleaded by leave of the Court. *Belyea* v. *Hatfield*, 23 C. L. T. 158.

Declaration.]—An allegation in the declaration which refers to matters which arose after the action has been instituted is irregular and will be struck on an inscription in law. *Lussier* v. *Hudon*, 11 Que. P. R. 40.

Default — *Foreclosure—Time—Security for costs — Notice.*]—The defendant cannot be foreclosed for default of pleading before the expiration of six days from the service of a notice informing him that the security for costs which the plaintiff has been ordered to furnish has, in fact, been furnished. *Guilbault* v. *Waring*, 10 Que. P. R. 45.

Default — *Leave to file — Regularity—Order — Appeal from — Time.*]—A party in default for the filing of a pleading in the matter of the contestation of a demand for an assignment, may obtain from a Judge leave to file such pleading, and if such permission is granted the filing will be regular. 2. An order permitting the filing of a pleading after the proper time, obtained *ex parte*, is a judgment, and the party complaining of such judgment must in proceeding to have it reviewed do so within the proper time. *Filion* v. *Mussen*, 5 Que. P. R. 284.

Default of plea — *Non-production of documents — Ex parte inscription—Striking out — Costs.*]—Until the actual proofs invoked in support of an action have been produced by the plaintiff, and notice given to the opposite party, the plaintiff cannot foreclose the defendant from pleading and inscribing for judgment *ex parte*. A motion of the defendant to set aside the foreclosure and the inscription will be granted with costs. *Lafontaine* v. *Choquette*, 4 Que. P. R. 437.

Default of plea — *Non-production of documents — Ex parte inscription—Striking out — Costs.*]—When the actual documents invoked in support of an action are not produced at the time the action is instituted, a defendant can be foreclosed from pleading only under an order of a Judge, even if such documents are produced after the return as to the service of process, and notice duly given of their production. 2. So long as a foreclosure has not been obtained as above, the plaintiff cannot inscribe for examination and hearing *ex parte*. 3. A motion of the defendant to strike out such an inscription and for permission to plead will be granted with costs against the plaintiff. *St. Aubin* v. *Lamarche*, 4 Que. P. R. 434.

Default of plea — *Noting pleadings closed — Neglect of plaintiff to produce documents — Irregular inscription — Leave to plead — Costs.*]—When the documents relied upon in support of the claim in an action are not produced with the return of the writ of summons, the defendant will not be foreclosed from pleading upon default of pleading within the usual time, except by the order of a Judge, even if such documents are afterwards produced. 2. The inscription *ex parte* of the action for examination and hearing under these circumstances is irregular and illegal, and will be struck out of the record. 3. The defendants having declared that they had a good defence and having produced affidavits to that effect with their motion, were allowed to file their defence, the whole with costs against the plaintiff. *St. Aubin* v. *Lamarche*, 5 Que. P. R. 41.

Defence in law—*Setting down—Irregularities — Exception à la forme.*]—A defendant who, instead of demurring according to Art. 192, C. P. C., files a defence in law in the form in use under the old Code, and afterwards sets down such defence for hearing, thereby makes his procedure regular, and the plaintiff, not being prejudiced thereby, cannot ask to have the defence in law set aside.—2. The principle of Art. 174, C. P. C., that the defendant may invoke, by way of exception to the form, when they prejudice him, grounds resulting from irregularities in the writ, the declaration, and the service, is applicable also to every other proceeding in the cause. *Montreal Park & Island Rw. Co.* v. *St. Louis*, 16 Que. S. C. 335.

Denial — *Inconsistency — Striking out.*]—A plea denying each and every of the allegations of the declaration in such manner as would force the plaintiff to prove them all, is exclusive of a second plea denying some of the counts only, and stating that the others are compensated, and a motion to reject the latter plea will be granted, unless the defendant consents to withdraw his first plea or modify it so as to put it in accordance with the second defence. *Brulotte* v. *Giard*, 2 Que. P. R. 450.

Denial of allegations of declaration —*Pleading additional facts — General denial — Art. 202, C. P.*]—Denying in particular every allegation of the declaration does not constitute a general denial, within the meaning of Art. 202, C. P.; it is per-

missible for the defendant to allege facts which simply add to the denial of a particular allegation. *Endrukaitis* v. *Alexandrovitch*, 10 Que. P. R. 207.

Denial of facts—*Subsequent inscription in law.*]—Where the defendant has filed a defence upon the facts denying the allegations of the claim, he cannot afterwards file an inscription in law except by leave of the Court. *Cropadill* v. *Marconi Wireless Telegraph Co. of Canada*, 10 Que. P. R. 117.

Dilatory exception — *Time*—*Defence au fonds* — *Parties* — *Executors.*]—A defendant who has obtained leave to defer pleading until an exhibit in support of the plaintiff's demand be produced may plead a dilatory exception during the three days which follow the production of the exhibit.—2. The fact that the grounds of a dilatory exception may be pleaded so as to go to the root of the action does not prevent the defendant from pleading them by way of exception.—3. A testamentary executrix whose removal is sought on account of bad administration has the right to demand, by way of dilatory exception, that her co-executors shall be made parties. *Carrière* v. *Roy*, 2 Que. P. R. 402.

Dilatory plea — *Partition* — *Parties*—*Names, residence, and quality.*]—A dilatory plea of a defendant in an action *en partage* to which a number of co-heirs are parties, alleging that three of the latter are dead, and praying that proceedings be stayed until their legal representatives are called in, must set forth the names, residence, and quality of such representatives, otherwise it will be rejected. *Descoteaux* v. *Lepitre*, 16 Que. K. B. 187.

Father sued for maintenance of his natural children cannot plead grounds for removal of the tutor from office. He can only plead such grounds in a direct action for such removal. *Picard* v. *Gadoury* (1900), 38 Que. S. C. 65.

Filing after time expired — *Terms*—*Costs.*]—If a plea is filed after the time fixed, without the consent of the opposite party or the permission of a Judge, the Court, upon motion of the plaintiff, will order the defendant to pay, within a fixed time, the costs occasioned by his default, upon failure of which his plea will be regarded as not filed. *Sun Life Assce. Co.* v. *Darcluy*, 6 Que. P. R. 346.

Forfeiture is distinguishable from prescription and may be pleaded by demurrer. *Barette* v. *Provincial Mutual Benefit Society* (1910), 12 Que. P. R. 224.

General denial—*Other pleas.*]—A special denial of all the allegations of a declaration is a general denial, which excludes all other defences, and subsequent pleas will be struck out on motion. *Jaboli* v. *Lawande*, 9 Que. P. R. 292.

General denial—*Special plea.*]—In certain cases a denial in the nature of a general denial may be pleaded with a special defence. *Huot* v. *Douchet*, 3 Que. P. R. 137.

Impertinent allegations — *Motion to strike out*—*Inscription in law.*]—It is by inscription in law, and not by motion, that the plaintiff must proceed to have struck out of the defendant's pleas allegations of fact which do not support the right asserted by the plea; a motion for that purpose will be dismissed, without prejudice to an inscription in law. *Jacques* v. *Waldt*, 10 Que. P. R. 46.

Inconsistency — *Denial* — *Subsequent allegations.*] — A defendant has a right to deny one by one all the paragraphs of the declaration and to follow this denial by other allegations. *Dansereau* v. *Latreille*, 6 Que. P. R. 464.

Inconsistency — *Settlement*—*Merits.*]—A defendant who pleads the settlement of a claim is not prevented thereby from contesting the foundation of the claim. *Dubeau* v. *Nadon*, 6 Que. P. R. 224.

Inconsistent pleas—*Building contract*—*Particulars.*] — The defendants, sued with others for the price of work done and materials furnished in connection with the erection of a building upon the property of all the defendants, may plead that they are in no way responsible to the plaintiff; that the plaintiff never did the work mentioned in the account; and that his account is exorbitant, and the prices claimed therein are too high; and will not be bound to give particulars of the last mentioned ground of defence. *Grothé* v. *Robillard*, 7 Que. P. R. 375.

Inconsistent pleas—*Denial*—*Payment*—*Set-off.*]—A defendant may plead at the same time that the debt sued for never existed and that it has been extinguished by payment or set-off. *Lemoine* v. *Caisse Generale*, 23 Que. S. C. 390.

Inconsistent pleas — *Denial*—*Set-off*—*Election.*]—A defendant who pleads set-off, however irregularly, is not thereby taken to have admitted the allegations of the declaration.—2. In such case the defendant cannot be placed in the position of having to elect between his denial of the allegations of the declaration and his plea of set-off.—3. The denial of certain allegations of the declaration only does not constitute a general denial, and, consequently, in accordance with the terms of paragraph 2 of Art. 202, C. P., does not exclude every other defence. *Pallister* v. *Duff*, 5 Que. P. R. 7.

Inconsistent pleas—*Denial*—*Special defence.*]—A special denial of each one of the allegations of the declaration is not a general denial within the meaning of Art. 202, C. P., and does not exclude another special defence. *Beaulac* v. *Lupien*, 21 Que. S. C. 216.

Inconsistent pleas—*General and special*—*Election.*] — When a defendant pleads a general denial in the two first allegations of his plea, and then pleads specially in the remaining paragraphs, on motion of the plaintiff to reject the special allegations of the plea, defendant will be permitted to make option within four days, and if he fails to do so, the special allegations will be struck from the plea. *Rutherford* v. *Macy*, 4 Que. P. R. 326.

Inconsistent pleas — *General denial—Exclusion of confession and avoidance.*] — Where the defendant pleads a denial that the accident alleged by the plaintiff took place, and that if it did take place it occurred by reason of the fault of the person injured, the defendant cannot have the benefit of both pleas: Art. 202 C. C. P. *McLeod* v. *Montreal Street Ry. Co.*, 20 Que. S. C. 8.

Inconsistent pleas — *General denial—Set-off—Payment.*]—There is no incompatibility between a plea by which a defendant denies having ever owed the plaintiff the sum demanded, and one by which he pleads set-off of the said sum if the Court is of the opinion that he owes it, or payment: a defendant may plead these three defences by the same pleading. *Lemoine* v. *LaCaisse Générale*, 5 Que. P. R. 104.

Inconsistent pleas — *General denial—Special allegations.*] — Where the defendant, in his plea, begins by denying generally all the allegations of the plaintiff's declaration, he is excluded, under Art. 202 of the Code of Procedure, from proceeding to special allegations upon the facts of the case. *Chapleau* v. *St. Louis*, 20 Que. S. C. 238.

Inconsistent pleas—*Ignorance—Set-off.*] —A plea in which the defendant commences by saying that he is ignorant of the facts alleged by the plaintiff does not hinder the defendant from pleading set-off at the same time, because the defendant must have a certain latitude in defending himself, and also because everything which prevents the useless multiplication of actions ought to be favoured. *Godbout* v. *McPeak*, 20 Que. S. C. 294, 4 Que. P. R. 190.

Inconsistent pleas—*Method of attacking—Dilatory exception—Slander—Irrelevant plea.*]—A dilatory exception, and not an inscription in law, is the proper remedy to compel a party to optate between different paragraphs of his pleading.—2. In a plea to an action in damages for slander, the words "*et qu'i dit à la prière de son curé*," are irrelevant and in no wise constitute a legal justification in respect of an action of this nature, and, on an inscription in law, will be struck from the plea with costs. *Bourget* v. *Lefebvre*, 4 Que. P. R. 325.

Inconsistent pleas — *Purchase of litigious rights—Deposit of price.*]—A defendant, being sued by the assignee of litigious rights, may, in a defence, in which he contests the demand on the merits, also invoke the benefit of Art. 1582, C. C., and deposit the amount which he alleges to be the price of the sale of such rights to the plaintiff, inasmuch as, by such deposit, he offers to take the plaintiff's bargain, and thereby, in effect, ceases to control it. *Crevier* v. *Evans*, 20 Que. S. C. 179.

Inconsistent pleas—*Striking out—Election.*]—Allegations which contradict the preceding allegations of the same plea, containing admissions, will be struck out upon motion of the plaintiff, without allowing the defendant the option of having the preceding allegations struck out. *Destroismaisons* v. *Dominion Ice Co.*, 4 Que. P. R. 368.

Inscription in law pleaded after plea to the merits—*C. C. P. 191.*]—The inscription in law should precede the plea to the merits; if the defendant joins issue with the plaintiff upon the action as it was taken, and with conclusions appropriate to his contention, he cannot afterwards inscribe in law against one of plaintiff's allegations and ask for its dismissal. *Caisse* v. *Fourcrau*, 11 Que. P. R. 79.

Interrogatories upon articulated facts—when answered by consent, by defendant's husband, her agent, a motion will not lie to have them held as admitted. *Imperial Bank* v. *Millette* (1911), 12 Que. P. R. 258.

Intervention — *Time—Service—Exception to form.*]—The time for pleading is computed from the day of the service of the intervention, and an exception to the form of the intervention must be filed within three days after the service thereof. *Beauchamp* v. *Beauchamp*, 4 Que. P. R. 367.

Irregular default note — *Effect of—vacation.*]—If a foreclosure to plead has been unduly entered during vacation, the lapse, after vacation, of the ordinary delay to plead does not affect the defendant until the plaintiff has removed the foreclosure. *Bernard* v. *Carbonneau*, 6 Que. P. R. 348.

Irregularity — *Notice of action—Want of particularity — Explanation to form.*] — The defendant in an action for damages in a plea to the merits alleged the irregularity of the notice of action, without saying in what it consisted:—*Held*, that this plea was in itself irregular and was properly attacked by an exception to the form. *Jones* v. *Montreal*, 8 Que. P. R. 25.

Irregularity—*Reply—Waiver.*]—A party who has replied without reservation to a plea irregularly filed, is considered to have renounced the right to take advantage of the irregularity. *Bergeron* v. *Campeau*, 25 Que. S. C. 26.

Irrelevant allegations — Narrative — Striking out pleas. *Dominion Iron & Steel Co.* v. *Dominion Coal Co.*, 2 E. L. R. 488.

Irrelevant plea — *Negligence — Fire—Building.*]—In an action for damages against an electric light company for loss by fire by reason of defective wiring and excess of electric current, an allegation in the plea which states that the building was refused as a risk by the insurance companies, will be struck from the plea, on an inscription in law, as being irrelevant to the issue and in no wise supporting the conclusions of the plea. *West* v. *Lachine Rapids Hydraulic & Land Co.*, 4 Que. P. R. 314.

Judgment—*Promissory note—Affidavit.*] —Where a defendant, in his pleading, denies that a promissory note signed by him is the consideration for a judgment whereon the plaintiff is suing him, such plea will not be struck out of the record for default of an affidavit in support of it: Arts. 208 and 209, C. P., not being applicable. *Penfold* v. *Piggott*, 3 Que. P. R. 361.

Jury trial—*Joinder of issue—Delays—Inscription in law—C. P. 191, 195, 214, 293, 442.*]—If an inscription in law and a plea to the merits have been filed concurrently, the delay of 30 days allowed by C. P. 442 to have the facts fixed for the jury does not run until the inscription in law has been determined (*Clough* v. *Fabre*, 9 Que. P. R. 231, followed). *O'Brien* v. *Montreal Light Heat & Power Co.* (1909), 10 Que. P. R. 348.

Mortgage action—*Foreclosure—Neglect to file exhibits—Plea filed without leave.*]—The default to file, with the return of the action, exhibits which are not of a nature to suspend the delay for foreclosure, does not prevent the filing of a plea, and a plea filed without leave will be rejected on motion to that effect. *Melancon* v. *Archambault*, 7 Que. P. R. 38.

Motion to strike out — *Particulars—Preliminary exception—Deposit.*]—A motion to strike out certain allegations of the defence as foreign to the litigation, vague, and indeterminate, and, as a subsidiary matter, for particulars of some of such allegations, is a preliminary exception, and will be dismissed if it is not accompanied by a deposit. *Cohen* v. *Lipschitz*, 3 Que. P. R. 577.

Motion to strike out plea—"False, ambiguous, and framed to delay"—Judgment by default. *Shaw* v. *Brown* (No. 2), 4 E. L. R. 314.

Motion to strike out plea — *Useless allegation — Statement of contention.*] — A party to an action has no right to demand the striking out of an allegation in a pleading (in this case a plea) which is no more than a simple statement of claim or contention, and which is useless and inoffensive. *Fisher* v. *Shapiro*, 9 Que. P. R. 198.

Motion to strike out pleas — *Action for malicious arrest—Reasonable and probable cause — Explanatory pleas.*] — Reasonable and probable cause being a good defence to an action for false and malicious arrest, pleas containing allegations explanatory of the reasonable and probable cause will not be struck out as irrelevant. See Art. 191, C. P. *Hawk* v. *Montreal*, 9 Que. P. R. 144.

Municipal by-law — *Invalidity—Advice of solicitor.*]—It is not lawful to plead in attacking the validity of a municipal by-law relied on by the plaintiff, that it was passed contrary to the opinion of the advocate of the municipality. *Westmount* v. *McKim*, 5 Que. P. R. 134.

Offer of money—*Condition—Demurrer.*]—Offers of money made in pleadings by virtue of Art. 1162, C. C., cannot be struck out on demurrer.—2. Such offers may be conditional.—3. The value of such offer cannot be adjudicated upon until judgment is given upon the merits. *Menier* v. *Whitting*, 2 Que. P. R. 387.

Offer of money—*Set-off.*]—A defendant cannot plead that he has offered the sum demanded without alleging that he has ever since been ready to pay it and renewing the offer in his pleading, and such a plea will be struck out on demurrer.—2. Allegations in the defence seeking to set off against the plaintiff's money demand under a notarial instrument and a promissory note, a claim by the defendant against the plaintiff for unliquidated damages arising out of an entirely different transaction, are bad and will be struck out on demurrer. *King* v. *Lepitre*, 2 Que. P. R. 429.

Possessory and petitory actions—*Lis pendens—Plea to the merits.*]—A possessory action stays the action for repossession, and so long as an action on disturbance is pending the parties thereto cannot revendicate, one from the other, the immovable in dispute.—To an action for repossession taken under such circumstances, the defendant can set up the above defence as a plea to the merits of the action. *Salois* v. *Brompton* (1909), 37 Que. S. C. 422.

Privileged communications.] — Correspondence between the head office of a bank and the agent of a branch, prior to the issue of the writ, or the time when informed that an action would be brought, are not privileged communications. *Scott* v. *Union Bank* (1909), 14 O. W. R. 967, 1 O. W. N. 135.

Procedure — *Written pleadings—Issue joined — Jury trial — Special demand — Delay to make it.*]—When the plea to an action contains new grounds, the issue is joined by the plaintiff's answer when it confines itself to either admitting or denying the allegations of the plea. A general reply on the part of the defendant thereupon becomes useless and will be rejected on motion.—The option for a jury trial made by a special demand within three days after filing of such reply, but eight days after issue was joined by the answer, is too late and will be rejected. *Parke & Laurie* (1910), 39 Que. K. B. 478.

Propositions of law — *Salary—Representations — Set-off — Preuve avant faire droit.*]—The Court will not strike out upon demurrer, legal propositions set forth in a plea, which do not require proof.—2. To an action for salary the defendant cannot plead that the plaintiff was engaged on certain conditions by reason of representations made by him, which have since proved false.—3. It is, however, not illegal to plead that the plaintiff has not fulfilled the obligations undertaken by him, and has thereby caused damage, and to demand on that account set-off equal to the damage caused; and *preuve avant faire droit* will be ordered upon such allegations. *Sexton* v. *Violett*, 6 Que. P. R. 413.

Puis darrein continuance—*Facts arising since action — Affidavits — Documents —Judgment.*]—The facts contained in a plea or a reply *puis darrein continuance* must have arisen since the contestation.—2. Such a plea or reply must be accompanied by an affidavit attesting the facts and allegations, unless these facts are stated by an authentic document.—3. A certified copy of a judgment proves its contents, but does not by itself prove the relation which exists between the adjudication and the facts which are set up in the proceeding in which it is delivered. *McDonough* v. *Catholic Institution of Deaf Mutes*, 5 Que. P. R. 436.

Relevancy — *Action to set aside contract—Acquiescence.*] — When a plaintiff seeks to have a municipal contract set aside as being *ultra vires*, it is not irrelevant for the defendant to allege in defence that the plaintiff actively and passively acquiesced in the contract complained of, and permitted the works to be in large part executed. *Beaubien* v. *St. Louis*, 8 Que. P. R. 290.

Revendication — *Set-off — Damages—Tender.*]—In an attachment in revendication of movables sold, allegations in a plea tending to set off against the purchase price damages arising from previous legal proceedings and seizures, will be rejected on inscription in law.—An allegation of the plea which sets forth an alleged tender of the amount claimed, is relevant. *Poulin* v. *Sekyer*, 9 Que. P. R. 50.

Simple warrantor summoned by the warrantee, may intervene and plead in the stead of the warrantee, and, in such case, set up against the principal action not only personal grounds of defence, but also those the warrantor himself could invoke. *O'Hara* v. *Jasmin* (1910), 39 Que. S. C. 182.

Special denial — *General denial—Option.*]—A special denial of all the paragraphs of a declaration amount to a general denial, and if special matters of defence are set forth in the following paragraphs, the defendant will be ordered to optate between the general denial and the special plea. *Malette* v. *Aubrain*, 7 Que. P. R. 390.

Striking out — *Demurrable plea.*] — A plea which is open to a general demurrer will not be struck out on a summary application under s. 133 of the Supreme Court Act; it must be demurred to. *Clark* v. *Miller*, 35 N. B. R. 42.

Striking out — *Embarrassment—Duplicity—Bail—Equitable defence.*] — To a declaration for breach of a limit bond given in a case wherein one of the defendants had been arrested upon an execution issued upon a judgment obtained in the St. John City Court, the defendants by a plea negatived the jurisdiction of such Court by reason of the cause having been tried and judgment entered upon a day upon which the Court was not authorised by law to sit, of which trial and entry of judgment the defendant had no notice:—*Held*, that the plea should not be struck out as embarrassing; if it were bad in substance, the plaintiff should demur. —2. To the same declaration the defendants pleaded on equitable grounds that the note upon which the original action was brought in the City Court had been paid; that the plaintiff, notwithstanding payment, retained the note in his possession, and fraudulently obtained judgment thereon in the City Court; that the defendant was an official Court stenographer and was privileged from arrest on civil process while in the performance of his civil duties, yet the plaintiff caused him to be arrested while he was performing such duties; that the defendant only went beyond the limits assigned in the bond when he was compelled to do so in order to perform his official duties:—*Held*, that this plea was bad as being both embarrassing and double.—*Semble*, that bail cannot by plea take advantage of matters forming grounds for equitable relief, but should apply to the Court by motion. *Dibblee* v. *Fry*, 35 N. B. R. 109.

Striking out allegations in — *Preliminary objection—Deposit.*]—A motion for the rejection of certain allegations of a plea, and that the defendant be ordered to furnish certain details, is of the nature of a preliminary exception, and will be rejected if not accompanied by a deposit. *Clermont* v. *Bilodeau*, 7 Que. P. R. 68.

Striking out as false—Action for damages for illegal destruction of liquor—Plea denying title and value. *Townshend* v. *Beckwith*, 1 E. L. R. 198.

Striking out as false. *McLaughlin Carriage Co.* v. *Borden*, 1 E. L. R. 86.

Submission of rights—*Law stamps.*]—A declaration of a defendant that he submits his rights to the Court, especially if accompanied by documents in support of it, is a pleading, and will be set aside if it is not stamped as such. *Dagenais* v. *Desnoyers*, 5 Que. P. R. 384.

Substitutes.]—In an action brought by one of the substitutes, founded on the gift as his title, the nullity of the substitution, for want of publication and transcription (insinuation) of the deed, being absolute, the defendant is not bound to invoke it by special plea, but may do so at the hearing on the merits, under a plea of general issue. *St. Denis* v. *Trudeau* (1909), 18 K. B. 434.

Time for filing—*Automatic foreclosure on default—Certificate of prothonotary—Vacation—Relief from foreclosure — Ex parte judgment.*]—Foreclosure being no longer an *acte* of the Court granted on application therefor, but taking place, at the expiration of the delay to plead, by sole operation of law, under Art. 207, C. P., a certificate thereof, when incurred before the 30th June, may be validly given by the prothonotary between that date and the 1st September, notwithstanding Art. 10, C. P.—2. A defendant, who is foreclosed from pleading, cannot, by any act or proceeding of his own, such as tendering a confession, or filing a plea, relieve himself therefrom, and the plaintiff cannot, thereby, be prevented from proceeding to judgment *ex parte*. *Skinner* v. *Curtis*, 17 Que. K. B. 477.

Time for pleading—*Motion for particulars — Good faith — Stay of time running.*] —Every proceeding taken in good faith, although it has not absolutely the character of a preliminary exception, is a preliminary ground of contestation, *e.g.*, a motion for particulars, and it has the effect of staying the time for pleading. *Blais* v. *Aube*, 9 Que. P. R. 390.

Time to plead.]—Where defendant swore it was necessary to obtain information from a party in U. S. to enable him to plead, he was given two months in which to plead on the usual terms. *Hodson* v. *Dawson* (1867), Pet. P. E. I. R. 191.

Trespass — *Boundaries — Settlement—Reference to land surveyor.*]—In an action for trespass, if the defendant alleges an agreement between the parties as to bound-

aries, he must set forth that an alleged reference to a land surveyor was to be a method of settlement of the trespass complained of, or of the action as to costs. *Deseve* v. *Roy*, 9 Que. P. R. 238.

See DEFAMATION — LANDLORD AND TENANT — LITIGIOUS RIGHTS — NOTICE OF ACTION—WARRANTY—WAY.

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13. REJOINDER.

Admission or denial — *Ignorance — Amendment.*] — Each party must reply specially and categorically to the allegations of the opposite party, either by admitting or denying them, or by declaring that he is ignorant of them. But, on a motion to reject an allegation of the replication to the answer to plea, the defendant will be permitted to produce a new allegation. *Vipond* v. *Kilburn*, 4 Que. P. R. 316.

Vagueness.] — A rejoinder in which a defendant denies all the new facts alleged in the reply of the plaintiff and which do not corroborate the allegations made in the defence, is too vague and will be struck out on motion. *Rousseau* v. *King*, 2 Que. P. R. 408.

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14. REPLY.

Abandonment of portion—*Inscription in law—Practice.*]—A party who has filed a discontinuance of certain paragraphs of his reply, against which his opponent had made an inscription in law, cannot inscribe the case for proof and hearing before *acte* is given of his discontinuance. *McKeown* v. *Wright*, 8 Que. P. R. 137.

Acceptance of money paid into Court — Notice — Costs — Order XXII., Rule 6. *Miller* v. *Archibald*, 40 N. S. R. 611.

Amendment — *Full Court—Statute of Limitations.*]—The full Court has power to allow, on terms, an amendment for the first time of a pleading by setting up a fact which would, if proved, be a good answer to a plea of the Statute of Limitations. *Jones* v. *Davenport*, 7 B. C. R. 452.

Assumpsit.]—To an action of assumpsit the defendant pleaded payment. The plaintiff's reply contained allegations to the effect that the defendant had definitely acknowledged the balance sued for, and had agreed that, if he should fail to make any monthly payment within three days after it should become payable, the entire balance should be immediately exigible:—*Held*, that the allegations were relevant, and were not such as should have been made in the declaration. *Ness* v. *Candlish*, 17 Que. S. C. 194.

B. C. Rule 168—*New points raised on appeal—Condition precedent.*] — The B. C. Supreme Court Rule 168 provides that "any condition precedent, the performance of which is intended to be contested, shall be distinctly specified in his pleadings by the plaintiff or defendant (as the case may be), and, subject thereto, an averment of the performance or occurrence of all conditions precedent, necessary for the case of the plaintiff or defendant, shall be implied in his pleadings." In an action for trespass and a mandatory injunction, the defendants pleaded the right of entry under a private Act, and the consent or acquiescence of the plaintiffs. The plaintiffs replied setting up the failure of the defendants to comply with certain conditions precedent to the exercise of the privileges claimed, but did not set up another condition precedent upon which the judgment appealed from proceeded, though it was not referred to at the trial:—*Held*, Killam, J., *contra*, that the Rule refers rather to cases founded on contracts than to those where statutory authority is relied upon, and that the plaintiffs need not have replied as they did, but having done so without setting up the conditions specially relied upon in appeal, thereby possibly misleading the defendants, they were properly punished by the Court below by being deprived of their costs in appeal.—*Per* Killam, J., it was improper for the Court appealed from to allow the absence of proof to be set up for the first time on the appeal. Judgment in 10 B. C. R. 361, varied. *Sandon Waterworks & Light Co.* v. *Byron N. White Co.*, 35 S. C. R. 309.

Close of pleadings—*Joinder—Necessity for filing—Motion for nonsuit—Costs.*] — A motion for judgment as in case of a nonsuit for not proceeding to trial after issue joined, according to the course and practice of the Court, was met by an affidavit made on behalf of the plaintiff shewing that no replication or joinder of issue had been filed. The defendant in reply proved that a joinder of issue had been served in compliance with a demand of replication made by him, and urged that it would be permitting the plaintiff to take advantage of his own wrong if this motion were refused on account of the plaintiff's neglect in filing the joinder: — *Held*, that the motion must be refused, because the cause is not at issue until the joinder is filed as well as served. Parties are not only at liberty to search to see whether or not pleadings have been filed, but are entitled to a fee for so doing. Moreover, as a fee is payable to the Crown for the filing of such papers as replications and joinders, it would be a fraud on the revenue to permit parties to proceed without filing and paying the fee. As the plaintiff's course was open to objection, he should be deprived of his costs upon dismissal of this motion. *Gallagher* v. *Wilson*, 21 C. L. T. 54.

Consideration — *Departure.*]—A party who sues on a writing alleged to have been given in execution of a natural obligation, cannot, in reply to a plea of no consideration, set out a wholly distinct and additional consideration; and the paragraphs of his reply relating thereto will be rejected on motion. *Brulé* v. *Brulé*, 5 Que. P. R. 263.

Contract — *Lease or sale—Amplification of plea.*]—If a party, in his plea, calls a certain contract a lease, and the plaintiff, as his answer, sets up that it is a sale, the defendant may, in his replication, allege that it is immaterial whether the writing is interpreted as a lease or as a sale.—2. A replication cannot set up in detail allegations already set up in a plea; such allegations being either useless or irregularly pleaded

in a replication. *Mignero* v. *Williams Manufacturing Co.*, 5 Que. P. R. 226.

Delivery after time allowed by Rules—*Validity.*]—A reply delivered more than eight days after the delivery of the defence, without any order extending the time, is not a bad pleading, and cannot be set aside for that reason alone, at least if no further step has been taken by the defendant before delivery of the reply. *Clarke* v. *Fawcett*, 5 W. L. R. 322, 6 T. L. R. 288.

Delivery after time expired—Motion to set aside—Practice. *Carke* v. *Fawcett* (N.W.T.), 5 W. L. R. 322.

Departure — *Contract — Repudiation—Reformation.*] — The plaintiffs alleged that they supplied the defendants, under an agreement, with patent brakes for use on their railway, and that the defendants altered them and infringed their patent. The defendants alleged that they had a right under their agreement with the plaintiffs to do what they had done. The plaintiffs, by their reply, denied any such agreement, and alleged that if the written agreement did give any such right, it was not the true agreement, and they asked to have it reformed:—*Held*, that there was no departure in the reply; for the fact that, by mutual mistake, the written agreement did not set forth the true agreement between the parties in this particular respect was a perfectly good answer to the plea of the agreement, and it was not necessary that the agreement should be actually corrected before the mistake could operate as an answer to its terms:—*Held*, also, that, even if the portion of the agreement upon which the defendants relied was contained in the same instrument as the "agreement" mentioned in the statement of claim, the plaintiffs might, consistently with their relying upon one part of it, ask to have another part reformed. *MacLaughlin* v. *Lake Erie & Detroit River Rw. Co.*, 21 C. L. T. 405, 2 O. L. R. 151.

Departure.]—Issue having been joined by the defence, the plaintiff cannot in replying bring forward new facts to add them to his demand. *Lapointe* v. *Carpentier*, 3 Que. P. R. 141.

Departure — *New facts.*]—Issue being joined by the claim and the defence, when the latter does not raise new facts, a reply alleging new facts will be struck out on motion. *Hébert* v. *O'Brien*, 10 Que. P. R. 108.

Departure — *New facts—Jurisdiction of Court.*]—A plaintiff may not in a reply to a declinatory exception allege new facts which support the cause of action, and which should have been set out in the declaration, in order to uphold the jurisdiction of the Court. *Forman* v. *Marchand*, 8 Que. P. R. 164.

Departure — *New title.*]—The plaintiff, in his reply, cannot abandon the original claim that he was vendor of a piano and substitute a new title, that of transferee of the piano. *Hurteau* v. *Dupuis*, 7 Que. P. R. 371.

Departure — *Rejoinder.*] — The Court will allow a defendant to allege new facts in his reply if they are necessary for the trial of the cause; the opposite party will then be allowed to rejoin specially to such new allegations. *St. Lambert* v. *Barsalou*, 8 Que. P. R. 49.

Departure — *Striking out — Demurrer ore tenus — Particulars — Estoppel—Deed —Cutting down — Evidence.*]—A pleading cannot be struck out on summary application on the ground that it is bad in law, unless it discloses no reasonable cause of action or answer (R. 151), or is so framed as to prejudice, embarrass, or delay the fair trial of the action (R. 127), but the opposite party may raise the point of law under Rule 149, or the Court or Judge may under Rule 251 direct the question of law, if there appear to be one to be raised by special case or in such other manner as the Court or Judge may deem expedient; or semble, the opposite party may take the point at the trial though it has not been otherwise previously taken. Even assuming that English Order 19, r. 6 (Mar. R. 202), is in force, before an application to strike out a pleading for want of particulars can be made, an application must first be made for further and better particulars under R. 212. Upon such an application, the Judge may impose the term that if the particulars ordered are not furnished, the pleading shall be struck out. Where the statement of claim is set up a case for reformation of a document on grounds other than that of fraud, and by the reply fraud was set up, it was held that the reply was bad in law, under Rule 117, as being a departure:—*Held*, as against the objection that the plaintiff was estopped by the recitals and other statements in the deed, of which he sought reformation, that parol evidence to shew that a conveyance absolute on its face was intended to take effect as a mortgage only, is admissible, but that such evidence must be of the clearest, most conclusive, and unquestionable character. The evidence on the plaintiff's behalf was in this case held to be sufficient to establish the plaintiff's case. *Boardman* v. *Handley*, 4 T. L. R. 267.

Departure — *Succession — Confession of judgments in part—Set-off.*]—A plaintiff who sues as heir of his father, and assignee of his co-heir, and donee of his mother (whose title he does not mention), cannot, in reply to a plea of set-off, following a part confession of a judgment, allege that there was community of property between his father and mother, and that in consequence the confession of judgment was insufficient. *Ranson* v. *Caty*, 8 Que. P. R. 180.

Departure from declaration.] — A plaintiff cannot, by a special reply, remodel, complete, or modify his declaration. *Walker* v. *Lamoureux*, 21 Que. S. C. 492.

Falsity of quittance pleaded — *Inscription en faux.*]—To a plea of payment based upon a notarial quittance the plaintiff may reply that the quittance is false, and this although the falsity cannot be proved without an inscription *en faux*. *McCarthy* v. *Laviolette*, 5 Que. P. R. 87.

Grounds of original claim—*Motion—Demurrer.*]—The plaintiff in his reply to a plea of the defendant must confine himself to setting up grounds going to shew that the

plea is not sustainable, and must not allege grounds tending to augment or reinforce his claim.—2. The fact that allegations necessary to sustain the claim are made in the reply, instead of being in the declaration, must be invoked by motion and not by demurrer.—3. Nevertheless, a demurrer may in certain cases be treated as a motion. *Fox* v. *Morris*, 4 Que. P. R. 345.

Insufficiency of particulars — *Exception to the form—Demurrer.*]—An inscription in law does not lie against a reply to a plea in which the details are insufficient. An exception *à la forme* is the proper recourse.—2. An allegation of a reply, insufficient in itself to displace the plea, but which tends to prove the truth of the plaintiff's action, will not be dismissed on inscription in law. *Vipond* v. *Kilburn*, 4 Que. P. R. 376.

Intervention — *Supplementing petition—Exception to form.*]—A reply to an intervention containing conclusions which should have been made in the petition for a writ of *mandamus*, is irregular.—2. Such a reply should be attacked by exception to the form, and not by demurrer. *Grier* v. *David*, 4 Que. P. R. 373.

Joinder — *Denial—Fresh allegations.*]—A party who, by his reply to a plea, joins issue upon one allegation of such plea, and denies all the others one by one, has the right in such reply also to make new allegations. *Provincial Bank of Canada* v. *Lacerte*, 4 Que. P. R. 292.

Leave to deliver — *Time — Jury notice — Discretion — Notice of trial — Close of pleadings.*]—Where an order was made by the Master in Chambers allowing the plaintiff to deliver a reply after the regular time for replying had expired, a Judge refused to interfere with the discretion exercised, although the reply was open to the objection that all that it sought to put in issue was already in issue by the statement of defence, the purpose being to enable the plaintiff to file a jury notice, and the case being one in which the plaintiff should be allowed to file a jury notice and thus leave it to the discretion of the Judge at the trial to say whether it should be tried with or without a jury. The pleadings were not closed until the lapse of four days (excluding the Christmas vacation) after the delivery of the reply, or until the defendants had joined issue; and a notice of trial given before the lapse of that time, and without a joinder of issue having been delivered, was irregular; and the Judge had no power to allow the notice of trial thus irregularly given to stand. Rules 257, 258, 262, considered. *Qua* v. *Canadian Order of Woodmen of the World*, 23 C. L. T. 51, 5 O. L. R. 51, 2 O. W. R. 8.

Leave to reply—*Time expired—Merits.*]—Decision of Henry, J., 19 C. L. T. 400, reversed, on the ground that he acted on a wrong principle in refusing the plaintiff leave to reply. The plaintiff should have been allowed to take the $1 out of Court and proceed to trial to see if she were entitled to any more. *Miller* v. *Archibald*, 20 C. L. T. 136.

Motion to strike out—Departure—Inconsistent pleading. *Dufferin* v. *Wellington*, 9 O. W. R. 262.

Motion to strike out last four paragraphs as embarrassing, or to amend them—In substance equivalent to a statement of claim in an action to have an award set aside or in an action by insurance company to have award declared binding on plaintiffs—Amendments ordered — Particular—Defendant to have week to rejoin—Costs to defendants in any event. *Great Northern Elevator Co.* v. *Manitoba Assurance Co.* (1911), 18 O. W. R. 907, 2 O. W. N. 926.

Negligence — *Denial — Reiteration.*]—In an action for damages caused by an automobile going at an imprudent rate of speed, the plaintiff may meet allegations of the defence stating that it was only going at 3 miles an hour and was stopped immediately after the accident, by stating the rate of speed at which the automobile was going, and asserting that it was not under control. *Abrahamson* v. *Yuile*, 7 Que. P. R. 61.

New facts—*Departure.*] —The plaintiff in his reply to the defence must confine himself to what is strictly in reply; he may not add to his original claim nor allege facts which should have been set up in the declaration or which might serve as a basis for another action. *Jobin* v. *Rainville*, 5 Que. P. R. 93.

Parties — *Departure—New action—Substitution.*]—In an action based upon an act of obligation executed in favour of the curator to a substitution and of three heirs, and brought by one of the heirs and other persons whose rights as creditors are not parent title, set up the title of these persons, a plea of the absence from the record of the curator and two of the heirs, and of the presence as plaintiffs of persons without apparent title, set up the title of these persons, and such part of the reply will be struck out on motion as tending to reconstitute the action. *Desrivières* v. *Delancy*, 3 Que. P. R. 384.

Regularity — *Title to land—Assignment of mortgage — Attacking.*] — The statement of claim, in an action for a declaration that the plaintiff was entitled to a share in certain lands and to recover possession, alleged that the defendant society were in possession of the whole of the lands and in receipt of the rents and profits, under a mortgage of a share or interest therein made by two of the remaining defendants, who derived their title from the plaintiff's father or some of his heirs. The defendant society sought to defend their possession and to hold the rents and profits by setting up in their statement of defence the assignment to them of a mortgage made by the plaintiff's father. The plaintiff replied that there was no consideration for the assignment of such mortgage, and that the alleged assignor was at the time of making it of unsound mind, to the knowledge of the defendant society:—*Held*, that the reply raised an issue which the plaintiff was entitled to have tried, and it was not irregular or improper to raise it at that stage. *Smith* v. *Smith*, 21 C. L. T. 531, 2 O. L. R. 410.

Replication — *Demand—Leave to plead and demur—Time—Replevin.*] — Where a plaintiff has been served with a demand of replication, and has afterwards obtained an order allowing him to plead and demur at the

same time to the defendant's pleas, he must do both within the time allowed by the demand. If a replication is served within such time, and a demurrer after it has expired, the latter will be set aside. In replevin the time for the plaintiff to reply to the defendant's pleas is ten and not twenty days. *Macmonagle* v. *Campbell*, 36 N. B. R. 468.

Settlement of action.] — A settlement of the cause entered into between the parties thereto cannot be set up by way of a supplementary reply. A motion for leave to file such a reply will be dismissed with costs. *Gilbert* v. *Tremblay*, 4 Que. P. R. 458.

Striking out — *Embarrassment.*] — Detinue for an engine. The defendants justified under a writ of attachment against the goods of F., an absent or absconding debtor, the engine being seized as F.'s property, and also under execution against the goods of F. The plaintiff replied (4) that when the writ of attachment was issued F. was not an absent or absconding debtor; (5) that the summons and attachment were never personally served upon F., who did not owe the defendants the whole amount of their judgment, and that such judgment was obtained by collusion with F.; (6) that the judgment was paid before this action; (7) that since the recovery of the judgment large sums had been paid by F. which had not been credited thereon, and F., in addition, gave the defendants certain stock as collateral security for all sums due, which stock should have been sold, and would, if sold, have yielded sufficient to pay all amounts due. These paragraphs of the reply having been struck out by order as irrelevant and tending to prejudice, embarrass, and delay the fair trial of the action:—*Held*, that the order was wrong as to the 4th, 5th, and 6th paragraphs, but right as to the 7th. *Leonard* v. *Sweet*, 33 N. S. R. 197.

Vagueness — *Striking out.*]—A general rejoinder denying all and every of the new facts alleged in a special reply, in so far as they contradict those of the defence, will, upon motion, be struck out of the record. *Rousseau* v. *King* (1899), C. C. Q. 3901, followed. *Lemay* v. *Nadeau*, 3 Que. P. R. 120.

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15. STATEMENT OF CLAIM.

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

Action by creditor in name of assignee—Claim for payment of debt to creditor—Venue. *Tierney* v. *Slattery*, 7 O. W. R. 489.

Action by ratepayer against municipal corporation — Parties—Attorney-General — Expenditure of municipal funds — Local improvements — Improper joinder of causes of action — Contractors — Joinder of, as defendants. *Bowman* v. *Toronto*, 12 O. W. R. 1059.

Action for damages for breach of contract by brokers to purchase and deliver shares—No allegation of tender or payment of price — Amendment. *Collier* v. *Heintz*, 8 O. W. R. 632.

Action for libel—Against newspaper—Notice of action—Statement of claim—Motion to strike out portions of, as irrelevant and embarrassing — Master in Chambers granted order, holding that the pleadings even if true did not come within Con. Rule 298—Plaintiff given leave to amend—Defendants to have week to plead thereafter—Costs of motion to defendants in cause. *Natural Resources* v. *Saturday Night* (1911), 18 O. W. R. 226, 2 O. W. N. 723.

Action on "lien note"—Consideration — Particulars — Interest—Motion to strike out pleading — Embarrassment. *McLeod* v. *Delaney* (N.W.T.), 3 W. L. R. 321.

Action transferred from Division Court—Plaintiff not confined to claims within jurisdiction of Division Court. *Gage* v. *Nash*, 13 O. W. R. 461.

Allegation of immaterial fact — Striking out—Rule 268—Evidence. *Prince* v. *Toronto Rw. Co.*, 5 O. W. R. 88.

Allegation of material fact.]—Where the failure to prove a fact will cause the action to fail, that fact is a material one upon which the plaintiff relies, and, under Rule 306 of the King's Bench Act, R. S. M. 1902, c. 40, should be set out in the statement of claim. *Makarsky* v. *Canadian Pacific Rw. Co.*, 15 Man. L. R. 53.

Alternative claim — Embarrassment—Partnership. *Hives* v. *Pepper*, 6 O. W. R. 713.

Alternative claim—Sale or conversion—Doubtful facts. *Leader* v. *Siddall*, 1 O. W. R. 337.

Amendment — Abandonment of part of claim after trial — New trial directed — Reduction of amount so as to prevent appeal to Privy Council—Workmen's Compensation Act—Allegations of facts proved at trial—Terms of amendment—Costs—Leave to plead Statute of Limitations. *McKay* v. *Toronto Rw. Co.*, 9 O. W. R. 832, 893.

Amendment—Additional cause of action—Master and servant — Workmen's Compensation Act — Claim at common law — Leave to amend — Terms — Costs. *Guthrie* v. *Foster-Cobalt Co.*, 11 O. W. R. 882.

Amendment—*Alternative cause of action—Leave to set up.*]—The statement of claim in the action was for an account of the defendants' dealings with certain securities delivered by the plaintiff to the defendants, the plaintiff having, at the defendants' request, become a surety for her husband's indebtedness. The defence was that the plaintiff had made an absolute assignment of the securities to the defendants, who had released and discharged the plaintiff and her husband from all liability. To this the plaintiff replied that the assignment was never intended to be an absolute one, and, if necessary, it should be reformed. Subsequently,

on a motion therefor, an order was made allowing the plaintiff to amend the statement of claim by setting up an alternative cause of action, impeaching the defendants' right to hold the securities in that they had been obtained by undue means. *Stuart* v. *Bank of Montreal*, 9 O. W. R. 741, 822, 14 O. L. R. 487.

Amendment—*Causes of action arising pendente lite — Appeal — Time.*]—There is nothing in Rule 540 of the King's Bench Act to warrant the amendment of the statement of claim by setting up matters which have arisen since the commencement of the action except by way of answer to a counterclaim set up by the defendant. That Rule confers on the Court no new power of amendment, but merely defines the procedure to be followed in exercising powers of amendment, which exist apart from it, and as to which the procedure is not pointed out by the Rules preceding it. *Yoke* v. *Andrews*, 8 Q. B. D. 432, distinguished. The referee having previously made an order allowing such an amendment to be made, the plaintiff made the amendment without waiting for the expiration of the time for appealing: —*Held*, that this was no reason for disallowing the appeal, which was made within the time allowed by the Rules. *Speton* v. *Gilmour*, 24 C. L. T. 157, 14 Man. L. R. 706.

Amendment — *Conformity with writ—Incorporated company — Slander — Joinder of causes of action — Trial.*]—The writ of summons claimed damages against an incorporated company for wrongful dismissal and slander. The original statement of claim was confined to the former cause of action, but, after defence and before reply due, the plaintiff amended on *præcipe* by adding a claim for slander:—*Held*, that it was competent for the plaintiff to do so, under Rule 200.—*Semble*, that an incorporated company may be liable for slander if spoken by its servants or agents in direct disobedience to its orders; and held, that, at all events the pleading setting up slander should not be struck out summarily, but should be adjudicated on. Leave to the defendants to have the question of law first determined. The two causes of action were properly joined; but application might be made under Rule 257 to direct the method of trial. *Rodger* v. *Nozon Co.*, 21 C. L. T. 78, 19 P. R. 527.

Amendment — *Conversion—Prayer for relief—Payment into Court — Judgment — Costs—Appeal.*]—The judgment in 4 Terr. L. R. 498 varied by striking out the order to amend the plaintiffs' statement of claim as unnecessary, and directing that judgment be entered for the defendant, and that the amount paid into Court by the defendant be paid out to the plaintiffs; the plaintiffs to have the costs of the action up to the time of the second payment into Court, the defendants to have the general costs of the action after that date, and the plaintiffs to have the costs of the issues upon which they succeeded. The trial Judge having reserved judgment came to the conclusion that the plaintiffs were entitled to the moneys paid into Court by the defendant. He held, however, that they were not so entitled under the form of the statement of claim (4 Terr. L. R. p. 498), but only under a claim for conversion, and accordingly in his reasons for judgment—the formal order had not been taken out before the appeal—he stated that under the authority of Rule 189 of the Judicature Ordinance, C. O. 1898, c. 21, he "amended the statement of claim so as to determine the real question at issue according to the evidence adduced," and thereupon directed judgment to be entered for the plaintiffs for the amount paid into Court, without costs:—*Held*, that no amendment was necessary; that if, as in this case, the facts alleged shewed a wrongful conversion, that was sufficient, although the specific words were not used, and that, so far as the relief claimed was concerned, the Court was entitled under English O. 20, rule 6 (introduced by J. O., 1898, s. 21), and J. O., 1898, s. 8, s-s. 5, to give, and ought to give, any appropriate relief to which the plaintiffs were entitled, though it was not specifically claimed.—2. That where money is paid into Court (though with a denial of liability) it is to be taken to be pleaded as an alternative defence going to the whole cause of action, and if the plaintiff fails to shew himself entitled to a judgment on this defence, and that the proper judgment as to costs is:—The plaintiff to have the costs of the action up to the time of payment into Court; the defendant to have the general costs of the action from that time, and the plaintiffs to have the costs of the issues found in his favour.—3. That although by Rule 509 of the J. O., C. O. 1898 c. 21, no appeal lies without leave from any judgment or order as to costs only which by law are left to the discretion of the Court or Judge making the judgment or order, and although the Court will not as a rule interfere with such discretion unless it has been exercised on a wrongful principle, nevertheless when the judgment or order dealing with the question of costs is appealed from on other grounds, the Court has power under Rule 507 to make any order which ought to have been made by the Court or Judge, and this Rule authorises the Court *en banc* to deal with the question of costs below in any way which may appear necessary or expedient by reason of its varying or reversing the judgment or order appealed from. *Imperial Bank* v. *Hull*, 5 Terr. L. R. 313.

Amendment—*Delivery of amended statement — Irregularity — Time — Validating order — Terms — Costs — Stay of proceedings — Appeal — Waiver — Compliance with terms.*]—After the delivery of the statement of claim an order for particulars was made, and the time for delivering the defence was extended until the expiry of six days after the delivery of the particulars. Before this period had elapsed, and before any statement of defence had been delivered, and more than four weeks after the appearance, the plaintiff, without leave and without the defendant's consent, delivered an amended statement of claim:—*Held*, that the delivery of the amended statement of claim was irregular under Rule 390. An order was made, upon the defendant's application to set aside the amending statement of claim for irregularity, validating the delivery of it, but directing that the plaintiff should pay the costs of the motion and other costs occasioned by the irregularity, and that until payment of such costs further proceedings on the charges introduced by the amendment should be stayed, or, if such costs should not be

paid within one month after taxation, that the amendments should be struck out. Mere compliance with the terms of an order, by the party to whom an indulgence or relief is granted on terms, does not preclude him from moving against the order. *Anlaby* v. *Praetorius*, 20 Q. B. D. 764; *Hewson* v. *Macdonald*, 32 C. P. 407, and *Duff* v. *Donovan*, 14 P. R. 159, followed. *Anthony* v. *Blain*, 23 C. L. T. 50, 5 O. L. R. 48, 1 O. W. R. 841.

Amendment—*Description of defendant—Married woman—Widow.*]—If a wife, common as to property, who is described as a widow in a contract, is described in the same manner in an action founded upon the contract, to which she is defendant, and pleads that she is a wife and common as to property, the plaintiff will not be permitted to amend by changing the description. *Merrill* v. *Laprade*, 6 Que P. R. 242.

Amendment—*Exceeding terms of order allowing—Waiver of right to object.*]—Two weeks after the receipt of an amended statement of claim the defendant's solicitors wrote to the plaintiffs' solicitor that they would "prepare and file a new statement of defence according to the amendment you have made," and two weeks later took out a summons to strike out the amended statement of claim, on the ground that it exceeded the terms of the order authorising amendment:—*Held*, that the defendants had waived their right to object. *Centre Star Mining Co.* v. *Rossland Miners' Union*, 23 C. L. T. 57, 9 B. C. R. 325.

Amendment—*Increasing amount claimed—Mistake—Money paid into Court—Acceptance by mistake.*]—The plaintiff was allowed under Rule 312 to amend his statement of claim in an action upon a building contract by increasing the amount claimed for extras, and to amend his reply by changing acceptance into non-acceptance of money paid into Court by the defendant, notwithstanding that the plaintiff had filed a memorandum of acceptance, under Rule 423, although he had not taken the money out of Court; the Court being satisfied that the plaintiff had made a mistake, and, on finding it out, had moved with reasonable promptness to correct it, and that no real prejudice was done to the defendant. *Emery* v. *Webster*, 9 Ex. 242, followed. *Chevalier* v. *Ross*, 22 C. L. T. 96, 3 O. L. R. 219, 1 O. W. R. 12, 115.

Amendment — *Limitation of Actions.*]—That the time allowed by a statute for the commencement of the action has expired when a demurrer to the statement of claim was argued, was held to be no objection to the allowance of amendments which did not seek to introduce any new parties or different causes of action. *Makarsky* v. *Can. Pac. Ry. Co.*, 15 Man. L. R. 53.

Amendment — *Lien — Fraud — Issue between co-defendants.*] — Plaintiff asked leave to amend the statement of claim by alleging that the defendant C. had been induced to sign a lien by the fraud of an agent of the co-defendants, N. It not being shewn that defendant C. was defrauded and the proposed amendment not raising an issue between the plaintiffs and the defendants N., but between the defendant C. and the co-defendants, application dismissed. *Tasker* v. *Corrigan*, 11 W. L. R. 235.

Amendment — *Misnomer of petitioner—Impossibility of amending security-bond.*]—If a petition in contestation of an election of a school commissioner may be amended by changing the first name of one of the petitioners, such change cannot apply to the security-bond given by the petitioners, which is a contract, and the petition cannot be amended if the security is not. *Dame* v. *St. Germain*, 6 Que. P. R. 449.

Amendment — *Misnomer of plaintiff — Affidavit.*]—The fact that the plaintiff is described in the writ of summons and declaration as "Charles Averill Kennedy," instead of "Charles Avery," causes no prejudice, and does not afford ground for an exception to the form.—2. In any case such an exception ought to be accompanied by the affidavit required by Rule 47 of the Rules of practice. *Kennedy* v. *Shurtleff*, 3 Que. P. R. 421.

Amendment — New causes of action—Allowance of, on terms—Statute of Limitations—Costs. *Can. Pac. Ry. Co.* v. *Harris*, 7 O. W. R. 782.

Amendment—*New claim after trial.*]—A motion to amend will not be allowed after the close of the trial, especially if the new claim attempted to be set up is not supported by the evidence. *Archambault* v. *Melancon*, 7 Que. P. R. 36.

Amendment—Ont. Rule 300—Motion to strike out amendments or for a direction to proceed forthwith to trial. Master in Chambers *held*, that amendments were not objectionable and that plaintiff could not be put on terms speeding the trial. *Duryea* v. *Kaufman* (1910), 1 O. W. N. 806.

Amendment—*Ordinary action—Appearance — Change to summary action.*] — A plaintiff cannot, after the appearance of the defendant, by simple amendment change an ordinary action into a summary action; and such an amendment will be struck out upon motion. *Trahan* v. *Morin*, 4 Que. P. R. 378.

Amendment—*Parties—Joinder of causes of action—Specific performance — Recovery of land.*]—The plaintiff Lee, being the assignee of a contract of sale of land by the defendants P. and M. to the defendant G., paid the balance due under the contract to P. and M., and received from them a transfer under the Real Property Act. He then discovered that one L. was in possession of part of the land, claiming title by prescription. This prevented Lee from getting his transfer registered, and he brought this action for recovery of possession from L., joining, by leave of a Judge obtained under Rule 258 of the King's Bench Act, a claim for specific performance of the contract as against G. and damages by way of compensation or otherwise. This was an application for leave to amend the statement of claim by adding a claim against P. and M. for specific performance of the contract alleged to have been made to them directly with Lee when he paid his money to them and they gave him the transfer, or for com-

pensation in default:—*Held*, that, under s.s. (*k*) of s. 38 of the King's Bench Act, the amendments asked for should be allowed. *Krutz* v. *Spence*, 36 Ch. D. 770, followed.—The test as to whether an amendment ought to be allowed is whether or not the other party would be placed in such a position that he could not be compensated by an allowance for costs or otherwise. *Stewart* v. *Metropolitan Tramway Co.*, 16 Q. B. D. 180, followed.—That the amendment asked for sets up a new cause of action is not of itself a sufficient ground for refusing to allow it. *Budding* v. *Murdoch*, 1 Ch. D. 42, and *Hubbuck* v. *Helms*, 56 L. J. Ch. 539, followed.—The contention that leave to join another cause of action with one for the recovery of land can only be granted before the commencement of the action, is not supported by the authorities, which shew that such leave is granted whenever the Court thinks it reasonable to do so. *Rushbrook* v. *Farley*, 52 L. T. 572; *Hunt* v. *Tensham*, 28 Sol. J. 253, and *White* v. *Ramsay*, 12 P. R. 626, followed. *Lee* v. *Gallagher*, 15 Man. L. R. 677, 2 W. L. R. 395.

Amendment — *Real Property Act — Caveat—Cloud on title—Action for removal—New cause of action—Parties—Transfer of land under Real Property Act — Estoppel.*]—A transfer of land, in the form provided in the Real Property Act, made by the registered owner, and without any special covenants or recitals, does not operate as an estoppel, and does not vest in the transferee an equitable interest subsequently acquired by the transferor, in the absence of any fraud or misrepresentation by the latter. *Noel* v. *Bewley*, 3 Sim. 103, and *Re Hoffe*, 82 L. T. 556, distinguished.—In an action by such a transferee against a person who had, before the registration of the transfer, filed a caveat against the land, claiming that the transferor, G., was a trustee for him of an undivided one-third interest therein, the plaintiffs set up that, after the filing of the caveat, the defendant sold his interest to G., and that they were, as transferees from G., entitled to the fee simple in the land free from any claim of the defendant. Afterwards the plaintiffs sought to amend their statement of claim by asking, as alternative relief, that they might be declared to stand in the position of G. towards the defendant in respect of the money due from G. to the defendant, and that an account might be taken as between the two latter, and that the plaintiffs might be declared entitled to specific performance by defendant of his agreement with G.:—*Held*, that such amendments should not be allowed, because the plaintiffs were not entitled to any interest in the land acquired by G. after his transfer to them, and also because G. was not a party to the action, nor was it proposed by the amendments to make him a party. *Bennett* v. *Gilmour*, 4 W. L. R. 196, 16 Man. L. R. 304.

Amendment — Slander—Words spoken to other persons. *McPherson* v. *Grant*, 9 O. W. R. 43.

Amendment. *Webber* v. *Pearson*, 1 E. L. R. 228.

Amendment — *Writ of summons—Two causes of action—Election to pursue one—*

Penalty — Discovery — Dominion Elections Act, 1900.]—The writ of summons (issued 30th January, 1901), was indorsed with a claim to recover penalties under the Dominion Elections Act, 1900, and for damages for wrongfully depriving the plaintiff of his vote at an election held on the 7th November, 1900. The statement of claim (delivered 14th March, 1901), did not assert any claim to penalties, but was confined to the common law cause of action. The statement of defence (delivered 27th March, 1901), denied the allegations of the statement of claim and alleged want of notice of action. The plaintiff obtained the usual discovery from the defendant, without objection. On the 31st December, 1901, after such discovery, and when the action was ready for trial, the plaintiff applied for leave to amend the statement of claim by adding a claim for the penalties mentioned in the indorsement of the writ:—*Held*, that the defendant in an action for penalties might have successfully resisted an attempt to compel him to submit to an examination for discovery. *Regina* v. *Fox*, 18 P. R. 343, distinguished. The plaintiff, having by proceeding at common law obtained from the defendant the discovery which he could not have had in an action for penalties, and having allowed more than a year to elapse before applying for leave to amend, must, notwithstanding the indorsement of the writ, be taken to have conclusively elected to pursue his common law remedy; and leave to amend was properly refused. Sections 19, 131, 133, and 142, of the Dominion Elections Act, 1900, discussed. *Rose* v. *Crodon*, 22 C. L. T. 135, 3 O. L. R. 583, 1 O. W. R. 179.

Amendment after issue joined and parties examined for discovery—Leave to set up fraud—Discretion—Appeal—Costs. *Harrison* v. *Boswell*, 8 O. W. R. 635.

Amendment at trial—*Trespass to land —New cause of action—Mine—Inspection.*]—In an action for damages for trespass and for an injunction the statement of claim alleged that the defendant, who was in occupation of adjoining property which was being operated as a coal mine, had entered upon and under lots B. and C. owned by the plaintiff, and had moved coal and minerals therefrom. From the evidence for the defence it appeared that no excavations had been made on lots B. and C. since the date trespass was alleged to have commenced, but that the defendant's tunnel had extended into other adjoining lands owned by the plaintiff in respect of which no complaint had been made. The plaintiff at the close of the defendant's case applied for leave to amend the statement of claim under s. 164 of the Judicature Ordinance, by alleging that the trespass had been committed upon these last mentioned lands:—*Held*, that the real controversy between the parties was whether the defendant had committed trespass upon lots B. and C., and no amendment was necessary for the purpose of determining that question, and it would be an unreasonable exercise of the powers conferred by the section to allow the plaintiff, after the close of the evidence, to amend by setting up a new cause of action discovered from the evidence for the defence:—*Held*, also, that a refusal by the defendant

to allow inspection by the plaintiff of the workings of the mine was not sufficient reason for allowing the amendment, as the defendant might have obtained an order for inspection. Greater latitude should be allowed to a defendant in amending by setting up new grounds of defence than to a plaintiff in setting up new causes of action, because a defendant cannot afterwards avail himself of such defence, while a plaintiff does not lose his claim in respect of such cause of action. *Moran* v. *Graham*, 2 Terr. L. R. 204.

Amendment before new trial—*Rule 312—"At any time"—Special damage.*]—All necessary amendments may be made "at any time" under Rule 312, and an action in which a nonsuit has been set aside as against one defendant and a new trial ordered as to him by a Divisional Court, is in the same position as if it was at issue and had not been tried; and the plaintiff was allowed to amend the statement of claim by inserting a paragraph alleging special damage. The Duke of Buccleuch, [1892] P. 201, referred to. *Semble*, that, while it may be convenient to submit a draft amendment upon a motion for leave to amend, it is not necessary to do so. *Hunter* v. *Boyd*, 24 C. L. T. 61, 6 O. L. R. 659, 2 O. W. R. 1055.

Amendment by plaintiff after return of action.]—Plaintiff may, after appearance but before plea, amend the writ and declaration by putting the words "summary procedure," provided he gives notice to defendant of such amendment; a motion to reject this amendment will be dismissed. *Filion* v. *Dandurand*, 11 Que. P. R. 48.

Amendment of writ—*Change of plaintiff—Proceeding by next friend—Exception to the style of cause—Costs.*]—The plaintiff, who has proceeded irregularly in the character of a next friend, will be permitted to amend his writ and statement of claim by striking out his name and leaving that of the real plaintiff. He will have to have a copy of this amendment signed and pay the expenses of the exception to the style of cause. *Re E. J. Benoit* v. *O'Brien* (1909), 10 Que. P. R. 400.

Animal killed on railway track — Railway Act. *Rysdale* v. *Wabash Ry. Co.*, 7 O. W. R. 677.

Anticipating defence — Alternative cause of action—Particulars.—*Macdonell* v. *Temiskaming & Northern Ontario Railway Commission* (1910), 1 O. W. N. 471, 480, 547.

Application to strike out—*Disclosing no real cause of action—Rule 51—Point of law.*]—By Rule 151 of the Judicature Ordinance, a pleading may be struck out on the ground that it discloses no reasonable cause of action or answer:—*Held*, that this Rule is only applicable to cases where the pleading obviously discloses no cause of action or answer, and the Court will not, under the authority of this Rule, strike out a pleading the sufficiency of which depends on the determination of an intricate point of law. *Kew* v. *Watt*, 7 W. L. R. 62, 1 Sask. L. R. 11.

Application to strike out—Prolixity—Embarrassment—Rules 109, 127. *Sack* v. *Construction Co.*, 7 W. L. R. 653.

Application to strike out—*Prolixity—King's Bench Act, Rules 300, 326—Embarrassment—Trade name—Invasion — Injunction.*]—Mere prolixity in a pleading, not such as will embarrass or delay the fair trial of an action, does not warrant the striking out, under Rules 320 or 326 of the King's Bench Act, of any portions of it, and there is no power, under any of the Rules, for the Court to revise pleadings, which are merely over-lengthy, by striking out or amending particular paragraphs in whole or in part.—*Millington* v. *Loring*, 6 Que. B. B. 195, followed.—2. In a statement of claim making out a case for an injunction to prevent an infringement of the plaintiffs' trade name, they may either allege in terse and general terms the acquisition of title by long user, or they may set out such facts in detail to prove the user, as they might have furnished by way of particulars, if demanded, in case they had confined themselves in the first instance to a general allegation of title acquired by user. *Theo Noel Co.* v. *Vita Ore Co.*, 7 W. L. R. 353, 17 Man. L. R. 319.

Application to strike out under Con. Rule 261—*Reasonable cause of action.*]—The plaintiff, a ratepayer of a city corporation, brought an action against the corporation to have declared void a contract entered into between the corporation and the Hydro-Electric Power Commission of Ontario, for the supply of electrical power to the inhabitants of the city, and in his statement of claim alleged that the contract could be validly entered into by the corporation only with the assent of the electors, and that there was a material variation between the contract attacked and that set forth in the by-law which had been approved by the electors, inasmuch as the latter contained a limitation as to the price at which the power was to be supplied, which was not contained in the contract proposed to be entered into between the defendants and the Commission. The statute by which the Commission was appointed provided that no action should be brought against it or any of its members without the consent of the Attorney-General, who refused the fiat permitting the joinder of the Commission as a defendant. The defendants having moved under Con. Rule 261 for an order that the statement of claim should be struck out, on the ground that it disclosed no reasonable cause of action, and for an order staying all proceedings until the Commission should be added as a defendant:—*Held*, that, as the statement of claim appeared to disclose a substantial cause of action (*see Scott* v. *Patterson* (1908), 17 O. L. R. 270), it should not be struck out under the Rule in question, which applies only to pleadings which are obviously unsustainable or to cases in which the Court is satisfied that a statement of claim discloses no cause of action at all.—*Held*, further, that even assuming the existence of a contract binding upon the corporation and the Commission, the Court should not, in the exercise of the discretion vested in it under Con. Rule 206, stay

the action until the Commission should be added as a co-defendant, inasmuch as the plaintiff had done all in his power to have it so added, having applied to the Attorney-General for a fiat permitting such joinder, which application had been strenuously opposed by the defendants, and refused. Con. Rule 266 (1), which provides that "an action shall not be defeated by reason of the misjoinder of parties," applies also to non-joinder, which is expressly included in the corresponding English Rule, and the authorities upon the latter are therefore applicable in our Courts. *Carter* v. *Clarkson* (1893), 15 P. R. 379, at p. 380, approved. *Atlantic & Pacific Telegraph Co.* v. *Dominion Telegraph Co.* (1880), 27 Gr. 592, and *Jones* v. *Imperial Bank* (1876), 23 Gr. 262, distinguished. Discussion of the principles upon which the Court will act in the exercise of its discretion in ordering, or refusing to order, the joinder as defendant of a person who ought under ordinary circumstances to be so joined, and of the cases bearing upon the subject. *Semble*, that as the defendants' application should under the practice have been made before a Judge in Chambers, it was open to doubt whether they could have maintained their appeal to a Divisional Court without special leave under Con. Rule 1278. *Beardmore* v. *Toronto, Smith* v. *London* (1909), 19 O. L. R. 139, 13 O. W. R. 198, 207, 519, 1148. *See* 14 O. W. R. 1248.

Attorney-General — *Parties.*]—Action by a ratepayer against the city of Toronto for a declaration that the defendants had improperly assessed local improvements on the property benefited so that the difference had been improperly thrown on the general fund of the city:—*Held*, that the Attorney-General is not a necessary party. Statement of claim directed to be amended. *Bowman* v. *Toronto*, 12 O. W. R. 1059.

Cause of action — Damages for not transferring stock — Principal and agent. *Durlamm* v. *Toronto Roller Bearing Co.*, 2 O. W. R. 463, 479.

Chambers motion — *Exhibits.*]—It is not necessary to file exhibits referred to in an affidavit filed on an application in Chambers. *Larsen* v. *Bauer*, 5 Terr. L. R. 458.

Conditional appearance — Motion for leave to enter—Action to recover proceeds of chattels from liquidator of defendant company—Mortgaged to plaintiffs to secure bonds prior to winding-up order—Master in Chambers, 17 O. W. R. 329, 2 O. W. N. 222, refused the motion with costs to plaintiff in cause — Meredith, C.J.C.P., affirmed the Master — Riddell, J., refused leave to appeal to Divisional Court. *National Trust Co.* v. *Trusts & Guarantee Co.* (1910), 17 O. W. R. 520, 2 O. W. N. 268.

Creditors' action against transferee of debtor — *Confused allegations—Embarrassment — Preference — No reasonable cause of action disclosed — Equitable execution — Vagueness of allegations — Existing debt — Execution creditors.*]—In an action by execution creditors of L., suing on behalf of themselves and of all other creditors of L., against M., for a declaration that the interest of L. in certain lands and a mortgage transferred to M. was available for payment of the debts of L., or, in the alternative, for a declaration that the lands and mortgage were held by M. in trust for the creditors of L., and for an injunction, further and other relief, and costs: —*Held*, upon a motion by M. to strike out the statement of claim as embarrassing, that the first paragraph, setting out the names and residences of the various plaintiffs and of the defendant, was unnecessary and improper. — 2. That the allegation that the plaintiffs "are execution creditors," though stating the Courts in which judgments were obtained, did not sufficiently shew that the executions were properly lodged and in force and effect against the property in question, or would be put for the transfer to M.; and if the plaintiffs were seeking equitable execution, which appeared to be the case, it would be necessary to so allege and prove. —3. That the allegation that the plaintiffs were creditors of L. was not a sufficient allegation of an indebtedness, which is a conclusion of law; the facts and particulars of the indebtedness should be stated.—4. That attacking a conveyance on the ground that it was made "with intent to delay, hinder, or defraud," as under 13 Eliz., or "with intent to defeat or delay or prejudice," as under the Ordinance respecting Preferential Assignments, C. O. 1898 c. 42, and attacking it on the ground of the transaction being a preference, are two distinct things. The claim, so far as based on preference, should be expunged; 13 Eliz. does not deal with preferences; C. O. 1898 c. 42 did so, but did not apply to land; and the Alberta Assignments Act, 1907, was not in force at the date of the impeached transaction.—5. That certain allegations intended as particulars of fraud were unnecessary; there is a clear distinction between attacking a transaction on the ground that it was effected through fraud and attacking it on the ground that it was done with a particular intent; and in the present case the question was one of intent.—6. And that in these instances and others specified in the judgment, the statement of claim was confused and embarrassing, and the whole of it should be struck out, because no reasonable cause of action was alleged from the point of view of preference; because it was not clearly indicated whether equitable execution was sought as an alternative remedy; and, these grounds existing, because of unnecessary, vague, and ambiguous allegations; with leave to file a new statement.—Proper form of statement of claim indicated. *Richard-Belvieau Co.* v. *Miller* (1910), 13 W. L. R. 384.

Damages — Breach of covenant—Necessary allegations—Particulars. *Robinson* v. *Trustees of Toronto General Burying Grounds*, 2 O. W. R. 891.

Declaratory judgment—Statements of reasons for seeking relief — Embarrassment —Pleading to claim—Waiver. *Harris* v. *Harris*, 1 O. W. R. 684, 754.

Defamation — Privilege — Motion to strike out paragraph — Pleading over — Waiver—Embarrassment — Indefinite charge —Mitigation of damages — Understanding

of bystanders of words complained of. *Lawrie* v. *Maxwell*, 3 O. W. R. 38, 134, 284.

Delivery after defence—*Irregularity.*]—The defendant entered an appearance and at the same time filed a statement of defence and counterclaim, which he then served, and gave notice to the plaintiffs that he did not require the delivery of a statement of claim:—*Held*, that a statement of claim subsequently delivered by the plaintiff was irregular. The indorsement on the writ of summons had become the statement of claim, and if not sufficient could be amended without leave. Rules 171, 243, 247, 256, 300, considered. *Confederation Life Association* v. *Moore*, 24 C. L. T. 25, 6 O. L. R. 648, 2 O. W. R. 941, 1030, 1087, 1120.

Delivery of amended pleading—Time—Leave—Consent—Order validating—Terms—Stay of proceedings — Payment of costs. *Anthony* v. *Blain*, 1 O. W. R. 841.

Demurrer — *Plea to merits.*] — If the statement of claim does not clearly shew that the plaintiff is owner of the promissory note upon which the suit is based, there may be reason for a demurrer or for a plea to the merits, but an exception to the form will not lie. *Quebec Bank* v. *Davidson* (1911), 12 Que. P. R. 231.

Demurrer to part—*Motion to strike out same part—Practice.*]—The defendants, having delivered a defence in which they demurred to certain paragraphs of the statement of claim, afterwards moved to strike out the same paragraphs as embarrassing:—*Held*, that the application to strike out should not be entertained.—Order of the Referee affirmed. *Smith* v. *Murray* (1910), 14 W. L. R. 402.

Discretion—*Appeal.*]—When a Judge to whom an application has been made to strike out a statement of claim, on the ground that it discloses no reasonable cause of action, has exercised a discretion and made an order refusing the application, that order ought not to be interfered with on appeal unless the Judge below decided the case upon an erroneous principle or omitted to take into consideration something which ought to have influenced his judgment. *Cooper* v. *Yorkshire Guarantee & Securities Corporation*, 11 B. C. R. 97.

Embarrassing — Motion to strike out three paragraphs of amended statement of claim dismissed, as they introduced no new matter and there was no doubt as to what plaintiff's ground of complaint was. *Rachar* v. *McDowell*, (1905), 14 O. W. R. 1159, 1 O. W. N. 244.

Embarrassing — *Prolixity.*]—Action for cancellation of conveyance and for declaration that certain transactions were frauds upon creditors. Defendants moved to strike out part of statement of claim as being unnecessary and embarrassing: — *Held*, that while some portions were unnecessary, yet they did not cloud the issue nor mislead defendants. Motion dismissed with costs. *Peck* v. *Gordon* (1909), 3 Sask. L. R. 118.

Embarrassment — *Cause of action — Crown—Ownership of foreshore.*]—In an action by the Attorney-General for the province for damages and an injunction the statement of claim alleged that the defendant company had wrongfully erected an embankment on the foreshore of Burrard Inlet, and thereby obstructed the outfall of sewers, to the damage and annoyance of the people of Vancouver:—*Held*, on an application to strike out the pleading as embarrassing and as disclosing no cause of action, that the pleading was good. In such an action it is not necessary for the plaintiff to allege ownership in the foreshore. *Semble*, a combined application may be made under Order XIX., r. 27, and Order XXV., r. 4, to strike out a statement of claim on the grounds that it is embarrassing and discloses no reasonable cause of action, and such procedure is not limited to cases which are plain and obvious. *Attorney-General for British Columbia* v. *Can. Pac. Ry. Co.*, 10 B. C. R. 108.

Embarrassment — Claim on behalf of third person—Interest—Defective allegations—Amendment. *Slater* v. *Tunnicliffe* (N. W. T.), 3 W. L. R. 447.

Embarrassment.] — In a paragraph of the statement of claim, plaintiff alleged that defendant, a married woman, enticed plaintiff's husband to leave plaintiff to live with defendant. There being no precedent for such an action, the Master dismissed the motion to strike out, without prejudice to any application that might be made at the trial. *Weston* v. *Perry*, 13 O. W. R. 246. *See* 14 O. W. R. 956.

Embarrassment — Irrelevancy—Municipal corporation — Contract with Hydro-Electric Commission — Validity — By-law—Action—Parties. *Smith* v. *London*, 12 O. W. R. 668, 675.

Embarrassment—Motion to strike out—Unnecessary allegations—Particulars — Application for dual relief—Costs. *Pershing* v. *Nason* (N. W. T.), 4 W. L. R. 10.

Embarrassment — Multifariousness — Irrelevancy — Pleading evidence. *Piper* v. *Airey*, 10 O. W. R. 607.

Embarrassment — *Particulars—Information required—Discovery of documents before pleading.*]—By the second paragraph of the statement of claim it was alleged that the plaintiff sold and delivered to the defendant one Monitor well auger No. L., and that the defendant, as security for the payment therefor, executed and delivered to the plaintiff certain lien-notes or agreements (describing them). The third paragraph contained certain credits to which the defendant was entitled:—*Held*, that the defendant was entitled to particulars as to the date of the sale and delivery and the prices of the machinery and of the items forming the credits; but the statement of claim was not embarrassing; and all the information the defendant required to enable him to plead or counterclaim could be obtained by means of an order requiring the plaintiff to make discovery of documents before the defendant should be required to plead, and that order

should be granted. — Order of the Local Master at Moose Jaw varied. *Reid* v. *Nelles* (1910), 15 W. L. R. 578. Sask. L. R. .

Embarrassment — *Prolixity.*]—Allegations in pleadings fairly considered as unnecessary, immaterial, but setting forth evidence in support of facts in issue, are merely prolix and unobjectionable. *McLean* v. *Kingdon*, 9 W. L. R. 370.

Enlargement of writ — Wrongful dismissal of servant—Depreciation in stock of company — Particulars. *Morley* v. *Canada Woollen Mills Co.*, 2 O. W. R. 457, 478.

Extension of claim in writ—*Service by posting* — *Subsequent appearance* — *Waiver.*]—The claim indorsed on the writ of summons was for specific performance of an agreement for the purchase and sale of land. The statement of claim prayed cancellation of the agreement and possession of the land:—*Held*, a legitimate extension of the claim within Rule 244. The defendant not having appeared within the proper time, service of the statement of claim was effected, pursuant to Rule 330, by posting up a copy in the proper office, after which the defendant entered an appearance and therein required the delivery of a statement of claim. —*Held*, that the defendant had waived any right to complain of the variation made in the extended pleading; and the order made upon a motion to set aside the statement of claim, allowing it to stand as of the date of the order, was the proper one. *Gee* v. *Bell*, 35 Ch. D. 160, distinguished. *Gibson* v. *Hirb*, 21 C. L. T. 211, 1 O. L. R. 247.

Extension of claim indorsed on writ of summons—*Service out of jurisdiction.*]—The plaintiffs began an action against three defendants all resident in England, and served the writ of summons on one of the defendants while temporarily in British Columbia, and then under Order XI. served the other defendants in England. The claim indorsed on the writ was for damages for non-transfer to the plaintiffs of shares according to agreement and for failure to hold certain stock in trust. By the statement of claim the plaintiffs set up in effect a claim for damages against the defendants for fraudulently manipulating certain companies so that the stock had become worthless:—*Held*, that the matters alleged in the statement of claim were within the scope of the indorsement. In deciding whether or not the cause of action indorsed on a writ has been unduly extended in the statement of claim, the fact that one of the defendants was served within the jurisdiction and the others were subsequently served without the jurisdiction under Order XI., is immaterial. *Oppenheimer* v. *Sparling*, 10 B. C. R. 162.

Extension of time for delivery—Time limit for bringing action—Application to delivery of statement of claim—Con. Rules 243, 353—Costs. *McDonald* v. *London Guarantee & Accident Co.*, 13 O. W. R. 403.

Fraud — Notice—Embarrassment. *Beatty* v. *McConnell*, 5 O. W. R. 541.

Frivolous or vexatious action—*Municipal corporation* — *Contract for purchase of plant* — *Allegations against mayor* — *Alteration in contract* — *Ratification by council* — *Injunction* — *Con. Rule 261* — *Amendment.*] — Under Con. Rule 261, an order to stay an action or to strike out a statement of claim as disclosing no reasonable cause of action will only be granted in the clearest case.—A statement of claim in an action by the plaintiff, on behalf of himself and the other ratepayers of a city, alleged that an agreement was entered into on the 17th July, 1905, by the city with an electric light company, which was duly authorised by by-law, whereby the city were to acquire for $200,000 the company's plant, together with supplies up to $3,000 not converted into plant; but that the defendant, the mayor, without any authority, altered the agreement, by inserting after the word "supplies" the words "on the 20th of April," the effect of which was to deprive the municipal corporation of a large amount of supplies. Motions made by the several defendants to strike out the statement of claim as disclosing no reasonable cause of action, and to stay or dismiss the action as frivolous and vexatious, were dismissed.—It is not essential in such an action to allege fraud; but there should be an allegation of a refusal by the corporation to bring an action; and where, with knowledge of the alleged alteration, the corporation had allowed six months to elapse without taking proceedings, and as a defence to the action a resolution of the council was produced, authorising such defence, which, it was alleged, amounted to acquiescence and ratification on the corporation's part, this was held to constitute evidence of such refusal, and the defendant was allowed to amend so as to specially allege it.—*Semble*, ratification of the act alleged would, in the circumstances, constitute a breach of trust on the part of the corporation. *Black* v. *Ellis*, 12 O. L. R. 463, 7 O. W. R. 490, 889.

General averment of secretion, following 895 C. P., par. 2 and schedule R. of the same code, and sufficient for the affidavit required for the issue of a writ of *capias*, is equally sufficient when contained in the statement of claim. *Quebec Bank* v. *Davidson* (1911), 12 Que. P. R. 231.

Illegal trade combination—Prefatory statements — Embarrassment — Damages — Particulars — Discovery — Privileges. *Grocers' Wholesale Co.* v. *Beckett*, 6 O. W. R. 531.

Irregularity — Naming place of trial other than that named in writ of summons —Waiver by taking proceedings in action. *Curry* v. *Star Publishing Co.*, 10 O. W. R. 960.

Irrelevant allegations — Company — Subscription for shares — False representations. *Coburn* v. *Clarkson*, 11 O. W. R. 344.

Joinder of causes of action—Action for damages for death of workman—Claims at common law and under Workmen's Compensation Act—Alternative claims. *Reutenmiller* v. *Grand Trunk Ry. Co.*, 7 O. W. R. 266.

Joinder of causes of action—Claim on guaranty—Claim to set aside transfers of

property—Class suit—Election—Amendment —*Lis pendens*. *Brock* v. *Crawford*, 10 O. W. R. 587.

Joinder of causes of action—Introductory statements — Libel — Special damage—Infringement of several patents for inventions—Company — Wrongs before incorporation. *Copeland-Chatterson Co.* v. *Business Systems Limited*, 6 O. W. R. 555.

Joinder of causes of action—*Joinder of defendants — Conspiracy — Company — Indemnity.*]—If the statement of claim in an action against a number of defendants contains paragraphs setting up matters in which some of the defendants are not interested, such paragraphs should be struck out on application of any of those defendants, but not on the application of any of the others. *Gower* v. *Coulbridge*, [1898] 1 Que. B. 348, and *Sadler* v. *Great Western Ry. Co.*, [1896] A. C. 450, followed.—As incidental to the matters which led up to the main cause of action against all the defendants, including an incorporated company, the statement of claim asked for judgment for a sum of money alleged to be due to them by the company:—*Held*, that this did not constitute a separate and distinct cause of action against the company alone, so as to bring the case within the principle of the above cited authorities. *Kent Coal Co.* v. *Martin*, 16 Times L. R. 486, and *Frankenburg* v. *Great Horseless Carriage Co.* [1900] 1 Q. B. 504, followed. *Martel* v. *Mitchell*, 3 W. L. R. 144, 16 Man. L. R. 206.

Joinder of causes of action—Malicious prosecution — Trespass — Exclusion or separate trial — Inconvenience — Jury — Premature application. *Coates* v. *Pearson* (Man.), 3 W. L. R. 1.

Joinder of causes of action—*Malicious prosecution — Trespass — Jury trial — Separate trials of different causes of action.*]—Under Rule 257 of the King's Bench Act, R. S. M. 1902 c. 40, a plaintiff may sue in the same action both for malicious prosecution and trespass, although, by s. 59 of the Act, the former must be tried by a jury unless the parties waive it, whilst the latter must be tried without a jury unless a Judge otherwise orders, and a statement of claim including both such causes of action is not thereby embarrassing or inconsistent with the Rules of practice of the Court.—After the pleadings are closed, a plaintiff suing for both such causes of action may either waive his right to a jury or apply to have the trespass claim also tried by a jury, and, if such application fails, then an application might be made, under Rule 263, to exclude one of the causes of action or for separate trials, but no application under the last-mentioned Rule should be made before the cause is at issue. *Coates* v. *Pearson*, 3 W. L. R. 1, 16 Man. L. R. 3.

Leave to amend a declaration "so as to agree with the facts proved," will not be granted if the amendment changes the nature of the demand, or is such as to lead the defendant into error as to the facts intended to be proved. In an action of damages caused by a collision with a tram car, in which it is alleged that "the car which struck the plaintiff was crossing another car moving on the same street, in the opposite direction," the plaintiff cannot, after trial, amend his declaration to make it set forth that the second car was stationary and not moving. Leave granted to him to do so by the trial Judge is sufficient ground to quash a verdict given in his favour. *Lemieux* v. *Montreal St. Ry. Co.* (1910), 38 Que. S. C. 400.

Libel — Newspaper—Notice of complaint before action — Conformity with pleading —Amendment—Matters alleged in aggravation of damages. *Pringle* v. *Financial Post Co.*, 12 O. W. R. 929.

Malpractice — "*Efficient*" — *Amendment.*]—The word "efficient," as applied to a medical practitioner in a statement of claim for damages for his unskilful treatment of the plaintiff, was held to be ambiguous, inasmuch as it might be taken to mean that the practitioner was merely competent, or that he was not only competent, but would in fact skilfully treat, and the statement of claim was therefore held to be embarrassing. Judge's order dismissing application to amend by setting up objection in law, varied, and plaintiff given leave to apply to amend, and in default defendant given leave to apply to strike out portion of claim as embarrassing. *Schiller* v. *Canada North-West Coal & Lumber Syndicate*, 1 Terr. L. R. 421.

Mistake as to credit — Amendment— Effect of judgment for part of claim — Action proceeding for balance — Interlocutory judgment. *Lisle* v. *DeLion* (Y.T.), 3 W. L. R. 510.

Mortgage — Covenant — Assignment *pendente lite*. *Ronald* v. *Whitehead*, 12 O. W. R. 1073.

Mortgage action—*Alternative provisoes —Embarrassing or unnecessary — Striking out.*]—Allegations in a statement of claim unnecessary inasmuch as they merely anticipate a possible defence, are not necessarily embarrassing. The plaintiffs in paragraph 2 of their statement of claim alleged that the defendant by deed dated 13th November, 1888, in consideration of £1,003 lent him by one A. M., mortgaged his reversionary interest in his father's estate, and that in the said deed it was provided that if the defendant should within ten years after the date of the mortgage become entitled to the said reversionary interest by the death of the tenant for life, and should within 30 days after obtaining possession of the same pay the said A. M. $2,000, with compound interest at 10 per cent. per annum, then the mortgage should be void. In paragraph 3 it was alleged that it was further provided by the mortgage that if the defendant should at the expiration of 10 years from the date of the mortgage repay to A. M. the said sum of £1,003, with interest compounded yearly at 10 per cent., then the mortgage should be void. In paragraph 4 it was alleged that the defendant covenanted in the said deed to pay the mortgage money and interest and observe the provisions therein contained. In paragraph 5 it was alleged that A. M. had duly assigned the mortgage to the plaintiffs; in paragraph 6, that the defendant did not

within 10 years become entitled to the property mortgaged by the death of the life tenant: and in paragraph 7, that the defendant had not paid any sum whatever on the mortgage. The plaintiff claimed £1,003 and interest at 10 per cent. compounded yearly:—*Held*, on an application to strike out the whole statement of claim, or at any rate either paragraph 2 or paragraph 3 as embarrassing, that the pleading was not embarrassing, and should stand; that so far as any of the allegations might be unnecessary they merely anticipated a possible defence, and were not on that account embarrassing. *Vancouver Land & Securities Co.* v. *McKinnell*, 5 Terr. L. R. 27.

Motion to allow delivery—*More than three months delay — Security for costs — Venue — Change of.*]—Order granted allowing delivery of statement of claim notwithstanding more than three months had elapsed since entry of appearance:—*Held*, also, that to require security for costs might virtually be a dismissal of the action; that it would be a sufficient test of plaintiff's solvency and good faith to require him as a term of the order to pay the costs of motion, fixed at $30, within six weeks and proceed to trial at as early a date as possible.—*Held*, further, that the order might provide for *venue* to be laid at Walkerton if accepted. *Shunk* v. *Gentles* (1910), 15 O. W. R. 866.

Motion to set aside—*Præcipe order to continue action at suit of assignee of plaintiff.*]—Order made validating a statement of claim not delivered until two years after service of writ. Plaintiff assigned his cause of action after issue of writ. Motion to set aside *præcipe* order to continue action at suit of assignee dismissed. *Stidwell* v. *North Dorchester*, 14 O. W. R. 709, 1 O. W. N. 51.

Motion to strike out — Embarrassment —Irrelevancy—Prayer for relief—Damages—Parties—Company. *Hart* v. *Hutcheson*, 7 O. W. R. 635.

Motion to strike out — Embarrassment —Prayer for relief—Malicious prosecution —Conspiracy—Amendment. *Vandusen* v. *Robertson*, 9 O. W. R. 634.

Motion to strike out certain portion as embarrassing—Or to have mortgagees added as defendants — Motion dismissed—Costs to plaintiffs in cause—Defendants to have 8 days to plead. *Can. Bank of Commerce* v. *Fitzgerald* (1911), 18 O. W. R. 908, 2 O. W. N. 951.

Motion to strike out large part — Embarrassing — Claim disallowed by judgment—*Res judicata* — Reasonable remuneration — Retainer — Action to determine question as to — To be tried without jury — No prejudice to defendants — Motion dismissed with costs — Defendants given week to deliver statement of defence. *Curry* v. *Clarkson* (1910), 17 O. W. R. 315, 2 O. W. N. 221.

Motion to strike out part—Execution against interest in land—Judgment—Remedy by summary application. *Bowerman* v. *Hall*, 5 O. W. R. 225.

Motion to strike out parts—Allegations of material facts. *Slemin* v. *Toronto Police Benefit Fund*, 5 O. W. R. 178, 239.

Non-conformity with indorsement on writ of summons—Additional claim related to original claim—Action to establish will and set aside deed—Claim to set aside later will—Embarrassment — Cross-action. *Nicholson* v. *Mahaffy*, 9 O. W. R. 685.

Non-conformity with indorsement on writ of summons — Particulars — Amendment — Costs. *Martin* v. *Jones*, 9 O. W. R. 866.

Non-conformity with writ of summons — Action begun by co-partnership—Statement of claim in name of incorporated company—Statute of limitations. *Muir* v. *Guinane*, 5 O. W. R. 324, 6 O. W. R. 64, 383, 844, 7 O. W. R. 152.

Non-conformity with writ of summons — Amendment—Practice. *Blackwell* v. *Blackwell*, 2 O. W. R. 411, 507.

Order for delivery—*Rules of Court.*]—The Court has jurisdiction under Order XXX. to direct the delivery of a statement of claim. Orders XX. and XXX. may be read together for this purpose. Decision of Morrison, J., in *British Columbia Iron Wire Co.* v. *Smith*, 4 W. L. R. 251, reversed. *British Columbia Wire & Nail Co.* v. *Ottawa Fire Ins. Co.*, 12 B. C. R. 212.

Particulars—*Copyright in book—Registration — Infringement.*]—In an action for infringement of copyright in a book, the statement of claim alleged that the plaintiffs were the proprietors of a subsisting copyright duly registered, but did not mention the date of registration, and further alleged that the defendants printed for sale a large number of copies of another book a part whereof was an infringement of the plaintiffs' copyright:—*Held*, that the defendants were entitled to particulars shewing the date of registration of the plaintiff's copyright, and shewing what part of the defendants' book infringed the plaintiffs' right. *Sweet* v. *Maugham*, 11 Sim. 51, not followed. *Mawman* v. *Tegg*, 2 Russ. 385, 390, and *Page* v. *Wisden*, 20 L. T. N. S. 435, followed. *Liddell* v. *Copp-Clark Co.*, 21 C. L. T. 126, 19 P. R. 332.

Particulars — Mortgage — Sale under power — Conspiracy — Account. *Huffman* v. *Hull*, 1 O. W. R. 242.

Particulars — *Settled accounts.*] — In order to open settled accounts on the ground of mistake specific errors must be alleged and proved. General allegations are not sufficient, and if made must be supplemented by particulars. *Ontario Lumber Co.* v. *Cook*, 11 O. L. R. 111, 7 O. W. R. 132.

Parties—Motion to strike out statement of claim—No joint cause of action — Improper joinder of separate and distinct actions—Five days given to elect on which action plaintiffs will proceed — Without prejudice to other rights if statement of claim is amended—Plaintiff Wakefield's action dismissed without prejudice — Costs.

Harris, Maxwell Larder Lake Mining Co. v. *Goldfields Ltd.* (1911), 19 O. W. R. 248, 2 O. W. N. 1087.

Personal injuries — *Negligence—Defective machine—Insurance against accident—Irrelevancy.*]—In an action for damages for personal injuries caused by a machine alleged to have been defectively constructed, belonging to the defendants, the fact that the defendants were insured in an insurance company against such accidents, cannot be given in evidence, as it was not in any way relevant: and an allegation in the statement of claim that such insurance existed was struck out, as embarrassing to the defendants. *Flynn* v. *Industrial Exhibition Association of Toronto*, 24 C. L. T. 58, 6 O. L. R. 635, 2 O. W. R. 1047, 1075.

Personal injuries by electric wires—Subsequent removal of wires—Admissibility of evidence. *Gloster* v. *Toronto Electric Light Co.*, 4 O. W. R. 532.

Plaintiff a shareholder in company—Action against manager for diminishing company's assets—Motion to strike out statement of claim as disclosing no reasonable cause of action—Riddell, J., granted the order as asked, but gave plaintiff leave to amend on payment of costs. *David* v. *Ryan* (1910), 17 O. W. R. 694, 2 O. W. N. 322.

Relevancy of allegations—*Contract for sale of lands—Specific performance.*]—Action for specific performance of contract for exchange of lands. Motion to strike out certain paragraphs of statement of claim setting out that differences of opinion had arisen between the parties as to effect of their contract and motion for particulars.—Master in Chambers dismissed motion. Costs to plaintiff in cause. *Shumer* v. *Todd* (1911), 18 O. W. R. 275, 2 O. W. N. 645.

Relevancy of allegations — Master in Chambers struck out paragraph of statement of claim tending to shew what happened after the cause of action arose—Defendants given a week to plead—Costs in the cause. *Fearnside* v. *Morris* (1911), 18 O. W. R. 271, 2 O. W. N. 676.

Saskatchewan Rule 151—*No reasonable cause of action—Statute of Frauds.*]—On application to strike out certain paragraphs of statement of claim on the ground that they disclose no reasonable ground of action, although the other paragraphs did. Such an application under above rule can be made as to either of these separate parts as a whole:—*Held*, that the first-mentioned paragraphs also disclosed a reasonable cause of action. It is not fatal to a paragraph referring to an agreement relating to land that it does not state such agreement to be in writing. Summons discharged. *Voorhees* v. *Holland*, 9 W. L. R. 687.

Service — *Time—Extension.*]—Application refused to extend time for service of statement of claim notwithstanding the defendant would be able to plead the Statute of Limitations. Under above Rule 176 the statement of claim must be served within 6 months. Unless under extraordinary circumstances the application must be made within the 6 months' period. Plaintiff had a remedy under Man. Rule 203. *Watson* v. *Bowser*, 19 W. L. R. 92.

Slander action — *Innuendo — Criminal charge—No reasonable cause of action — Con. Rule 261.*] — Motion by defendant under Con. Rule 261 to strike out plaintiff's statement of claim. Defendant used the words "you cannot get your expenses, you ran away;"—*Held*, that taking the innuendo as stated by plaintiff, the words used did not impute that plaintiff had committed a crime. No reasonable cause of action having been disclosed, order granted as prayed. *Law* v. *Llewellyn*, [1906] 1 K. B. 408, followed. *Titchmarch* v. *Crawford* (1910), 15 O. W. R. 664.

Specific performance—Indefiniteness—Documents—Rules 275, 429 — Amendment. *Clarkson* v. *Jacobs*, 10 O. W. R. 65.

Striking out—*Cause of action—Amendment—Limitation of actions—Railway Act.*] —Section 125 of the Judicature Ordinance, R. O. 1888 c. 58, can be invoked only (1) when the whole pleading, and not merely "matter in the pleading" within s. 105, is attacked; and (2) when the pleading discloses not merely no cause of action or answer but one not reasonable, that is, not fairly open to argument as a point of law, or when the action or defence is shewn by the pleadings to be frivolous or vexatious. If it is fairly open to argument whether a pleading discloses a good cause of action or answer, the question involved should be raised as a point of law by the pleadings under s. 123. On the pleadings it was objected that the amended statement of claim set up a new cause of action, which had become barred by provisions of the Railway Act:—*Held*, that a new cause of action was not set up in the amended statement of claim. *McEwen* v. *North West Coal and Navigation Co.*, 1 Terr. L. R. 203.

Striking out—*Cause of action—Embarrassment—Demurrer—Amendment—Terms—Rules 259, 261, 298.*]—In an action to recover the amount of an insurance upon the life of C., under a policy issued by the defendants and assigned to the plaintiff, the plaintiff alleged, in the alternative, that the defendants had re-insured with another company, and after the death of C. the defendants requested the re-insuring company to pay the amount re-insured to the defendants, which the re-insuring company did with a direction to pay the amount over to the plaintiff, which the defendants refused to do:—*Held*, that this amounted to an allegation that the defendants had received a sum of money to the use of the plaintiffs, which they refused to pay over to him, and that they were trustee thereof for him; and the paragraphs of the statement of claim containing the alternative allegations should not be struck out summarily under Rule 261 as disclosing no reasonable cause of action, nor under Rule 298 as tending to prejudice, embarrass, or delay the fair trial of the action. Rule 261 is intended to apply only where the pleading is obviously bad. A party may still have a point of law disposed of, although he is not at liberty to demur: Rule 259. *Attorney-General of the Duchy of Lancaster* v. *London and North-Western Ry.*

Co. [1892] 3 Ch. 274, and *Kellaway* v. *Burg*, 66 L. T. N. S. 559, followed. *Semble*, that where a pleading is struck out and the party pleading is allowed to amend, there is no authority for imposing the term that he is to file with the amendment an affidavit shewing *prima facie* its truth. *Brophy* v. *Royal Victoria Ins. Co.*, 21 C. L. T. 589, 2 O. L. R. 651.

Striking out—Embarrassment—Fraud—Setting out facts and circumstances—Anticipating defence—Leave to amend. *Wagar* v. *Carscallen*, 8 O. W. R. 426, 486.

Summary application to strike out, as disclosing no reasonable cause of action and as frivolous and vexatious—Rule 151—Question of law raised as on demurrer—Construction of Rule. *Acre* v. *Watt* (Sask.), 7 W. L. R. 62.

Summary judgment — *Affidavit verifying claim—Sufficiency of—Time for making applications — Issue joined.*]—Plaintiff applied to strike out appearance and enter judgment against the defendant under Rule 103 of the Judicature Ordinance. The affidavit filed alleged a judgment recovered against the defendant in the Alberta Court for a certain sum, but did not set out that he was still indebted to the plaintiff in that or any sum:—*Held*, that the affidavit did not sufficiently establish the cause of action. *Gaetz* v. *Hall* (1909), 2 Sask. L. R. 184.

Time for delivery—*Several defendants—Rule 243 (b).*]—Under Con. Rule 243 (*b*), where there are several defendants in an action, it is sufficient if the statement of claim is delivered to each defendant within three months after the last appearance. *McKay* v. *Nipissing Mining Co.*, 10 O. W. R. 30, 14 O. L. R. 457.

Trespass—*Seizure of goods by sheriff—Action against execution creditors—Failure to allege specific directions—Amendment.*]—In an action against the sheriff and several execution creditors of A. O. for trespass in seizing the goods of the plaintiff under the writs of execution, the statement of claim did not allege that the defendants the execution creditors had interfered directly and ordered the sheriff to seize particular goods:—*Held*, that the statement of claim disclosed no reasonable cause or ground of action against the defendants the execution creditors; but, upon a motion by one of those defendants to dismiss the action, the plaintiff was allowed to amend by inserting an allegation that those defendants had specifically directed the sheriff to seize the particular goods. *Olsen* v. *Van Wart* (1910), 13 W. L. R. 661.

Undue extension of indorsement of writ of summons—Inconsistent causes of action—Action to set aside will—Contract of testator with child — Property wrongfully obtained from testator in his lifetime — Amendment. *Mountjoy* v. *Samells*, 10 O. W. R. 605.

See ACCOUNT—CONTRACT—CROWN LANDS—DEFAMATION — JUDGMENT—LIS PENDENS—MECHANICS' LIENS.

16. STATEMENT OF DEFENCE AND COUNTERCLAIM.

Action against husband and wife—Only one statement of defence filed—Motion to strike out part as embarrassing—Point new — Success divided—Costs in cause. *Titchmarsh* v. *Burkhead* (1910), 17 O. W. R. 564, 2 O. W. N. 394.

Action brought in name of company—Question of practice—Use of company's name as plaintiff in actions—Discretion — Motion to stay. *Saskatchewan Land and Homestead Co.* v. *Leadley*, 2 O. W. R. 745, 850, 917, 944, 1075, 1112, 3 O. W. R. 123, 191, 4 O. W. R. 39, 378, 5 O. W. R. 449, *Saskatchewan Land and Homestead Co.* v. *Moore*, 2 O. W. R. 916, 944, 1075, 1112, 4 O. W. R. 39, 378.

Action for conspiracy — Members of trade union—Denial of fact not alleged — Argumentative claims of right — Striking out pleading. *Vulcan Iron Works Limited* v. *Winnipeg Lodge No. 122, International Association of Machinists* (Man.), 4 W. L. R. 313.

Action for money had and received—Counterclaim for transfer of shares, delivery up of promissory note, account of dividends and profits, and damages—Striking out part as to damages. *Union Trust Co.* v. *Fowler*, 11 O. W. R. 675.

Action for slander — *Amendment of statement of claim—Innuendo.*]—Plaintiff, who moved to strike out a large part of statement of defence as irrelevant and embarrassing, decided to confine trial to two specific acts of wrong-doing. Amendments allowed accordingly. It is here said that an active politician need not defend his every act. *Nunc dimittis. Foster* v. *Macdonald*, 13 O. W. R. 671.

Action of ejectment — Title—Counterclaim to remove deeds from register—Parties —Amendment. *Setchfield* v. *Patterson*, 12 O. W. R. 1070.

Action to set aside agreement to sell—*Notes given as a collateral security—Deposit of these notes in Court with the statement of defence—Inscription in law.*]—The plaintiff does not withdraw his action to set aside an agreement to sell by depositing in Court with his statement of defence, notes which had been given him by the defendant to guarantee the payment of the price of the sale. *Metrakos* v. *Thomas* (1909), 10 Que. P. R. 365.

Action under Workmen's Compensation Act — *Statement of defence—Amendment of—Setting up action barred by Statute of Limitations—Failure to plead statute in statement of defence—Slip of solicitor—Costs.*] — Plaintiff brought action for damages for injuries under Workmen's Compensation Act. Defendant's solicitors, through a slip, neglected to plead the Statute of Limitations as a bar to the action. Defendants moved to amend their statement of defence by so pleading the statute.—Master in Chambers allowed the motion on payment to plaintiff of costs of motion fixed at $20. *Sireu* v. *Temiskaming Mining Co.* (1910), 17 O. W. R. 81, 2 O. W. N. 129.

Amended pleading—Leave to deliver—Company—Lien—Solicitor—Adding party—Pleading over. *Ryckman* v. *Toronto Type Foundry Co.*, 3 O. W. R. 267, 290, 434, 522.

Amendment—Costs. *McLaughlin Carriage Co.* v. *Borden*, 1 E. L. R. 85.

Amendment — Damages—New trial—Payment into Court. *Stephens* v. *Toronto Ry. Co.*, 7 O. W. R. 39.

Amendment — *Denial of representative character of plaintiff—Status to maintain action—Letters of administration—Cause of action arising in another province — Fatal Accidents Act.*]—The plaintiff, as administrator of his deceased wife, sought to recover damages for her being burnt to death in a fire which occurred on a steamer owned and operated by the defendants, while such steamer was at Warren's Landing, in the North-West Territories of Canada. The statement of defence admitted the truth of the allegation in the statement of claim that the plaintiff was the administrator of the estate and effects of his deceased wife; but such administration had only been granted in and for the province of Manitoba; and the defendants applied for and obtained leave to amend their defence by setting up that the plaintiff had not been appointed such administrator by or under the authority of the North-West Territories of Canada, wherein the plaintiff's alleged cause of action had arisen, and that the plaintiff had no status or right to bring the action, and the alleged cause of action was not and never had been vested in him. *Couture* v. *Dominion Fish Co.*, 18 Man. L. R. 408, 10 W. L. R. 85.

Amendment—*Fraud.*]—In an action for specific performance the defendant will be allowed to amend his statement of defence so as to set up fraud; and questions of delay, acquiescence, waiver, etc., are only to be dealt with at trial.—An application to so amend on the part of the defendant is entitled to greater consideration than a like application on the part of the plaintiff. *Bishopric* v. *York*, 7 W. L. R. 206, 1 Alta. L. R. 22.

Amendment—Leave—Setting up fraud. *Bishopric* v. *York* (Alta.), 7 W. L. R. 206.

Amendment — Leave refused. *Halifax Breweries Limited* v. *MacCoy*, 40 N. S. R. 606.

Amendment — Libel and Slander Act, ss. 13, 16. *Morency* v. *Wilgress*, 9 O. W. R. 392.

Amendment—Motion for leave to add counterclaim — Refusal. *Union Investment Co.* v. *Polushie* (N.W.T.), 4 W. L. R. 552.

Amendment—Statute of Frauds—Terms —Costs. *McLeod* v. *Crawford*, 6 O. W. R. 797.

Amendment—*Withdrawal of admission —Want of notice of action.*]—*Held*, that an admission made on the pleadings cannot be withdrawn unless evidence be produced to shew that it was made inadvertently, and is not correct.—2. That parties should be permitted to amend their pleadings so as to raise all questions touching the issue; but, as an amendment setting up want of notice of action would not raise a point affecting the issue, but rather one affecting the right of the party to bring the action, it should not be permitted. *Gesman* v. *City of Regina*, 7 W. L. R. 307, 1 Sask. L. R. 39.

Anticipating defence — *Embarrassment—Validity of provincial statute—Municipal corporation — By-law — Railway — Construction of subway — Property injuriously affected — Claim for compensation— Order of railway committee of Privy Council.*]—A by-law of the city corporation, the plaintiffs, adopted an agreement between the plaintiffs and a railway company providing for the construction of a subway, the closing of certain streets, etc.; the by-law was ratified and confirmed by 3 & 4 Edw. VII. c. 64 (Man.). In this action the plaintiffs by their statement of claim alleged that the subway was completed on or before the 8th November, 1904; that the defendants, the owners of certain property said to be injuriously affected by the construction of the subway, on the 28th May, 1906, took proceedings by way of arbitration to obtain compensation therefor; that no claim was made by the defendants within one year, and that the claim, if any, was, therefore, barred by s. 775 of the Winnipeg charter. A declaration to that effect was asked, and an injunction to restrain the defendants from proceeding to arbitrate. The defendants delivered a statement of defence, one paragraph of which was struck out by an order in Chambers, and by the same order the defendants were allowed to amend by inserting an alternative counterclaim, alleging that the subway was constructed under the authority of the plaintiffs and in assumed compliance with the order of the Railway Committee referred to in the by-law of the plaintiffs' by-law, and that the defendants' lands were injuriously affected by such construction, and that the plaintiffs were wrongdoers in constructing the subway, and were liable to the defendants for damages sustained by such construction, because no steps were taken under the provisions of the Railway Act of Canada to determine or pay the compensation to which the defendants were entitled, and without any order being obtained under the Railway Act permitting such construction without such determination or payment, wherefore the defendants counterclaimed damages and interest: — *Held*, on appeal from the order allowing this counterclaim to be set up, that, as the plaintiffs had not stated that they claimed to have constructed the subway under the order of the Railway Committee, the defendants by the counterclaim were anticipating the defence thereto, which was embarrassing and should not be permitted: Cameron, J., dissenting.—Leave was given to the defendants to counterclaim simply on the injury done to their property by the acts of the defendants, leaving the plaintiffs to meet the counterclaim as they should think best. —*Per* Cameron, J.A., that the counterclaim disclosed a cause of action, and should be allowed to stand, but the plaintiffs should have the right to reply stating any objections in point of law as they might be advised. *Winnipeg* v. *Toronto Gen. Trusts* (1910), 13 W. L. R. 577.

Application refused to strike out a paragraph in statement of defence alleging that the bank of which plaintiff is liquidator illegally dealt with and traded in its capital stock. *Stavert* v. *Holdcroft*, 13 O. W. R. 1174.

Application to strike out—Defence in bar—Prosecution for crime. *Canada Biscuit Co.* v. *Spittal*, 2 O. W. R. 387, 735.

Application to strike out—Irrelevant matter. *Preet* v. *Malaney*, 2 O. W. R. 388, 410.

Attorney-General — *Action to avoid Crown mining leases — Misrepresentation—Jurisdiction — Discretion of Attorney-General — Land Titles Act — Caution.*] — Where an action was brought by the Attorney-General for the province to avoid mining leases of public lands as having been granted by the Crown through misrepresentation and fraud on the part of the defendants, and the latter set up in their defence matter attacking the plaintiff's status as suing not in the interest of the public, but at the private solicitation of interested individuals:—*Held*, that this portion of the defence was objectionable and should be struck out, because the discretion of the Attorney-General, as representing the Crown in the commencement and conduct of litigation, is not subject to investigation or control by the Court.—A "caution" under the Land Titles Act, R. S. O. 1897 c. 138, amounts to no more than the notice of an adverse claim equivalent to a *lis pendens*, and expires by lapse of time, or otherwise as may be directed by the Court in an action.—It does not form a blot on the title, and no pleading is necessary to have it vacated.—Matter proper for petition of right cannot be set up by way of counterclaim. *Attorney-General for Ontario* v. *Hargrave*, 11 O. L. R. 520, 7 O. W. R. 368, 455.

Charging fraud.]—It is discretionary with the Judge to allow defendant to amend his statement of defence to a libel action, by charging plaintiff with fraud in a plea of justification. *Laird* v. *Leader Pub. Co.* (1909), 9 W. L. R. 676; 1 Sask. L. R. 1.

Claim on behalf of defendant and others—*Release.*] — The plaintiff, having under her deceased husband's will a charge on land devised by him to the defendant, brought this action to enforce payment of arrears by a sale of the land and for construction of the will. The defendant delivered a counterclaim alleging that he was one of the next of kin of the testator; that the testator by his will directed the plaintiff, who was executrix, and his executors, to manage a farm for the maintenance of the children until the youngest should reach the age of twenty-four; that the plaintiff received all the profits of the farm for many years, and kept them; that the defendant, as one of the next of kin, was entitled to a share; that the executors of the testator had never had control of the land; and that any remedy against them was barred by statute; and he asked for an account and payment into Court of the amount found due by the plaintiff, to be divided amongst the parties entitled. He further alleged that the plaintiff had executed a release of a part of the charge for which she claimed:—*Held*, that the counterclaim was in effect for a declaration that the plaintiff was a trustee for the defendant and the other next of kin of certain profits of working the testator's farm alleged to have been received by her so many years ago that if she were not a trustee their rights would be barred. The counterclaim was an action brought on behalf of the defendant and the other *cestuis que trust*, who would be necessary parties at the outset but for Rule 203, and who must be made parties in the Master's office; and not being for himself alone, but for himself and others, did not come within Rule 248. *Bender* v. *Taddei*, [1898] 1 Q. B. 798, followed. The effect of the release was not a matter to be raised by counterclaim, but as a defence. *Hume* v. *Hume*, 22 C. L. T. 147, 1 O. W. R. 156, 187.

Contract — *Striking out defence — Falsity.*]—Action on a contract. Defence: "never agreed." The defendant's affidavit disclosed that his defence was that a tender of a contract he had made had never been accepted by the plaintiff:—*Held*, that under the circumstances there was matter for trial, and that the defence should not be struck out. *Moore* v. *Murphy*, 20 C. L. T. 353.

Contributory negligence—Particulars—Postponement till after discovery. *Kelly* v. *Martin*, 6 O. W. R. 141.

Counterclaim — Exclusion of terms—Action for conspiracy against three defendants — Counterclaim by one defendant on promissory note — Division Court jurisdiction. *O'Leary* v. *Gordon*, 8 O. W. R. 145.

Counterclaim — Motion to strike out—Irregularity — Co-defendants — Convenience — Trial — Relief asked—Setting aside judgments — Declarations of ownership—Mining leases — Agreements. *Armstrong* v. *Crawford*, 10 O. W. R. 381, 534.

Counterclaim — Motion to strike out—Irrelevancy — Company — Parties—Joinder of plaintiffs — Costs. *Woodruff Co.* v. *Colwell*, 8 O. W. R. 747.

Cross-demand — *Allegation that action premature — Assertion of cross-demand — Set-off — Irregularity—Exception to form.*] —A defendant who pleads that the action should be dismissed as premature, may claim by cross-demand the sums due to him by virtue of the same contract as that sued upon, and is not bound to seek to establish his rights by pleading set-off.—Even if the cross-demand is an irregular proceeding, the irregularity should be moved against by way of exception to the form, and not by defence in law. *Hendershot* v. *Locomotive and Machine Co. of Montreal*, 8 Que. P. R. 145.

Default in delivery—Noting pleadings closed — Setting aside note and leave to defend — Terms — Costs. *Copeland-Chatterson Co.* v. *Lyman Brothers*, 8 O. W. R. 876.

Default of defence to—Pleading on noted as closed and judgment for defendants entered on—Appeal to Divisional Court—Order set aside—Whole issue should go down to trial—Action for specific performance of

contract for sale of land—No costs to either party. *Smith* v. *Ransom* (1911), 18 O. W. R. 916, 2 O. W. N. 921.

Defences to counterclaim.—Motion to strike out paragraphs — Contract — Breach —Agency — Conclusion of law — Joint agreement — Foreign defendants—Submission to jurisdiction by pleading to counterclaim. *Yapp* v. *Peuchen*, 8 O. W. R. 569.

Defendants to counterclaim — Receivers and managers under order of Court —Proceedings against, without leave of Court—Motion to strike out counterclaim—Action by assignees of chose in action — Bringing in assignees as defendants to counterclaim — Judicature Act, s. 58 (5)—Rule 251 — Set-off — Claim for unliquidated damages — Defence or counterclaim — Convenience — Personal claim against receivers. *Sovereign Bank* v. *Parsons*, 11 O. W. R. 615, 845, 968.

Delay in filing — *Motion to strike out —Counterclaim validated.*]—Plaintiff moved to strike out defendant's counterclaim. It was admitted that the defendant was a day late and he also wished to change the name of Mullins to Mullin. The Master allowed defendant to do so and ordered that the statement of defence and counterclaim to be validated as of the day of filing. Motion otherwise dismissed, but as defendant received some relief the costs to be in the cause. Plaintiff to have a week to plead to the counterclaim. *Farquhar* v. *Royce* (1910), 15 O. W. R. 817.

Denial — Inducement — Admissions— Fraud—Summary judgment — Mortgage. *Lougheed* v. *Hamilton* (Alta.), 7 W. L. R. 204.

Denial of plaintiff's title—*Defendants' title—Laches.*] — The statement of defence traversed allegations in the claim to the effect that plaintiffs were entitled to mine certain coal under the sea, without shewing the defendants' title in the defence, and further set up laches as an alternative defence: —*Held*, that the defendants were bound to set forth their title in their statement of defence. Decision in 6 B. C. R. 396 reversed. *Esquimalt and Nanaimo Rw. Co.* v. *New Vancouver Coal Co.*, 9 B. C. R. 162.

Embarrassing and irrelevant — *Amendment by order—Pleading still embarrassing—Secret fraudulent agreement—Commission on sale under — Fraud on the parties.*]—Defendants amended their statement of defence pursuant to order of Master in Chambers, 16 O. W. R. 992, 2 O. W. N. 74, and plaintiff moved to strike out defendant's amendments as embarrassing and irrelevant. Master in Chambers struck out paragraph 8 which was as follows: "In any event the defendant submits that the plaintiff cannot recover the one-half of the commission agreed to be paid to the said Woods (which), said money, owing to the fraudulent agreement and breach of trust, being the property of the said American Good Roads Machinery Co. Limited, and the defendants." Motion dismissed as to other paragraphs. Costs in the cause. *Turner* v. *Doty Engine Works* (1910), 17 O. W. R. 99, 2 O. W. R. 131.

Embarrassment — *Action against trade union—Defence of ultra vires corporation — Application to strike out.*]—It is open to either party to an action up to the time of the trial to attack the other's pleadings. In an action against a labour union for damages in respect of a strike, the union pleaded that "they were not a company, corporation, co-partnership, or person, and not capable of being sued in this or any action?"—*Held*, bad plea. Questions of law going to the merits of a case will not be decided on an application to strike out pleadings as embarrassing. *Centre Star Mining Co.* v. *Rossland Miners' Union*, 23 C. L. T. 272, 9 B. C. R. 531.

Embarrassment—*Action on life insurance policy—Plea that policy not in force—Grounds for—Jurisdiction of Court—Bar to action—Foreign statute — Inconsistent defence—Repetition—Order in chambers striking out defences—Discretion — Appeal.*] — An appeal from an Order in Chambers striking out certain paragraphs of a statement of defence dismissed. Paragraphs not disclosing grounds of defence are defective. A paragraph alleging that plaintiff's claim is barred by R. S. O. 1897, c. 203, and amendments thereto, was held to be embarrassing and obscure. The pleader in referring to a foreign statute should state with reasonable certainty the particular provisions relied on. *Strathdee* v. *Manufacturers Life Ins. Co.*, 11 W. L. R. 468; 2 Alta. L. R. 141.

Embarrassment — Irrelevancy—College of dentistry—By-laws—*Ultra vires*—Professional misconduct — Discipline committee. *Little* v. *Royal College of Dental Surgeons*, 11 O. W. R. 973, 12 O. W. R. 175.

Embarrassment—Master and servant— Wrongful dismissal — Denial—Justification. *Wall* v. *McNab & Co.*, 2 O. W. R. 1128.

Embarrassment—*Striking out—Partnership—Bills of sale.*]—Matter in a statement of defence, attacked as tending to prejudice, embarrass, or delay, will be struck out less freely than in a statement of claim. *McEwen* v. *North-West Coal and Navigation Co.*, 1 Terr. L. R. 203, followed. Statement of claim set up a partnership between the plaintiff D. and the defendant P., a mortgage by D. and P. of partnership goods to C., and a mortgage of P.'s interest therein to C. Bros. The 1st paragraph of the defence of C. Bros denied the partnership. The 2nd paragraph set up that, "whatever relationship existed" between D. and P., that relationship was put an end to and the entire ownership of the goods mortgaged then vested in D. free from any interest of P.:—*Held*, that the 2nd paragraph was embarrassing, inasmuch as, while it assumed some relationship to have existed between D. and P., and alleged it to have been put an end to and the property to have vested in D., it did not allege (1) the nature of the relationship, and (2) the mode in which the relationship had been terminated and the property become vested in D., *i.e.*, whether by operation or implication of law or by agreement of dissolution or other agreement stating the nature of such other agreement. The 7th paragraph of the defence of C. Bros. alleged that, even if the mortgage to C. constituted a partnership liability, C. Bros.

had a separate claim against D. before C. acquired any such partnership liability:—*Held*, that the 7th paragraph was embarrassing, inasmuch as it did not allege that the separate claim of C. Bros. was the same as that for which they held the chattel mortgage, and as, if that was not the case, the whole paragraph was entirely immaterial. The 8th paragraph of the defence alleged that the mortgage to C. was void, and did not comply with the Bills of Sale Ordinance, and no affidavit of *bona fides* accompanied it:—*Held*, that the 8th paragraph was embarrassing, inasmuch as it was uncertain whether it intended that the mortgage was void on the ground only of the absence of an affidavit of *bona fides*, or as well for non-compliance with other requirements of the Bills of Sale Ordinance, or on grounds apart from that Ordinance. *Davis* v. *Patrick*, 2 Terr. L. R. 9.

Embarrassment—*Striking out.*]—Questions of substantial difficulty or importance raised by the statement of defence should not be disposed of on motion in Chambers, under Rule 318 of the King's Bench Act, 1895, to strike out paragraphs of the statement of defence as embarrassing, but should be left to be dealt with at the trial of the action. The defences herein were held to present questions of such substantial difficulty and importance that they should not be struck out on motion in Chambers. *Ætna Life Ins. Co.* v. *Sharp*, 11 Man. L. R. 141, discussed and explained. *Long* v. *Barnes*, 14 Man. L. R. 427.

Embarrassment — Will — Legacy — Promissory note — Ademption. *Weathertilt* v. *Weathertil* 12 O. W. R. 66, 156.

Embarrassment or irrelevancy — "*Not guilty by statute*"—*No allegation of quashing convictions.*] — Motion to strike out statements of defence as embarrassing and irrelevant, dismissed. Defendants pleaded facts leading up to convictions, and "not guilty by statute." Nothing in statement of claim shewing convictions quashed. *Titchmarsh* v. *Graham*, *Titchmarsh* v. *McConnell*, 13 O. W. R. 618, 683.

Exclusion of—*Defendants to counterclaim out of jurisdiction — Foreign trade mark—Conspiracy to defraud.*]—The plaintiffs, an English company, brought an action against the defendants in Ontario to restrain them from exporting goods to and interfering with their business in Australia, in breach of a certain agreement, and the defendants, besides setting up as a defence certain breaches of the agreement by the plaintiffs, counterclaimed against the plaintiffs for damages for such breaches, for a declaration of their rights as to trade with Australia and other countries, and a rectification of the agreement to make it conform to the representations of the plaintiffs. The defendants also counterclaimed against the plaintiffs, and G. and P., two persons not originally parties to the action, one resident in Ontario and one in Australia, and an Australian company, alleging a conspiracy by them to defraud and cheat the defendants out of certain rights to trade marks they were entitled to in Australia under the agreement by the plaintiffs, assigning the trade marks to G. and P., who, with the Australian company, fraudulently put in force the trade mark laws of Australia, and prevented the defendants exporting their goods to Australia and obstructing them in their business:—*Held*, that the claims made in the counterclaim against the plaintiffs alone were proper subjects of a counterclaim in the action; but that there was no such intimate connection between the subject of the action and the subject of the counterclaim against the four parties, only one of whom was resident within the jurisdiction or had admitted the jurisdiction of the Court, as to oblige the Court to require both to be disposed of in the same action. *South African Republic* v. *La Compagnie Franco-Belge du Chemin de Fer du Nord*, [1897] 2 Ch. 487, followed. *Dunlop Pneumatic Tire Co.* v. *Ryekman*, 23 C. L. T. 106, 5 O. L. R. 249, 1 O. W. R. 699, 820.

Exclusion of counterclaim—Action for price of goods—Counterclaim for malicious prosecution—Parties—Added defendant by counterclaim — Convenience. *A. MacDonald Co.* v. *Logan* (N.W.T.), 2 W. L. R. 23.

Exclusion of counterclaim—Action on foreign judgment — Counterclaim for libel. *Molsons Bank* v. *Hall*, 4 O. W. R. 452, 5 O. W. R. 625.

Exclusion of counterclaim—Inconvenience—Delay—Mortgage action — Counterclaim for wrongful seizure and sale of goods — Forum. *Imperial Bank of Canada* v. *Martin*, 6 O. W. R. 485, 736, 824.

Immaterial issue—*Striking out.*]—The plaintiff's claim was for work done and materials provided for a company for which the defendants had agreed to become responsible. The statement of claim set out the items of the claim. By one paragraph of the statement of defence the defendants set up that no account of the moneys claimed by the plaintiff, except as to one disputed item, had been rendered to the defendants, and that payment had not been demanded before action brought; and by another paragraph, that before the commencement of the action the defendants offered to the plaintiff a specified sum (less than the amount claimed) and that the plaintiff had not demanded nor made any claim for any amount in excess thereof:—*Held*, that no issue or an immaterial issue was tendered by these paragraphs, and that they were embarrassing and must be struck out. *Webb* v. *Hamilton Cataract Power, Light and Traction Co.*, 7 O. L. R. 607, 3 O. W. R. 384.

Improper joinder of separate causes of action against several defendants by counterclaim — Principal and agent — Contract — Striking out or amending counterclaim. *Stitt* v. *Arts and Crafts Ltd.*, 11 O. W. R. 589, 645.

Inconsistent defences — *Embarrassing —Action for infringement of patents and breach of contract—Invalidity of patents—License — Rules of pleading.*] — Plaintiff brought action in respect of an agreement whereby defendants were to be allowed to use certain valuable discoveries made by plaintiff in respect of the manufacture of starch. Plaintiff alleged that he had performed all that he was bound to do under

the agreement, and that defendants had taken full advantage of his discoveries but refused to carry out the obligations attached thereto. He asked for an injunction and damages for breach of contract or for an account of profits and an injunction against infringing his patents.—Defendants in their counterclaim pleaded that the plaintiff's patents were invalid and that the inventions or improvements covered thereby were neither new nor useful and asked for a declaration that defendants were entitled to use the plaintiff's patents under the agreement in question or in the alternative that the said patents be declared invalid. Plaintiff moved to strike out above pleadings on the ground that defendants by asking to have the agreement carried out, it was not open to them to attack the validity of the patents; that this was asking inconsistent relief which was always held to be embarrassing:—*Held*, that while pleadings must disclose what is to be tried every pleader is at liberty to allege any fact which would be allowed to be proved; that no pleading can be said to be embarrassing if it alleges facts which may be proved; only pleadings which allege facts that would not be allowed to be proved are embarrassing; that there was no reason why at present the defendants could not set up inconsistent defences. Motion refused with costs to defendants in any event. *Duryea* v. *Kaufman* (1910), 16 O. W. R. 57, 21 O. L. R. 161. See S. C., 16 O. W. R. 913, 2 O. W. N. 23.

Indefinite averment—Set-off—Counterclaim. *McLaughlin Carriage Co.* v. *Borden*, 1 E. L. R. 84.

Judgment — *Application to amend, file counterclaim and proceed to trial.*] — Defendant had filed statement of defence and been examined for discovery, but no good defence on the merits had been disclosed as might be deemed sufficient to entitle him to proceed to trial. Judgment was given against him on an application for judgment. Defendant appealed to the Divisional Court shewing a case for now allowing him to defend the action and meet the plaintiff's claim by counterclaim:—*Held*, that on payment into Court of the amount of the judgment and interest from its date, the judgment be set aside and defendant be allowed to amend his statement of defence and file a counterclaim. The Court of Appeal varied that order by allowing the judgment to stand for the protection of the plaintiff *quantum valeat*, the defendant to be at liberty, upon payment of the costs of the application for judgment and the appeal to the Divisional Court, to amend his statement of defence and to file a counterclaim. Meredith, J.A., and Riddell, J. (dissenting), *held*, that the order of the Divisional Court should be affirmed, except that the defendant should have leave to give security, instead of paying into Court. *Auerbach* v. *Hamilton* (1909), 14 O. W. R. 902, 1 O. W. N. 109.

Leave to amend — Adding defence—Attaching order. *Gearing* v. *McGee*, 1 O. W. R. 213.

Leave to amend—*Motion in Chambers—Delay in moving bona fides—Costs.*]—An application for leave to amend the statement of defence, made about 18 months after its delivery, was allowed, notwithstanding the delay in moving, where there was nothing to indicate *mala fides* and no prejudice to the plaintiff that could not be compensated in costs.—The proper time to apply to amend is before the hearing, and in Chambers, and there every possible opportunity should be granted to place the actual matters in controversy before the Court, and to come down to trial with a complete record.—*Johnson* v. *Land Corporation of Canada*, 6 Man. L. R. 527; *Crapper* v. *Smith*, 26 Ch. D. 510, and *Tildesley* v. *Harper*, 10 Ch. D. 396, followed.—Terms as to costs imposed.—Order of the Referee reversed. *McPherson* v. *Edwards* (1910), 13 W. L. R. 440.

Leave to plead other defences with "not guilty by statute"—Railway—Injury to animals on track—Railway Act — Cattle guards—Negligence — Contributory negligence. *Daniel* v. *Canadian Pacific Ry. Co.* (N.W.P.), 6 W. L. R. 538.

Libel—*Amending defence—Justification.*]—In a libel action defendants pleaded generally denying the allegation in statement of claim. Subsequently they were allowed to amend their statement of defence by pleading justification although the matters relied upon as justification charged plaintiff of acceptance of bribes when holding a municipal office. *Laird* v. *Leader Pub. Co.* (1909), 9 W. L. R. 676; 2 Sask. L. R. 1.

Libel—*Embarrassing pleading—Rule 298—Striking out.*] — "Embarrassing" under Ontario Rule 298 means bringing forward a defence which defendant cannot make use of. Paragraph in statement of defence struck out which referred to the acquittal of a party not a party to this action against whom plaintiff had caused an indictment for defamatory libel to be laid before a grand jury. *Mills* v. *Spectator*, 13 O. W. R. 685.

Malicious prosecution — *Embarrassment—Ambiguity.*]—In an action for malicious prosecution, the statement of defence denied the material allegations of the statement of claim. It also set up generally that the defendant had reasonable cause for taking against the plaintiff the first proceeding complained of, and that the defendant acted *bona fide* and in the reasonable belief of the truth of the charges laid by him. It alleged that the defendant had reasonable and probable cause for believing that the plaintiff was guilty. Paragraphs setting up certain alleged facts and information given to the defendant tending to cause his belief of the plaintiff's guilt, and, also, that the defendant laid all the information received by him before the magistrate before whom the charges were made, and before counsel, who advised that the proceedings complained of should be taken, were struck out. *Rogers* v. *Clark*, 20 C. L. T. 419.

Malicious prosecution. *Kearns* v. *Bank of Ottawa*, 2 O. W. R. 483.

Matters arising since action—*Breach of contract—Adding defences of waiver—Acquiescence—Manitoba Rule 339.*]—Plaintiffs claimed that defendants were not entitled to bring electrical power into Winnipeg, which had been generated outside city limits, without plaintiffs' consent. Since commence-

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ment of suit, plaintiffs had been taking electrical power from defendants generated outside city limits to the knowledge of the plaintiffs. A referee permitted defendants to amend their defence by pleading these additional facts. On appeal, *held* that plaintiffs may reply to this proposed defence that such use by plaintiffs was without prejudice to their rights in this action. Referee's order varied by confining second amendment to permits issued on 8th and 9th December. *City of Winnipeg* v. *Winnipeg Electric Ry. Co.* (Man.), 10 W. L. R. 633. Appeal dismissed. 11 W. L. R. 175.

Monies collected compensated by professional services — *C. P. 191, 217; C. C. 1188.*]—*Held*, if in an action for the recovery of monies collected by the defendant for the plaintiff, the former by a cross-demand, alleges compensation by professional services, commission, etc., an inscription in law asking the rejection of the cross-demand will not be granted on the ground that the debts are equally clear and liquidated, and that the defendant should merely have pleaded to the principal action; but the parties will be then ordered to proceed to trial notwithstanding the law issue. *Drouin* v. *Patry* (1910), 11 Que. P. R. 266.

Motion for leave to add new defence —Mortgage action—Illegal consideration—Bank — Future advances—Affidavits of merits — Delay. *Imperial Bank of Canada* v. *Martin*, 6 O. W. R. 485, 736, 824.

Motion to compel amendment — Particulars—Premature application—Several defendants—Increase in amount. *Fuller* v. *Appleton*, 2 O. W. R. 424, 448, 829, 1083.

Motion to set aside — Action against partners—Motion by the plaintiff for an order setting aside statement of defence of defendant James Hawes and affidavit on production—Order granted — Decisions conflicting—Costs in cause. *Arnoldi* v. *Hawes, Gibson & Co.* (1911), 19 O. W. R. 76, 2 O. W. N. 1019.

Motion to set aside—*No answer in law —Forum.*]—*Quære*, whether a defence can be set aside, as disclosing no reasonable answer in law, on a summary application to a Judge in Chambers. *Laird* v. *McGuire*, 40 N. S. R. 129.

Motion to strike out—Embarrassment —Amendment — Costs. *Huston* v. *Irving*, 40 N. S. R. 606.

Motion to strike out—Embarrassment —Evasion — Assignment for benefit of creditors — Proof of creditors' claims—Distribution of assets — Motion partly successful—Costs. *Cockshutt Plow Co.* v. *Wilkerson* (N.W.T.), 3 W. L. R. 175.

Motion to strike out—Embarrassment —Previous action—*Res judicata*. *Barrette* v. *Canadian Bank of Commerce* (Y.T.), 1 W. L. R. 171.

Motion to strike out—*Embarrassment —Rules of pleading — Evasion.*]—The plaintiffs sued for the price of goods alleged to have been sold and delivered to the defendant, and, in the alternative, claimed damages for non-acceptance of the goods and non-payment for the same. By the third paragraph of the statement of defence, the defendant denied that she had purchased or received the goods, and then proceeded as follows: "And the defendant is informed that the alleged claim of the plaintiffs for the said brushes (part of the goods), if any, arose prior to the time when the defendant started in business, and if the same exists at all, which the defendant does not admit, it is against the estate of the defendant's late husband and not against the defendant:"—*Held*, that the part of the paragraph quoted was embarrassing, and should have been struck out, because it was not stated positively but only on information, and was thus in violation of Rule 290 of the King's Bench Act, and also because it sought to raise an immaterial issue.—Odgers on Pleading, pp. 103, 106, and *Jones* v. *Turner*, [1875] W. N. 239, referred to.—Paragraph 5 was in part as follows: "The defendant says that she never agreed to purchase mufflers from the plaintiffs for the price and sum of £129 15s. 1d., as alleged by the plaintiffs:" —*Held*, that this was an evasive or ambiguous denial, containing a "negative pregnant," and was not in compliance with Rule 290, which requires a specific denial, if any is made, as the statement would be true even if the fact was that the defendant had purchased the goods for £129 15s., and that this paragraph must be amended or in default struck out.—Paragraph 7 alleged that some of the goods referred to in the statement of claim, if ordered at all, which was not admitted, were ordered under a contract set out in another paragraph setting up a counterclaim, a contract which was in no way identified with that sued upon, and alleged a breach of such other contract and went on to set up at least quite different defences.—*Held*, that this paragraph also was embarrassing and should be amended, or in default struck out as conflicting with Rule 300. *Schweiger* v. *Vineberg*, 15 Man. L. R. 536, 2 W. L. R. 266.

Motion to strike out—Falsity. *Paulsen* v. *Crosby*, 40 N. S. R. 634; *Canada Permanent Co.* v. *Moore*, *ib.*, 605.

Motion to strike out.]—Plaintiffs according to style of cause issued on behalf of themselves and all other creditors of defendant B. to set aside a mortgage to defendant C., and a transfer of equity of redemption to defendant D., as fraudulent and void. Plaintiffs had a judgment against B., who by his statement of defence set up a transfer of certain securities to plaintiff, which he claimed paid the judgment, and asked for an account. Plaintiffs moved to strike out paragraphs of statement of defence. This was refused, as action was based solely on judgment. Leave given to amend statement of claim as plaintiffs may be advised, or motion may be dismissed and plaintiffs may proceed relying on their judgment alone. *Ontario Asphalt Co.* v. *Cook*, 13 O. W. R. 283.

Motion to strike out. *Taylor* v. *Barwell* (1910), 1 O. W. N. 444.

Motion to strike out certain parts as embarrassing — *Estoppel—Satisfaction*

of claim.]—Plaintiff, an architect, brought action to recover for services. Defendants pleaded that they were not liable as plaintiff's services where rendered for consideration given by a large shareholder in defendant company, and that plaintiff had disclaimed any intention of making any charge against defendants and had declined to render any account. Plaintiff moved to strike out above portions of statement of defence. —Master in Chambers dismissed the motion with costs in the cause.—*Stratford Gas Co.* v. *Gordon*, 14 P. R. 407, specially referred to. *Gibson* v. *Toronto Bolt & Forging Co.* (1910), 16 O. W. R. 997, 2 O. W. N. 74.

Motion to strike out counterclaim — *Receivers and managers under order of Court—Proceedings against, without leave of Court—Motion to strike out counterclaim —Appeal on matter of procedure — Con. Rule 251.*] — A paper manufacturing company having become financially embarrassed, J. C. and G. E. were appointed by the Court joint receivers and managers to carry on the business of the company on behalf of debenture holders to whom its property and assets had been mortgaged. Previously to this appointment the company had entered into contracts with the defendants to supply them with paper at certain prices for certain periods of time, and after their appointments it was alleged that J. C. and G. E. had continued to deal with the defendants under these contracts, and other contracts into which J. C. had entered at a time when he was acting as sole receiver and manager. J. C. and G. E. at various times assigned the indebtedness of the defendants under these contracts to the plaintiff, who brought this action to enforce payment. The defendants thereupon set up a counterclaim, adding J. C. and G. E. as defendants thereto, and alleging that J. C. and G. E. had wrongfully terminated these contracts at a time when they were in full force, on which account the original defendants were obliged to enter into contracts with other manufacturers of paper at a greatly increased price, whereby they suffered and would suffer damages greatly in excess of the amount claimed by the plaintiffs, which damages they claimed to set off against the claim of the plaintiffs to the extent of that claim, and they counterclaimed for the balance of their damages against J. C. and G. E.:—*Held*, affirming the orders of Meredith, C.J.C.P., and a Divisional Court, that the counterclaim should be struck out as against J. C. and G. E., but that the original defendants should be at liberty to amend their pleadings so as to make the counterclaim a defence to the action. Remarks upon the difference in scope between Con. Rule 251 and the corresponding English Rule 126.—*Semble*, that an appeal did not lie to the Court of Appeal against the order of the Divisional Court, the matter being one of procedure only, not affecting the ultimate rights of the parties. *Sovereign Bank of Canada* v. *Parsons* (1908), 18 O. L. R. 665, 11 O. W. R. 615, 845, 968.

Motion to strike out part — Action for negligence resulting in destruction by fire of plaintiffs' buildings—Insurance moneys—Application in reduction of damages—Objection in law. *Methodist Church* v. *Town of Welland*, 10 O. W. R. 687.

Motion to strike out part — Action to establish will—Setting up prior will. *Re Hughes, Mahaffy* v. *Nicholson*, 9 O. W. R. 506, 652, 917.

Motion to strike out part—*Relating to contract—For construction of railway—Dispute as to "overhaul"—Construction of contract—Order of Master in Chambers directing better production of documents relating to prior contract—Relevancy.*]—Middleton, J. (18 O. W. R. 180, 2 O. W. N. 523), struck out paragraph of statement of defence relating to work done under a prior contract and directed the statement of defence to be amended so as to confine it to the later contract.—Britton, J. (18 O. W. R. 180, 2 O. W. N. 677), granted leave to appeal under Con. Rule 777 (1278), owing to matters of great importance upon questions of Pleading and Evidence.—Divisional Court allowed defendants' appeal with costs. No opinion expressed as to production of documents. *MacDonell* v. *Temiskaming & Nor. Ont. Rw. Com.* (1911), 18 O. W. R. 677, 2 O. W. N. 894.

Motion to withdraw and substitute another — Original filed under misconception of minutes in book — Admission of agency — Mistake excusable—Order granted —Not a case for reference to trial Judge. *Williams* v. *Leonard*, 16 P. R. 544, 17 P. R. 73, followed. *Northern Sulphite Mills* v. *Occidental Syndicate* (1911), 19 O. W. R. 69, 2 O. W. N. 1015.

New defendant by counterclaim — *Rule 295 — Damages.*]—Action by registered owner of land to remove a caveat. Defendant claimed by way of counterclaim against plaintiff and T. for specific performance, and in alternative against T. for damages. First claim held to be within above Rule, latter is not. *Fernie* v. *Kennedy* (1909), 12 W. L. R. 48.

"Not guilty by statute" — *Leave to plead with other defences — Statutes of James I. not in force in Saskatchewan—Action for false arrest and imprisonment.*]—Action for false arrest and imprisonment. Application for leave to plead special defences in addition to "not guilty by statute:"—*Held*, that the statutes of James I. are not and never were in force in this province. *Plested* v. *McLeod* (1910), 12 W. L. R. 709.

"Not guilty by statute"—Motion to strike out—Demurrer—Rule 261 — Amendment. *Robinson* v. *Morris*, 11 O. W. R. 716.

"Not guilty by statute"—Motion to strike out—Public officer—Medical superintendent of hospital—Notice of action—Public Health Act. *Pyc* v. *Toronto and Tuxedie*, 9 O. W. R. 632.

"Not guilty by statute" — *Particulars.*]—A railway company cannot be required to give particulars of the defence of "not guilty by statute." The right to plead such a defence being expressly preserved by Rule 286, the application of Rule 299 is excluded. *Jennings* v. *Grand Trunk Rw. Co.*, 11 P. R. 390, overruled. *Taylor* v. *Grand Trunk Rw. Co.*, 21 C. L. T. 437, 2 O. L. R. 148.

Noting pleadings closed—Long delay in proceeding with action—Presumption of abandonment — Notice to parties affected. *Radford* v. *Barwick*, 6 O. W. R. 765, 10 O. L. R. 720.

Order striking out, as vexatious and embarrassing—*Costs — Fraud — Proof of.*]—The plaintiff, who had acquired certain property of B., an insolvent, at a sale held under the provisions of the provincial Act, proposed to W., B.'s brother-in-law, that he should purchase the property for the benefit of B.'s wife. W. agreed to do so, and the plaintiff thereupon entered into an agreement in writing to transfer the property to him upon payment of an agreed sum. The plaintiff subsequently entered into an agreement with B. to transfer the property to him, upon the performance of certain conditions by W. and the payment of a smaller amount by B., and deposited with his solicitors a deed to be delivered to B. upon performance of the conditions named. The solicitors inadvertently recorded the deed before the consideration money had been paid or the conditions agreed performed. In an action against judgment creditors of B. to have the registration of the deed set aside, the defendants counterclaimed making W. a party, and asking a declaration that he had no interest in the property, but was acting on behalf of B., and for the purpose of defeating, hindering, etc., the creditors of the latter:—*Held*, that the matters set forth were not matters of counterclaim, and that the counterclaim should be struck out as vexatious and embarrassing, with costs against the defendants.—*Held*, also, that the trial Judge erred in presuming, without sufficient evidence, the existence of fraud between W. and B. to defeat the creditors of the latter.—Fraud is not to be presumed but must be proved. *McIsaac* v. *Boyd*, *Kirk* v. *McIsaac*, 42 N. S. R. 352.

Particulars relied upon as a plea of justification to a libel action, need not be put in the pleadings, but if not pleaded they must be delivered subsequently. *Laird* v. *Leader Pub. Co.* (1909), 9 W. L. R. 676; 1 Sask. L. R. 1.

Payment into Court — *Acceptance of money paid in—Expiry of time for—Extension—Reply—Costs — Discretion.*] — Action by an executrix for damages for an alleged unlawful detention of the plaintiff's goods. The defendant pleaded a number of defences, and paid into Court $1, which, he said, was sufficient to satisfy the plaintiff's claim. A motion was made by the plaintiff at Chambers for an order allowing him, notwithstanding the time limited for so doing had expired, to file and deliver a reply accepting the sum of money paid into Court by the defendant, and enlarging the time for payment of the money out of Court:—*Held*, in Chambers, that, although there was a technical right on the part of plaintiff to recover nominal damages, the action should not have been commenced for the value of the property, and, for this reason, the plaintiff should be refused assistance over the technical difficulty which stood in her way on account of her not having replied within the ordinary time:—*Held*, on appeal, reversing the order in Chambers, that in case of a plea of payment of money into Court to satisfy the claim of the plaintiff, whenever the plaintiff becomes ready to accept such sum, his right to amend so as to accept such sum, paid in in full must be allowed, subject to such terms as the law requires. *Per* Meagher, J., dissenting, that, as the amendment sought did not go to the merits of any question to be tried, but affected the right to costs merely, the Chambers Judge had a discretion to grant or refuse the indulgence asked. *Miller* v. *Archibald*, 19 C. L. T. 400, 20 C. L. T. 136, 33 N. S. Reps. 189.

Points of law under Rules 259 or 373.]—Whether the point of law raised is brought up for hearing and disposal under Rule 259 or 373, the party raising it must admit, for purposes of argument, that the pleading on which it is alleged that the question arises is true in fact; and for purposes of argument the allegations of statement of defence ought not to be regarded.—Judgment of Falconbridge, C.J.K.B. 11 O. W. R. 329, and Divisional Court, 11 O. W. R. 1136, reversed. *Bank of Ottawa* v. *Farlborough* (1908), 18 O. L. R. 511, 13 O. W. R. 1175.

Production of authorities after argument—*Limit of the right of solicitors.*] —When a case has been argued solicitors will not be permitted to put in supplementary statements of their case without the permission of the Court. The solicitor may, nevertheless, without special permission, send to the Court citations of authorities and group them under different headings in the form of propositions. *Bank d'Hochelaga* v. *Richard* (1908), 10 Que. P. R. 324.

Promissory note—*Fraud — Striking out — Falsity.*]—Upon an application to strike out a paragraph of the statement of defence, setting up fraudulent circumstances in the taking of a promissory note: — *Held*, that, though the defence was false, and should not be sustained at the trial, in view of *Rooks* v. *Battin*, 30 N. S. R. 386, and *Holmes* v. *Taylor*, 31 N. S. R. 191, the application must be refused, the defendant undertaking to swear to a defence, especially of fraudulent circumstances in the taking of the note. *Hamilton* v. *McIntosh*, 20 C. L. T. 16.

Promissory note—Illegality—Failure to set forth necessary facts — Striking out — Amendment. *Ireland* v. *Andrew* (N.W.T.), 1 W. L. R. 346, 375.

Promissory note—*Indorsement without value—Fraud—Set-off defeated.*]—Action by an indorsee against the maker and the indorser of a promissory note. Defence that the indorser, for whose benefit the note was made, and who had received the consideration, indorsed it to the plaintiff's brother, who when he was indebted to the indorser, in collusion with the plaintiff, and for the purpose of defrauding the indorser, and preventing him from collecting the sums due by the plaintiff's brother, indorsed the note to the plaintiff without consideration: — *Held*, that the plea was no defence to the action and must be struck out as embarrassing. *Caldwell* v. *McDermott*, 2 Terr. L. R. 249.

Promissory note — Parental influence. *Stavert* v. *Macdonald* (1910), 1 O. W. N 860.

Promissory note—*Striking out defence*—*Falsity.*]—The action was upon a promissory note. The defendants alleged no presentment, no notice of dishonour, and payment. The plaintiff's affidavit verified his claim. Affidavits filed by the defendants stated that the note was paid, but did not go far enough to prove non-presentment and lack of notice of dishonour:—*Held*, that the allegations of want of notice and non-presentment must be stricken out, but, as to payment, there was matter for trial, and this paragraph must stand. *Mackintosh* v. *MacCoy*, 20 C. L. T. 412.

Quality of goods — *Prejudice.*]—In an action for the price of goods sold and delivered the defendant made an incidental cross-demand for damages for non-delivery of the remainder of the goods purchased:—*Held*, that allegations that the goods which the defendant had to procure elsewhere owing to the default of the plaintiff were of an inferior quality to those of the plaintiff were sufficiently definite not to prejudice or embarrass the plaintiff, and should not be struck out upon exception to the form. *Hart* v. *Timossi*, 3 Que. P. R. 58.

Real Property Limitation Act—*Section relied on*—*Appeal*—*Practice* — *Costs.*]—*Held*, by the Master and a Judge in Chambers, following *Pullen* v. *Snelus*, 40 L. T. N. S. 363, that a defendant pleading the Real Property Limitation Act must set out in his statement of defence, or give particulars shewing, the section or sections on which he relies:—*Held*, by a Divisional Court, that the defendant should have been content in such a matter with his appeal to the Judge in Chambers, and should not have incurred useless costs by a further appeal. *Dodge* v. *Smith*, 21 C. L. T. 162, 1 O. L. R. 46.

Relevancy—Bank illegally trafficking in shares. *Stavert* v. *Holdcroft*, 12 O. W. R. 1174.

Relevancy — Parties—Promissory note—Action on — Fraud and misrepresentation—Cancellation — Damages — Money lent—Claim for solicitor's costs — Amendment. *Cook* v. *Slattery*, 12 O. W. R. 1183.

Relevancy.]—Statement of defence allowed to stand without amendment, striking out paragraph referring to indemnity over. *Cook* v. *Slattery*, 12 O. W. R. 1183.

Repetition of counterclaim — *Tender and payment into Court*—*Judgment*—*Costs.*]—In an action for the price of goods sold and delivered, the defendant counterclaimed for damages for breach of contract, and, for grounds of defence, repeating the clauses of the counterclaim, pleaded (1) payment into Court of an amount alleged to be sufficient to satisfy the plaintiffs' claim, and (2) tender before action brought of the amount paid into Court. The plaintiffs replied, (1) denying that the amount paid in was sufficient to satisfy their claim, and (2) objecting to the paragraphs of the defence, so far as they incorporated the paragraphs of the counterclaim, as bad in law, on the ground that the counterclaim was no defence to the action, and could not be so pleaded:—*Held*, that the defence was no answer to the action, and the plaintiffs were entitled to recover the amount of their claim. The tender was bad, being pleaded to the whole cause of action, and being insufficient to cover it. The trial Judge having found in favour of the defendant on the counterclaim, and his finding being supported by the evidence, it should not be disturbed. Judgment for the plaintiffs upon their claim with costs, and for the defendant on his counterclaim with costs—the two amounts to be set off *pro tanto*. No costs of appeal. *Bauld* v. *Fraser*, 34 N. S. R. 178.

Res judicata—Pleading evidence. *Conmee* v. *Ames* (1910), 1 O. W. N. 470, 480.

Sale of medical practice — *Covenant not to open an office*—*Injunction restraining from practising*—*Judgment not supported by pleading.*]—The defendant agreed with the plaintiff "not to open an office or have one for the practice of medicine in," etc. The plaintiff sued, alleging that the defendant had agreed "to refrain from practising as a physician," and that he had not ceased to practise "as he had agreed to." The relief sought was an injunction "to restrain the defendant from practising." The defendant admitted that he had agreed "not to open an office, nor to have one for the practice of medicine." At the trial the plaintiff's evidence was directed to proving that the defendant, in breach of the agreement, did "open and have an office," and the defendant, relying on the pleadings, which had not been amended, offered no evidence. Judgment was given restraining the defendant from opening or having an office:—*Held*, on appeal, that the judgment was not supported by the pleadings, and must be set aside. *King* v. *Wilson*, 25 C. L. T. 51, 11 B. C. R. 109.

Setting aside as false — *Trial.*]—The summary jurisdiction to set aside a defence as false, etc., must be exercised with great caution. A Judge should not weigh the evidence and decide upon its preponderance.—Unless it is shewn beyond doubt that the defence is untrue, the Court will not adopt a course which will deprive the defendant of a trial in open Court, with all that such a proceeding implies. *Gittleson* v. *Sydney Household Co.*, 40 N. S. R. 381.

Specific denial — *Admission* — *Motion for judgment.*]—Upon motion for summary judgment:—*Held*, that a defence stating in answer to each of the paragraphs of the statement of claim, "The defendant specifically denies the allegations contained in paragraph — of the statement of claim," may be deemed a specific denial, and will not be treated by the Court as an admission: *per* Scott, J.—Such a defence is not a specific denial and will be treated by the Court as an admission; *per* Stuart, J. *Adkins* v. *Metropolitan Tramways Co.*, 63 L. J. Q. B. 261, 10 Times L. R. 173, dissented from. *Smith* v. *Canadian Pacific Ry. Co.*, 21 C. L. T. 193, and *Daniel* v. *Canadian Pacific Ry. Co.*, 6 W. L. R. 538, followed. *Lougheed* v. *Hamilton*, 7 W. L. R. 204, 1 Alta. L. R. 16.

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Specific denials of allegations of statement of claim—*Negligence—Contributory negligence — Embarrassment — Rules 290, 326.*]—In an action for damages for personal injuries sustained by the plaintiff by falling through a trap-door in the defendants' premises, owing to the negligence of the defendants in leaving it open and unguarded, the defendants, in paragraph 1 of their statement of defence, made a general denial of the plaintiff's material allegations; and, by paragraphs 2, 3, and 4, denied (2) that they suffered the trap-door to be left open or unguarded; said (3) that if the door was open (which was denied), it was sufficiently guarded and was not dangerous; and said (4) that it was not by reason of it being open or unguarded that the plaintiff fell into it, if (which was not admitted), he did in fact fall into it:—*Held*, that these paragraphs were specific denials of certain material allegations contained in the statement of defence, and were unobjectionable: Rule 290 of the King's Bench Act, as enacted by s. 4 of 7 & 8 Edw. VII. c. 11.—By paragraph 8, the defendants said: "There was no negligence on the part of the defendants; there was contributory negligence on the part of the plaintiff;" and particulars followed, stating that the plaintiff knew the premises, and that the defendants had pointed out to the plaintiff the trap-door, and that he was well aware of it and its nature—"the plaintiff did not exercise ordinary care or caution in the matter;"—*Held*, that this pleading was not objectionable nor embarrassing under Rule 326.—Order of the Referee in Chambers reversed. *Smith* v. *Canada Cycle & Motor Co.* (1910), 15 W. L. R. 344, 20 Man. L. R. 134.

Statute of Limitations—Particulars—Amendment — Conspiracy — Pleading evidence — Striking out counterclaim. *Stone* v. *Stone*, 11 O. W. R. 891, 936.

Striking out—No claim against plaintiff—No prayer for relief.—Third parties. *Wade* v. *Pakenham*, 2 O. W. R. 1183, 3 O. W. R. 47.

Striking out — Parties—Action by execution creditor of husband to declare wife trustee for husband—Counterclaim by husband for debt assigned to him. *Ennis* v. *Reade*, 1 O. W. R. 652.

Striking out — Patent for invention—Trade mark—Contract for right to—Breach of—Injunction. *McAvity* v. *Morrison*, 1 O. W. R. 552, 632, 2 O. W. R. 156, 1018.

Striking out as false and frivolous. *Austen Brothers* v. *Piers*, 1 E. L. R. 227.

Striking out defence as embarrassing—*Third party proceedings—Stay of proceedings.*]—In an action for foreclosure of a mortgage made by the defendant and his deceased partner, paragraphs of the defence alleging in effect that the administratrix of the estate of the deceased partner was a necessary party to the action, inasmuch as the defendant was entitled to contribution from the estate, and as an order that no action should be brought against the administratrix as such, and staying all pending proceedings against her as such administratrix for four months, prevented the defendant from pursuing his remedy in that behalf, were struck out as embarrassing; the defendant's proper course being an application under the third party procedure, and the plaintiff not being affected by the effect of the order upon the defendant's rights or remedies. *Paul* v. *Flinn*, 2 Terr. L. R. 406.

Striking out part—*Rules 261, 298.*]—The jurisdiction conferred by Rule 261 may not be invoked for the excision of portions of a pleading only: — *Held*, also, in this case, that the portions of the statement of defence in question did not so plainly disclose no reasonable answer to the plaintiff's claim that they should be summarily stricken out. *Smith* v. *Traders Bank*, 11 O. L. R. 24, 6 O. W. R. 748.

Striking out portion as false—Costs—Practice. *Dominion Coal Co.* v. *Burchell*, 5 E. L. R. 493.

Struck out at trial on affidavits — *Practice—Con. Rules 253, 261—Prayer for general relief—Action on promissory notes—Signed by company—With rubber stamp—Company name abbreviated — Powers of officers—Judgment for plaintiff stayed pending trial of counterclaim—Costs.*] — Plaintiff brought action to recover on promissory notes given by defendant company. The notes were signed by the company officers with rubber stamps with company name abbreviated. On 9th June, 1909, defendants delivered a counterclaim to above action, asking for a return of moneys wrongfully used by plaintiff and another, belonging to defendant company. On 10th March, 1910, Sutherland, J., sitting as trial Judge, struck out defendants' counterclaim, with costs, and then proceeded with plaintiff's case, giving him judgment for $1,192.50 with costs.—Divisional Court affirmed above judgment for plaintiff on the promissory notes, holding that there is no law compelling a company to use its full name without abbreviation, in any instrument, but proceedings on the judgment should be stayed until the counterclaim was tried, as it was an action before the Court at trial, and should not have been struck out on affidavit evidence. *Thompson* v. *Big Cities Realty* (1910), 16 O. W. R. 435, 21 O. L. R. 394, 1 O. W. N. 933.

Tender—Action for damages. *Provo* v. *Cameron*, 40 N. S. R. 604.

Tender before action—*Payment into Court—Effect of plaintiff taking money out—Costs.*]—When the plaintiff takes money out of Court paid in by the defendant with a plea of tender before action, he does not thereby admit the tender, and neither party has any right to tax costs against the other until the issue on the plea of tender is disposed of. *Griffiths* v. *School District of Ystradyfodwg*, 24 Q. B. D. 307, and *American Aristotype Co.* v. *Eakins*, 7 O. L. R. 127, 3 O. W. R. 256, 306, followed. *Nixon* v. *Retsworth*, 16 Man. L. R. 1.

Third party issue—Order directing trial of—Motion to set aside—For leave to amend statement of defence — And other relief—Service of notice—After third parties pleaded

—Amendment—Costs. *Holmes* v. *Mowery* (1911), 18 O. W. R. 392, 2 O. W. N. 613.

Time for — *Noting for default—Security for costs—Payment into Court—Notice of.*] —Where a plaintiff, having complied with an order for security for costs by paying money into Court, gives notice thereof, as required by Con. Rule 1207, the defendant is entitled to at least one day to ascertain if payment has really been made, and to file his defence, before the plaintiff can note the pleadings closed for default of defence—the order for security for costs having stayed the proceedings the day before the last day for delivering the defence. *Northern Elevator Co.* v. *North-West Transportation Co.*, 6 O. L. R. 23, 2 O. W. R. 525.

Traverse—*Defences setting up right to do things not complained of by plaintiff — Injunction against members of trade union — Declaratory judgment — King's Bench Act, R. S. M. 1902 c. 40, s. 38 (c).*]—1. Pleadings in defence are confined to denials, (*a*) of the jurisdiction of the Court, (*b*) of the plaintiff's charges, or (*c*) of the sufficiency in law of those charges, and pleas by way of confession and avoidance.—2. A denial by a defendant that he has been guilty of any improper conduct is not a proper traverse of the plaintiff's charges complaining of specified acts of the defendant, and should be struck out.—3. Defences setting up merely argumentative claims of right to do certain things which the defendants do not admit having done, and which do not clearly appear from the pleadings to be the acts charged against them, should be struck out, not being pleas by way of traverse or by way of confession and avoidance.—4. The Court would have no jurisdiction, under s.-s. (*c*) of s. 38 of the King's Bench Act, to give a declaratory judgment interpreting an Act of the Parliament of Canada on hypothetical facts, even if it could so interpret a provincial statute on the application of a defendant. *Yukon Iron Works Limited* v. *Winnipeg Lodge No. 122, International Association of Machinists*, 4 W. L. R. 313, 16 Man. L. R. 207.

Trespass on mining claim—*Grouping of claims — Irrelevant matters.*] — As the statement of defence clearly shewed that matters of counterclaim were mixed with matters of defence, plaintiff's motion is well founded and various paragraphs were struck out. Defendants given leave to amend. *Olsen* v. *Desjarlais*, 11 W. L. R. 316.

Trespass to land—Action for—Defence that land is public highway — Necessity to shew title. *Colquhoun* v. *Creighton*, 40 N. S. R. 607.

Writ of summons — *Motion for judgment — Defence served before hearing of motion — Judgment debt.*]—Plaintiff moved for final judgment. A statement of defence was filed and served before hearing of the application, the defence being that an action does not lie on a judgment of one of the Courts established under the provisions of the Municipal Courts Act. A triable issue being raised by the defendant's application, motion dismissed. *Somers* v. *McLeod*, 6 E. L. R. 371.

See DEFAMATION — MECHANICS' LIENS— MINES AND MINERALS — MUNICIPAL CORPORATIONS.

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17. STATEMENT OF DEFENCE TO COUNTERCLAIM.

Embarrassment — *Prolixity — Rules 306, 326 — Amendment — "Unnecessary" matter — Setting out evidence — Immaterial allegations.*]—*Held*, on a motion to strike out parts of the statement of defence to a counterclaim, that, notwithstanding the requirement of Rule 306 of the King's Bench Act, that "pleadings shall contain a concise statement of the material facts upon which the party pleading relies, but not the evidence by which they are to be proved," and notwithstanding the amendment of Rule 326 by 7 & 8 Edw. VII. c. 12, s. 6, by inserting the words "unnecessary or" before the word "scandalous" therein, if pleadings are merely prolix by reason of containing passages setting out facts which are immaterial and unnecessary and passages which are merely recitals of the evidence proposed to be adduced, such passages should not be struck out under Rule 326, as they are neither embarrassing nor tending to prejudice or delay the fair trial of the action. *Theo Noel Co.* v. *Vitæ Ore Co.*, 17 Man. L. R. 319, and *dictum* of Bowen, L.J., in *Knowles* v. *Roberts*, 38 Ch. D. at p. 270, followed. *MacLean* v. *Kingdon Printing Co.*, 18 Man. L. R. 274, 9 W. L. R. 370.

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18. MISCELLANEOUS.

Amendment at trial — Compensation for improvements — Real Property Limitation Act — Additional evidence. *Watson* v. *Kincardine*, 10 O. W. R. 1092.

Default—Leave to defend—Particulars. *General Construction Co.* v. *Noffke* (1910), 1 O. W. N. 454.

Delay for appearance — *3 Edw. VII. c. 83, s. 293.*]—Section 293 of the Cities' and Towns' Act does not seem to require the appearance of the defendant in six days, and it is sufficient if the writ be returned on the day fixed by a Judge. *Laframboise* v. *Charbonneau* (1910), 16 R. de J. 269.

Delays upon appeals from interlocutory judgments—*Article 1225 C. P.*]—Upon appeals from interlocutory judgments, the delay for appearance after receipt of the record is one day, and the delay to set up exceptions is likewise one day. After expiry of these delays, the cause should be placed upon the Court roll with the rules and orders of the day. *Parke* v. *Laurie* (1910), 16 Que. R. de J. 268.

Delivery of pleadings — Extension of time — Peremptory order — Application for further indulgence — Solicitor's slip—Rule 555 — Terms — Costs. *Canadian Bank of Commerce* v. *Wilson* (Y.T.), 6 W. L. R. 585.

Disposition of application — *New application for same order — Hearing on the*

merits.]—Where a party defendant had applied to be struck out, but his application dismissed on the ground that he had not entered an appearance:—*Held*, that a second application for the same purpose could not be entertained. *Cyr.* v. *O'Flynn* (1907), 6 Terr. L. R. 299.

Duplicity—*General allegation of fraud—Amendment after demurrer argued — Demurrer.*]—To a declaration on a fire insurance policy, defendants pleaded *non actio*, because plaintiff did not send in as particular an account of the loss as alleged and in the same plea added "nevertheless for a plea in this behalf," alleging fraud in general terms. To this there was a special demurrer on the grounds of duplicity and that the allegations of fraud were too general:—*Held*, no duplicity, the real plea being fraud, and that the traverse was an introductory part of the plea, and was waived as a defence; (2) that the charge of fraud was sufficiently specific, as the alleged fraud was within the knowledge of the opposite party; (3) that plaintiff might withdraw his demurrer and reply. *Hazzard* v. *The Charlottetown Mutual Ins. Co.* (1868), 1 P. E. I. R. 275.

Exhibits referred to in an opposition —If already filed in original case, it is not necessary to file further copies of them with the opposition. *Drainville* v. *Savoie & Drainville* (1910), 11 Que. P. R. 437.

Inscription in review—*Motion to dismiss — Proceedings common to the principal action and to the action in warranty and to the intervention — Deposit — C. P. 1196, 1197.*]—Where, by consent, the parties have proceeded with the principal action, the action in warranty and the intervention as if they were one case, and where there has been but one hearing upon the merits and one judgment, a single inscription in review, accompanied by one deposit, is sufficient. *Anderson* v. *Smith & Church* (1910), 11 Que. P. R. 416.

Inscription in review—*Motion for its dismissal — Loss of record — C. P. 52, 509.*] —An inscription in review will not be rejected because the record is lost. *Dupere* v. *London & Lancashire Life Assce. Co.*, 11 Que. P. R. 198.

Opposition to withdraw — *Motion to dismiss opposition — Examination of the opposant — C. P. 651.*]—The Court, after the examination of the opposant, may dismiss the opposition as to all of the effects seized or as to some of them only. *Carriere* v. *Poirier & Martel*, 11 Que. P. R. 141.

Opposition to withdraw — *Motion to dismiss the opposition and to examine the opposant — C. P. 651.*]—A motion to dismiss an opposition or to examine an opposant in an opposition to withdraw will not be granted if it is apparent that the opposition is made in all seriousness and in good faith.—In the present case, the opposant claims the ownership of certain gas and electric fixtures, she swears that she bought them with her own money and that she is the owner of the house in which the fixtures are installed. *Brandeis* v. *Scott*, 11 Que. P. R. 155.

Partial inscription in law; its object *peace — Nature of such appeal — Narrative of the facts — Attack upon the Judge — C. P. 191; R. S. Q. 5597, 5609.*]—The object of a partial inscription in law is to obviate unnecessary proof by striking out from a written pleading allegations which are foreign to the case, and is not intended to decide the legal pretensions of the parties by the elimination of allegations which embody argument and not matters of fact.—The petition for leave to appeal from a decision of a justice of the peace is more of the nature of an inscription accompanied by a memorandum than a writ of summons with a declaration annexed to it.—Allegations which embody but a recitation of the facts, will not be struck out on inscription in law but will be reserved until hearing on the merits of the case.—Allegations attacking the character and the personality of the Judge presiding at the trial will be rejected from the record. *Baron* v. *Lapointe*, 11 Que. P. R. 166.

Petition of right — Amendment—Consent of Crown — Rules of Court—Particulars — Commission on sale of treasury bills and bonds — Names of purchasers. *Coates* v. *The King*, 10 O. W. R. 522, 628.

Second motion made while a first one is not disposed of—*C. P. 280, 283.*] —A motion for peremption of suit is a useful proceeding and must be disposed of by the Court, or withdrawn by the defendant, before a second motion may be presented, unless two years elapsed since the filing of the first one. *Lessard* v. *Bourget* (1909), 10 Que. P. R. 368.

Short prescription.]—An action to recover a debt, which on the face of the declaration, falls under Art. 2267 C. C., is open to demurrer by defendant, who may set up the short prescription by inscription in law. *Joyce* v. *Outremont* (1909), 18 Que. K. B. 447.

PLEADINGS.

See TRIAL.

PLEAS.

See PLEADING.

PLEASURE GROUNDS.

See NEGLIGENCE.

PLEDGE.

Bailment of animal — Pasturage — Subsequent advances — Distinction between pledge and chattel mortgage. *Kelly* v. *Pollock*, 1 O. W. R. 735.

Deposit with tender — *Forfeiture — Breach of contract — Municipal corporation — Right of action — Damages — Set-off —*

Restitution.]—C., on behalf of a firm of contractors of which he was a member, deposited a sum of money with the city of Montreal as a guarantee of the good faith of the firm in tendering to supply gas. After the construction of some works and laying of pipes in the public streets, the firm transferred their rights and privileges under the contract to another company, and ceased operations. The plaintiff, afterwards, as assignee of C., demanded the return of the deposit, which was refused by the city council, which assumed to forfeit the deposit and declare the same confiscated to the city for non-execution by the firm of their contract. After the transfer, however, the companies supplying the gas in the city reduced the rates to a price below that mentioned in the tender, so far as the city supply was affected, although the rates charged to citizens were higher than the contract price:—*Held*, that the deposit so made was a pledge subject to the provisions of tit. 16 of the Civil Code of Lower Canada, and which, in the absence of any express stipulation, could not be retained by the pledgee, and that, as the city had appropriated the thing pledged to its own use without authority, the security was gone by the act of the creditor, and the debtor was entitled to its restitution, although the obligation for which the security had been given had not been executed. As the city had not been obliged to pay rates in excess of those fixed by the contract, no damage could be recovered in respect to the obligation to supply the city, and the breach of contract in respect to supplying the public did not give the corporation any right of action for damages to individuals. Prospective damages which might result from the occupation of the city streets by the pipes actually laid and abandoned were too remote and uncertain to be set off against the claim for the return of the deposit. *Finnie* v. *Montreal*, 22 C. L. T. 356, 32 S. C. R. 235.

Must the plaintiff tender it with his action? — *Dilatory exception — C. P. 177 (2) ; C. C. 1969.*]—He who has received certain articles in pledge is not bound to deliver them until his claim has been paid; he is not obliged to tender them with his action. *Timossi* v. *Diodati* (1908), 11 Que. P. R. 290.

Person placed by true owner in possession of chattel — Authority to pledge —Replevin order obtained by true owner against pledgee—Finding of jury in favour of pledgee—Pledgor not a party—Indemnity to pledgee against possible claim of pledgor — *Res judicata* — Amendment — Pawnbrokers Act —Application to single dealing—Return of article replevied — Form of judgment. *Steele* v. *Luck*, 11 O. W. R. 823.

Purchaser of pawn-ticket — *Rights of—Replevin.*]—A writ of replevin can only be directed against the person who possesses the article replevied, or who, having had it in his possession, has parted with it by deceit or fraud, with the object of preventing it from being replevied.—The sale of a pawn-ticket given by a pawn-broker in exchange for an article pawned is a commercial transaction, and one who buys in good faith from the holder, and takes the article out of pawn, cannot be dispossessed even by the true owner, who in this case did not offer to repay the price paid by the purchaser. *Contra* v. *Despras*, 17 Que. S. C. 453.

Railway bonds — *Rights of pledgee — Railway Act — Registration — Transfer — Coupons.*]—The pledgee of the bonds of a railway company, deposited with him as security for the re-payment of advances to the company cannot use them as if he were a holder for value, and is not a bondholder within the meaning of the Railway Act, 3 Edw. VII. c. 58, ss. 111, 116. He cannot, therefore, cause them to be registered in his name, nor in that of parties to whom he has transferred them; nor deal with them as if they were his property, *e.g.*, by detaching coupons therefrom, so as to change their appearance and reduce the extent of their nominal value. *Atlantic & Lake Superior Ry. Co.* v. *Galindez*, 14 Que. K. B. 161.

Revendication by true owner.]—One who is in possession of a watch pledged to him for advances which he has made to the possessor of such watch, and who does not come within any of the cases mentioned in Arts. 1488 and 1489, C. C., cannot oppose the revendication of such watch by the true owner. *Marcotte* v. *Fortin*, 21 Que. S. C. 102.

Securities — *Bank — Power of sale — "By giving"—Notice — Auction — Private sale—Purchasers for value.*]—As collateral security to a promissory note the makers deposited with a bank certain railway bonds, and by a memorandum of hypothecation authorised the bank, upon default, "from time to time to sell the said securities by giving 15 days' notice, in one daily paper published in the city of Ottawa with power to the bank to buy in and resell without being liable for loss occasioned thereby." Default having been made, notice of intention to sell was duly published, and, pursuant to the notice, the bonds were offered for sale at public auction, after two postponements at the request of the pledgors, but no sale was made for want of bidders. The bank afterwards made a private sale of the bonds without further notice:—*Held*, that the words "by giving" in the memorandum were equivalent to "after giving" or "first giving" or "giving," and the condition of publication of the notice having been performed, the power to sell arose and might be exercised afterwards without fresh notice: —*Held*, also, that there was nothing upon the evidence to shew that the purchasers were not *bona fide* purchasers for value or that they had any reason to suppose that the bank were not authorised to sell; and under these circumstances the objection of the power of sale should not be strained against the purchasers. *Toronto General Trusts Corporation* v. *Central Ontario Ry. Co.*, 24 C. L. T. 319, 7 O. L. R. 660, 3 O. W. R. 520.

Securities — *Contract — Construction —Remedies of creditors.*]—An agreement by which a debtor consents that his creditors shall become the owner of securities which he delivers to him as collateral security for the principal debt, upon his default in payment of that debt, is not a new binding contract, but an extension of the contract of pledge. It gives to the creditor, at maturity, the choice of two alternatives; either to ap-

propriate the pledge in payment without recourse to a judgment and execution, or to recover his debt by the ordinary ways upon other goods of his debtor, subject to the obligation of remitting the pledge as soon as it is paid in full. *Holman* v. *Scott*, 15 Que. K. B. 193.

Securities — *Railway bonds — Sale by pledgees—Compliance with terms of hypothecation — "By giving" — Notice — Abortive sale—Subsequent private sale.*]—Dispute as to which of two parties were entitled to prove in respect of 300 bonds issued by the railway company for the sum of $1,000 each, with interest coupons attached, which had been pledged by Ritchie to the Bank of Ottawa, as security for a promissory note of $50,000 made by him, bearing date 30th November, 1900, and payable 15 days after date, with interest at 6 per cent. per annum from 31st May preceding. Blackstock and Weddell claim as purchasers of the bonds from the bank, after default in payment of the note, at the rate of 22½ cents on the dollar of the principal money of the bonds, and to have paid the purchase money therefor, amounting to $67,500. Ritchie, on the other hand, contends that the bank having held the bonds in pledge by way of security, the sale made by them was irregular and void, and that the purchasers, having bought with notice of the character in which the bank held the bonds were affected by the invalidity of the sale:—*Held*, that the respondents had notice before completion that the bank held the bonds as pledges and not as owners. The contract authorises the bank, in default of payment of the note at maturity, "from time to time" to "sell the said securities or any part thereof by giving 15 days' notice in one daily paper published in the city of Ottawa, as to the said bank shall seem proper, with power to the bank to buy in and resell without being liable for loss occasioned thereby." The bank published a notice of a sale of the bonds by auction on 11th March, 1902, and it was published in the Ottawa "Evening Journal" daily for 15 days before the day of sale. There was no sale at the time appointed. On 19th August an offer was received by the bank from Mr. Blackstock, one of the respondents, of 22½ cents in the dollar on the par value of the principal money of the bonds, and, after much correspondence, a sale of the whole of the bonds, with unpaid coupons attached, was made to Mr. Blackstock, on behalf of himself and the other respondent, and completed on or about 30th September. At the time of the sale the par value of the bonds, with interest coupons in arrears, was, as found by the Master, about $66,000; the debt due to the bank was $56,872.78, and the purchase money received was $67,500, or $10,627.22 more than was due. So that the bank sold nearly five bonds, with attached coupons, the par value of which was $11,000, more than was necessary to pay their debt, no effort having been made to restrict the sale to so many as was necessary for that purpose. On receiving Blackstock's offer of 19th August, the bank telegraphed to Ritchie at Akron, Ohio, where he lived, that they had an offer for the bonds, not stating what it was, and that they would sell unless payment was made by 12 o'clock on the 21st. To this they received an answer on the same day that arrangements were being made to pay the debt, and protesting against the sale. No further communication was made to Ritchie, and the fact of the sale was apparently not made known to him until 21st October afterwards:—*Held*, the sale was not made with reasonable care nor with proper regard to the rights and interests of Ritchie. No attempt had been made to reach the inquiries referred to in Mr. Burn's letter of 18th March, and who were expected at that time to become purchasers, and when the offer of 19th August came, its items were not communicated to Ritchie, but he was called upon to redeem, within 48 hours, or in default it would be accepted. That offer was about 10½ cents in the dollar of the bonds and arrears of interest which were sold. The very first offer was accepted, because it was sufficient to pay the bank's debt, although they knew there were other inquirers for the bonds, who, as they had reason to believe and expect, might become purchasers. They also carelessly sold more than were necessary to pay their debt, without any effort to restrict the sale to what was sufficient for the purpose, and, although the offer was at so much in the dollar, and not a fixed sum for the whole, such a sale, even if the bank had power to sell by private contract, which they had not, cannot be supported as between the bank and Ritchie, and by reason of notice to respondents cannot be maintained by them any more than it could be by the bank. The appeal allowed, and the decision of the Master restored. *Toronto General Trusts Corporation* v. *Central Ontario Ry. Co.*, 5 O. W. R. 606. See 3 O. W. R. 520, 7 O. L. R. 660, 10 O. L. R. 347.

Shares — *Sale by auction — Notice — "Disposing" — Contract.*] — The pledgee who is authorised by the contractor to dispose of the thing pledged in default of payment of the debt, and to apply the proceeds thereto, can only do so by a public sale, duly advertised. Where a number of shares in a joint stock company were pledged with the above covenant, a sale of them by auction, at which the pledgee bought them for less than their value, of which notice was given by private circular to the other shareholders of the company only, was not such a "disposing" of them as was intended by the contract. *Campbell* v. *Berger*, 30 Que. S. C. 86.

See Bankruptcy and Insolvency — Banks and Banking — Broker — Company — Lien — Partnership — Pawn Broker—Vendor and Purchaser.

POISON.

See Negligence—Pharmacist.

POLICE.

Jurisdiction — *Appointment for town—Justice of peace for county—Offences in another town—Quashing conviction—Costs.*] —A police magistrate appointed for a town, notwithstanding he has jurisdiction as a justice of the peace for the whole county, has no jurisdiction to act at the trial of an

offence committed in another town for which there is a police magistrate, except at the general sessions or in the case of the illness or absence or at the request of such other police magistrate; Magee, J., dissenting.—In quashing a conviction, an order was made protecting the justices, and costs were awarded to the defendant upon his undertaking not to institute any civil action against the informant. *R.* v. *Holmes*, 9 O. W. R. 750, 14 O. L. R. 124.

Jurisdiction — *City and county—Summary trial for indictable offence.*]—A police or stipendiary magistrate for the county of Westmoreland, with jurisdiction in the city of Moncton, has no authority to try summarily a person charged with an offence under LV. of the Criminal Code, s. 785, s.-s. 2, as amended by the Criminal Code Amendment Act, 1900, giving jurisdiction to police or stipendiary magistrates of cities and incorporated towns to try summarily indictable offences. *R.* v. *Benner*, 35 N. B. R. 632.

Jurisdiction — Fraud at municipal election — Information — Prohibition. *R.* v. *Thompson*, 3 O. W. R. 155.

Jurisdiction — *No evidence to justify conviction.*]—A conviction was quashed as evidence did not in terms point to the place where the act charged was done as being in jurisdiction of police magistrate making conviction. *R.* v. *Reedy*, 13 O. W. R. 265.

Jurisdiction — *Parish — County—City —Place of offence — Canada Temperance Act.*]—A police magistrate appointed under 46 V. c. 37, for the county of Westmoreland, with civil jurisdiction within the parish of Shediac, has jurisdiction to try offences against the Canada Temperance Act committed at the city of Moncton, and such judisdiction is not restricted by the "Act relating to the jurisdiction of police or stipendiary magistrates," 2 Edw. VII. c. 11, giving police or stipendiary magistrates appointed for a parish jurisdiction for the county in which such parishes are situate, and providing that such magistrates shall have no jurisdiction over offences committed within the limits of any city or incorporated town. *R.* v. *McQueen, Ex p. Landry, Ex p. Legere*, 2 E. L. R. 457, 38 N. B. R. 48.

Jurisdiction — Summary punishment of sailors for disobedience to orders of master of ship—Seamen's Act—Ship of Canadian registry—Absence of agreement—*Certiorari* —Collateral inquiry as to jurisdiction. *R.* v. *Olsen* (B.C.), 4 W. L. R. 108.

Jurisdiction in city and county — *Subsequent appointment of magistrate for county — Conviction.*] — Motion to quash a conviction made by a police magistrate for a city, appointed under R. S. O. 1877, c. 72, and afterwards appointed police magistrate for the county in which the city was situate, under 41 V. c. 4, s. 9 (O.), for an offence committed in the county outside the city limits. A salaried police magistrate was subsequently appointed for the county under 48 V. c. 17, s. 1 (O.); R. S. O. 1887, c. 72, s. 8:—*Held*, that the conviction was good, as the latter appointment was not "in the place and stead" of the first, and that the convicting magistrate had jurisdiction in both city and county.—*Per* Britton, J.:—The city police magistrate is *ex officio* a justice of the peace for the county, and could, as police magistrate, sitting alone, do anything that two justices of the peace sitting together could do. *Rex* v. *Spellman*, 13 O. L. R. 43, 8 O. W. R. 700.

Municipal corporations are liable for the damages caused, in the discharge of their duties, by police officers appointed, paid, discharged and subject to orders by them, by application of the rule that masters are responsible for the acts of their servants. *Levinson* v. *Montreal* (1910), 39 Que. S. C. 259.

Police constables, appointed by municipal corporations, are entrusted with a share of the public authority and are bound to execute the provisions of laws and of by-laws arising therefrom by delegation. They are in no wise the servants of the municipalities, and the latter are not responsible for the acts of such constables. *Rey* v. *Montreal* (1910), 39 Que. S. C. 151.

Powers of deputy — *Conviction — Information, before whom taken.*]—An information was sworn before the police magistrate for a city, but the case heard and conviction made by the deputy police magistrate. The conviction recited that it was made by R. E. K., deputy police magistrate, acting at the request of G. T. D., police magistrate:—*Held*, having regard to the Municipal Act, R. S. O. c. 223, s. 486, the Act respecting police magistrates, R. S. O. c. 87, ss. 10, 13, the Ontario Summary Convictions Act, R. S. O. c. 90, s. 2, and the Criminal Code, s. 842, s.-s. 5, that the deputy police magistrate was acting within the powers and authority conferred upon him by statute, and it was not necessary for the magistrate trying the case to be the magistrate who took the information. *Regina* v. *Duggan*, 21 C. L. T. 35.

Summary trial — *Perjury — Acquittal —Further prosecution—Indictment.*]—A person accused of perjury may, with his own consent, be summarily tried before a police magistrate: Criminal Code, ss. 145, 539, 782, 785. And where the defendant sought and consented to be tried summarily under s. 785, pleading "not guilty," and the magistrate, upon hearing the evidence, adjudicated summarily and dismissed the charge under s. 787:—*Held*, that the magistrate was right in refusing thereafter to bind the prosecutor over to prefer and prosecute an indictment against the defendant, as provided for in s. 595; for the magistrate has, under s. 791, to determine, before the defence has been made, whether he will try the case summarily or not. *Re Rex* v. *Burns*, 21 C. L. T. 236, 1 O. L. R. 341.

See ATTACHMENT OF DEBTS — CONSTITUTIONAL LAW — CRIMINAL LAW — JUSTICE OF THE PEACE — LIQUOR LICENSES — MUNICIPAL CORPORATIONS — NORTH-WEST MOUNTED POLICE — PROHIBITION — STIPENDIARY MAGISTRATE.

POLICE BENEFIT FUND.

See BENEFIT SOCIETY.

POLICE COMMISSIONERS.

See MUNICIPAL CORPORATIONS — NEGLIGENCE.

POLICE PROTECTION.

See MUNICIPAL CORPORATIONS.

POLICE REGULATIONS.

See CONSTITUTIONAL LAW.

POLL CLERKS.

See MUNICIPAL CORPORATIONS.

POLL TAX.

See ASSESSMENT AND TAXES — CARRIERS—MUNICIPAL ELECTIONS.

POLLICITATION.

See CONTRACT.

POLYGAMY.

See CRIMINAL LAW.

POOL ROOMS.

See MUNICIPAL CORPORATIONS.

POOR LAW.

See PAUPER.

PORTWARDENS.

Fees of office — *Competition.*] — Portwardens appointed by the city of St. John have no exclusive right to examine hatches of vessels arriving at the port so as to entitle them to fees for the services paid to an outside person. *St. John Portwardens* v. *McLaughlin*, 26 C. L. T. 385, 3 N. B. Eq. 175.

POSSESSION.

See EJECTMENT—LIMITATION OF ACTIONS.

POSSESSION OF LAND.

See EJECTMENT—LIMITATION OF ACTIONS.

POSSIBILITY OF ISSUE EXTINCT.

See VENDOR AND PURCHASER.

POSTHUMOUS CHILD.

See WILL.

POST MASTER.

See CROWN—PENALTY.

POST OFFICE.

See BAILMENT — CONTRACT — CRIMINAL LAW—CROWN.

POSTPONEMENT OF TRIAL.

See TRIAL—WRIT OF SUMMONS.

POUNDAGE.

See SHERIFF.

POWER OF ATTORNEY.

Its sufficiency to take proceedings—*C. P. 177* (7).]—A power of attorney by which a party is authorised to administer my properties . . . to sell them for such price and on such conditions that he may think fit, and generally do all I could do myself if personally present, includes not only the power to collect the rental due, but also the taking of such proceedings as may be necessary to force the debtor to pay the same. *Furois* v. *Labadie*, 11 Que. P. R. 233.

Motion by one of several defendants for power of attorney from plaintiff absent from the province, benefits such defendant only, and does not suspend proceedings as to the other parties who made no such demand. *Edwards* v. *Ste. Marie du Monnoir* (1910), 12 Que. P. R. 24.

Treasurer of a corporation, which has made a demand of abandonment, will be bound to file a power of attorney. *Jubinville* v. *Scott & Bourne* (1911), 17 R. L. n. s. 262.

See COMPANY—COSTS—JUDGMENT DEBTOR—LAND TITLES ACT—PRACTICE—PRINCIPAL AND AGENT—SUCCESSION—WRIT OF SUMMONS.

POWER OF SALE.

See MORTGAGE—WILL.

PRACTICE.

Action to annul a municipal process-verbal — *Intervention — Bill of costs — Review of the taxation — C. P. 50, 554; M. C. 106; Tarif, Art. 2, par. 2.*]—The fees on an action to have a municipal *procès verbal* set aside, and taken under the provisions of Art. 50, C. P., are of the second class. The same rule applies to an intervention filed in a similar case. *Bernier* v. *St. Michel & Laramee* (1910), 11 Que. P. R. 326.

Action transferred from Division Court to High Court.]—This action for trespass for taking stone from land was transferred from a Division Court to the High Court, parties to deliver usual High Court pleadings. By former Court the damages were limited to $60, but in statement of claim $600 damages claimed. Motion to strike out this latter claim and paragraph alleging trespass *quare clausum fregit*, dismissed, as when action transferred to High Court parties have all the rights and remedies of that jurisdiction. *Gage* v. *Nash*, 13 O. W. R. 461.

Adduction of evidence—*Cross-examination at trial—Vexatious and irrelevant questions — Discretionary order — Propriety of review.*]—The Judge presiding at the trial of a cause has a necessary discretion for the protection of witnesses under cross-examination and, where it does not appear that he has exercised that discretion improperly, his order ought not to be interfered with on an appeal. Hence Appellate Court is not justified in ordering a new trial on the ground that counsel has been unduly restricted in cross-examination by a question being disallowed, which did not, at the time it was put to the witness, have relevancy to the issues.—Idington, J., dissented on the ground that, under the circumstances of the case, counsel was entitled to have the question answered. — Appeal allowed with costs. *Brownell* v. *Brownell* (1909), 42 S. C. R. 368, 39 C. L. T. 1169.

Affidavits filed on interlocutory application — Scandal — Prolixity — Irrelevancy — Embarrassment — Application to remove from files — Partnership action. *York* v. *Secord*, 7 W. L. R. 448.

Amendment to statement of defence *Settlement of another action—Release of defendant—Con. Rule 294—Costs.*] — Where plaintiff, after defendant had delivered his statement of defence, had settled an action brought against another party, the effect of which the defendant claimed released him from any liability, an order was granted that defendant may amend as it thought best to set up new defence. Con. Rule 294 is applicable. Costs of and incidental to this order will be in the cause unless otherwise ordered at trial. *Moffat* v. *Gladstone Mines* (1909), 14 O. W. R. 1082, 1 O. W. N. 223, 272.

Appeal to Judicial Committee—*Judgment.*]—It is proper practice to move to have a judgment of the Judicial Committee of the Privy Council entered as a judgment of the Supreme Court of New Brunswick in a case appealed from that Court. *Robertson* v. *Fairweather*, 2 E. L. R. 134, 37 N. B. R. 497.

Appearance — *Expiry of time — Leave to appear — Terms — Costs.*] — Where a defendant wishes to appear after the expiry of the time for doing so, and after the plaintiff has taken a subsequent step in the action, in this case the service of interrogatories, the defendant must obtain the leave of the Court and pay the costs occasioned by his default. *Castelli* v. *Micciani*, 10 Que. P. R. 98.

Appearance — *Heirs — Art. 135 C. P.*] —A general appearance for all the heirs, in the case provided for by Art. 135, C. P., is regular; the attorney of the defendants is not obliged to specify the names of the persons in whose interest he appears. *O'Brien* v. *Church*, 9 Que. P. R. 106.

Appearance — Necessity for notice of—Rules of Court — English practice — Security for costs. *Bell Engine & Thresher Co.* v. *Brace* (N.W.T.), 6 W. L. R. 357.

Application to strike out name of a defendant — Dismissal, because made before appearance — Second application — Refusal to entertain—Costs. *Cyr* v. *O'Flynn* (N.W.T.), 5 W. L. R. 524.

Application to strike out name of a defendant — *No appearance — Second application.*]—Where a party defendant had applied to have his name struck out, but his application was dismissed on the ground that he had not entered an appearance:—*Held*, that a second application for the same purpose could not be entertained. *Cyr* v. *O'Flynn*, 5 W. L. R. 524, 6 Terr. L. R. 220.

Chambers application — Affidavit filed — Direction for cross-examination of deponent — Service of subpœna — Necessity for shewing original — Defective affidavit of service and notice—Misdescription of parties —Necessity for order for cross-examination. *Fey* v. *Seimer* (N.T.), 4 W. L. R. 145.

Chambers summons — *Irregularity—Omission of solicitor's name — Waiver.*] — *Held*, that when not otherwise provided, the forms in use in the administration of civil justice in England, with such modifications as may be necessary to make them conform to the practice of the Supreme Court of Saskatchewan, must be followed in the Supreme Court of Saskatchewan, and therefore the omission to endorse the name and address of the solicitors issuing a Chambers summons, as required by form of summons No. 1, in appendix K., to the English Rules, is an irregularity.—*Quære*, whether it is open to a solicitor to appear on the return of a summons and take such an objection, without thereby waiving the irregularity. *Beaver Lumber Co.* v. *Eckstein*, 8 W. L. R. 439, 1 Sask. L. R. 134.

Consent of next friend — *Filing — Time—Proceedings avoided by omission.*]— The English Rule requiring that, where the consent of the next friend of the plaintiff is necessary, it must be filed before the issue of the writ of summons, is in force in the Territories, and default is not cured by

a consent filed subsequently to the issue, but avoids all the proceedings in the action. *Short* v. *Spence*, 6 T. L. R. 267.

Costs — *Scale of — Action in High Court on promissory note for $500—Jurisdiction—Title to land—County Courts Act, s. 22—Ontario Rule 1132.*] — Defendant claimed that he had been induced to give above note on the representations of plaintiff and another that the latter owned an interest in some land in Wisconsin which defendant agreed to buy and for which said note was given:—*Held*, no title to land brought in question and District Court, not High Court, costs properly given plaintiff. *Dobner* v. *Hodgins* (1909), 14 O. W. R. 265. Leave to appeal to Judge-in-Chambers refused, 14 O. W. R. 593, 1 O. W. N. 12.

Entry of action in wrong district—*Nullity or irregularity — Transfer — Summons to set aside proceedings — Failure to state objections — Irregularity — Enlargement.*]—*Held*, that the entry of an action in the wrong judicial district, contrary to s. 4, s.-s. 2, of the Judicature Ordinance (C. O. 1898, c. 21), is an irregularity, not a nullity, and the defect may be cured under Rule 538, by transferring it to the proper judicial district. (Reversed on appeal.)—2. That in case of an irregularity in a summons to set aside irregular proceedings, in not stating the objections relied upon, pursuant to Rule 540, the summons should not be discharged, but on the objections being stated on the return of the summons, it should be enlarged at the request of the party called upon. *Saskatchewan Land Co.* v. *Leadley*, 6 T. L. R. 18.

Delay in proceeding with action — *B. C. Order LXIV., Rule 13 — Month's notice of intention to proceed—Order to amend writ of summons—"Step in the proceedings."*]—*Held*, that the plaintiff's obtaining of an order *ex parte* allowing the amendment of the writ, and the amendment of it, is a step in the proceedings under Rule 13 above. *Goldstein* v. *Vancouver* (1909), 12 W. L. R. 154.

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

Directing argument of points of law —Appeal to Judicial Committee from refusal to quash conviction—Concurrent civil action for declaration of its invalidity. *Townshend* v. *Beckwith*, 2 E. L. R. 421.

Discontinuing action — *Costs — Good reasons for depriving defendant of—Con. Rule 439 (4).*—Plaintiff given leave to discontinue his action for reasons given in *Armstrong* v. *Armstrong* (1904), 4 O. W. R. 223, 301, 9 O. L. R. 14, and *McIlroy* v. *Miles*, 9 O. W. R. 542. As defendant could have notified plaintiff before appearance of his mistake, and then there would have been no costs, defendant was deprived of costs. *Ruston* v. *Galley* (1909), 14 O. W. R. 999, 1 O. W. N. 186.

Discontinuance — *Yukon Rule 173—"Save any interlocutory application"—Motion for leave to discontinue.*]—After service of statement of defence, plaintiff obtained inspection of defendants' books and then served a notice of discontinuance. Inspection of documents is an interlocutory step. Notice properly given, motion unnecessary. *O'Brein* v. *O'Brein*, 10 W. L. R. 694.

Dismissal of action as frivolous and vexatious — Application to make party plaintiff a company already defendant — Fraud, allegation of. *Hoffus* v. *Lenora Mount Sicker Copper Mining Co.* (B.C.), 7 W. L. R. 156.

Distraint before trial — *Complaint in appeal — Affidavit—C. P. 931.*]—It is not necessary that the complaint in appeal of the *distrainée* should be supported by an affidavit, such complaint being of the nature of a defence. *Union Brewery* v. *Christian* (1909), 10 Que. P. R. 337.

Documents — *Ought to be produced before their examination by a party.*]—A party cannot obtain an order from the Court enjoining a witness to give him access to books and documents that are in his possession, relative to a pending action to examine them, and later on cause him to produce those he thinks suitable. The books and documents must first be produced to the parties to examine them afterwards. *Connolly* v. *St. Raymond Paper Co.* (1909), 10 Que. P. R. 427.

Evidence — Impeachment of testimony —Notice of imputations — Promissory note — Fraud — Suspicious circumstances — Transfer of negotiable instrument. *Peters* v. *Perras et al.*, 42 S. C. R. 244.

Ex parte order — *Right of Judge to rescind—Appeal—Rules of Court — Order allowing defendants to plead other defences with "not guilty by statute."*]—Every application not expressly permitted to be made *ex parte* must be made in Chambers by summons, and an order made upon an *ex parte* application not so authorised is irregular.—2. A single Judge has power to set aside an *ex parte* order for irregularity.—Order of Wetmore, J., 6 Terr. L. R. 423, refusing to set aside his own order (by inadvertence made *ex parte*), allowing the defendants to plead other defences with "not guilty by statute," on the ground that he had no power to set it aside, reversed. *Jackson* v. *Can. Pac. Ry. Co.*, 7 W. L. R. 828, 1 Sask. L. R. 84.

Extension — *Time limit for bringing action.*] — Leave granted plaintiff to deliver statement of claim, notwithstanding over three months had elapsed since appearance entered. Action was on a guarantee policy and defendants opposed motion on ground that no action could be brought unless commenced and served within six months next after discovery of alleged defalcation, and that it was just as much dead owing to non-delivery of statement of claim as required by Rule 243, as if writ had not been issued within the six months' period. *McDonald* v. *London*, 13 O. W. R. 403.

Forum — *Court or Chambers — Motion by assignee for benefit of creditors for directions—Ontario Rule 915.*]—This application should have been made in Court:—*Held*, no jurisdiction to dispose of it in Chambers, nor should it be removed into Court, the respondent not having appeared. *Re Reid*, 13 O. W. R. 915.

Infant — *Next friend — Married woman.*]—Order made staying the action until a proper next friend should be appointed for plaintiff, an infant, that is one instead of his mother, his father being alive. *Booth* v. *Toronto* (1909), 14 O. W. R. 87; affirmed 128.

Injunction — Con. Rule 47 — Motion to continue injunction refused. *Reith* v. *Rainy River* (1909), 14 O. W. R. 530.

Inscription for proof and hearing—*Motion to reject—Jury trial—Delays; are they suspended by the death of one party?—Notice of such death—C. P. 268, 293, 423.*]—*Held*, the death of one of the defendants does not interrupt the delays as regards proceedings to trial or interfere with the right of the plaintiff or take the necessary proceedings for trial in the absence of any suggestion or notice of such death. *Chartrand* v *Paquette* (1910), 11 Que. P. R. 351.

Interrogatories — *Insufficiency of answer — Exceptions.*]—Bill in equity for specific performance of a contract to purchase certain real estate. One of the sections of the interrogatories contained about a dozen distinct questions. Exception taken to the answers of eight of these. Defendant knowing little of the matter, his solicitor having had full charge of it, answered that he was informed by his solicitor, and admitted it to be true, that the solicitor was informed, etc.:— *Held*, sufficient answer. Bunching questions in interrogatories commented on. *Fenety* v. *Johnston*, 6 E. L. R. 213.

Issue of writ in wrong district — *Setting aside.*]—Where the provisions of the Judicature Ordinance fix the judicial district in which a writ must issue in any action, a writ issued in the wrong judicial district is a void, not merely an irregular, proceeding, which cannot be cured by an order transferring the cause into the proper district. Judgment of Scott, J., reversed. Remarks by Scott, J., on the proper practice where a summons to set aside proceedings for irregularity is itself irregular in omitting to give the grounds relied upon. *Saskatchewan Land & Homestead Co.* v. *Leadley* (1904), 6 Terr. L. R. 82.

Judgment debtor — *Examination of agent or employee — Rule 903 — Unpaid agent acting under power of attorney.*]—Application under above rule to examine C. as an agent or employee of defendant, a judgment debtor, dismissed. C. held a power of attorney under which he acted occasionally for the defendant:—*Held*, this did not make C. a clerk or an employee. *Smith* v. *Clergue* (1909), 14 O. W. R. 31.

Judgment for recovery of land and mesne profits — *Undefended action — Counterclaim — Motion for judgment — Forum—Rules 163, 164.*] — The plaintiff claimed possession of land and *mesne* profits; the defendant did not defend, but counterclaimed for moneys paid: — *Held*, that the counterclaim was not a defence and the plaintiff was entitled, under Rule 163, to enter judgment for the recovery of the land, as a matter of course, and without application to a Judge; and, after so entering judgment, the plaintiff could apply to a Judge in Chambers or the Local Master, under Rule 164, for judgment for *mesne* profits.—A Judge presiding at a sittings for trials declined to entertain a motion for judgment for the recovery of the land and *mesne* profits. *Tunnicliffe* v. *Pollard* (1910), 14 W. L. R. 214, 3 Sask. L. R. 153.

Jury notice — *Striking out — Common law action—Avoidance of delay.*]—Motion to strike out jury notice dismissed. Power to strike out in Chambers in cases outside Toronto should be sparingly used. *Hurdman* v. *Gall* (1909), 14 O. W. R. 143.

Lease — Application for approval of — Devolution of Estates Act, sec. 25 (*b*)—"High Court or a Judge thereof"—Forum. *Re Montgomery* (1910), 1 O. W. N. 999.

Long vacation — *Cases between lessor and lessee — Proceedings on oppositions for payment with allegation of insolvency of debtor and demand of order to call in creditors—Power to deal with it summarily.*]—Proceedings following upon the execution of judgments (*e.g.*: contestations of oppositions), in cases between lessor and lessee, are governed by the rules that apply to the actions in which they were rendered and come within the first exception to Art. 15 C. P. They can therefore be had during the long vacation. *McFadden* v. *Hodgson* (1910), 37 Que. S. C. 430.

Money in Court — *Right of execution creditors of party entitled.*]—Plaintiffs obtained a charging order against certain moneys in Court:—*Held*, such an order unnecessary and inappropriate; that a stop order should be obtained and a subsequent application be made under the above Ordinance for transfer of the fund to the sheriff for distribution. *McDougall* v. *Inglis* (1909), 12 W. L. R. 78.

Motion for better and further affidavit for production — *Counterclaim.*] — Order granted in usual form with costs of motion in cause as the point was new. *Kemerer* v. *Wills* (1909), 14 O. W. R. 1015, 1 O. W. N. 208.

Motion for further and better affidavit on production — *Fraud.*]—On motion for further and better affidavit on production, defendant set out 10 documents which he claimed privileged, being communications of his solicitors:—*Held*, that the privilege was taken away as fraud on the part of defendant was a direct issue. *Greene* v. *Black* (1909), 14 O. W. R. 722, 1 O. W. N. 60.

Motion for peremption — *Delay for service—Last proceeding — Amendment not*

served—C. P. 279, 514; R. P. 55.]—A notice given on Saturday that a motion for peremption will be presented on the following Monday is sufficient. If the defendant has filed an amended plea without the permission of the Court and without having served it upon the opposite party, there is no delay for answering it until one or the other proceeding is adopted, and a motion for peremption of suit cannot be granted. *Samson* v. *Montreal*, 11 Que. P. R. 180.

Motion to amend statement of defence — *Action for libel in newspaper — Criminal charge.*]—Order made allowing defendants to amend their statement of defence by pleading privilege, and in mitigation of damage to shew that the character of plaintiff was not such as would be injured by publication of statement complained of. *Kelly* v. *Ross* (1909), 14 O. W. R. 1078, 1 O. W. N. 221.

Motion to commit for contempt of Court — *Strictissimi juris* — Affidavit not filed before service of notice of motion — Rule 524—Clerical error in affidavit — No proof that proceedings pending in Court—Dismissal of motion—Costs. *Re Toronto Junction & Toronto Rw. Co., Re Greenwood*, 11 O. W. R. 182.

Motion to set aside statement of claim — *Praecipe order to continue action as suit of assignee of plaintiff.*] — Where statement of claim was not delivered until two years after service of writ it was validated as of this date. Where a plaintiff assigns his course of action he is no longer entitled to prosecute it, as unless assignee could get conduct of suit it might be settled or dismissed without his consent. *Stidwell* v. *North Dorchester* (1909), 14 O. W. R. 709, 1 O. W. N. 53, 73, 134.

Motion to strike out counterclaim as improper.]—Order made striking out counterclaim except that part which was applicable to the statement of defence. *Can. Pac. Rw. Co.* v. *Port Arthur* (1909), 14 O. W. R. 1005, 1 O. W. N. 187.

Naming place of trial in writ of summons not specially endorsed—*Different place named in statement of claim.*]—In a writ of summons not specially endorsed, Toronto was named as place of trial, and without order Peterborough was named as such in the statement of claim. Naming the place of trial in such a writ is an irregularity not a nullity, and statement of claim was amended naming Toronto as place of trial. *Delbaugh* v. *Frederick*, 12 O. W. R. 1121.

Notice of motion—Where the rules provide that a motion in Chambers shall be made by notice, the procedure by summons cannot be adopted. *Dominion Bank* v. *Fredt* (1907), 6 Terr. L. R. 208.

Nuisance.]—When a claim can be stated against an owner and a contractor jointly, it can be stated against first one and then in the alternative against the other. *Coulstring* v. *Nova Scotia*, 5 E. L. R. 556.

Opposition to withdraw — *Motion to dismiss — C. P. 651.*] — An opposition to withdraw will not be dismissed as frivolous, upon motion to that effect, when the opposant swears that he has always been and is still the proprietor of the effects seized and that he bought them with his own moneys. *Renaud* v. *McNairn & Martin*, Opp., 11 Que. P. R. 229.

Order for sale of real estate pendente lite — *Order 50, Rule 1.*]—Rule 1 of Order 50 provides, in part: "If in any cause or matter relating to any real estate, it shall appear necessary or expedient that the real estate or any part should be sold, the Court or a Judge may order the same to be sold:" —*Held*, that this is a general power, to be exercised by the Court or a Judge according to the circumstances, and is not meant to apply only where a sale is necessary or expedient for the purposes of the action. *In re Robinson*, 31 Ch. D. 247, not followed. *Rainey* v. *Rainey*, 12 B. C. R. 494.

Order in chambers — *Power of master to amend after appeal and confirmation — Making order issued conform to minutes as settled — O. R. 640.*]—The Master in Chambers under Ontario Rule 640 has power to amend an order as issued so as to make it conform to that actually made, and which had been affirmed on appeal to a Judge and a Divisional Court. *Copeland* v. *Business Systems*, 13 O. W. R. 656.

Order in Chambers — *Rehearing of application before order issued — Powers of Judge—Powers of local Master—Res judicata —Admission of new material—Discretion.*] —A Judge or local Master of the Supreme Court in Saskatchewan has jurisdiction to rehear an application upon which he has pronounced an order, so long as the order has not been drawn up and perfected. *In re St. Nazaire Co.*, 12 Ch. D. 88, *Miller's Case*, 3 Ch. D. 661, and *Preston Banking Co.* v. *William Allsup and Sons*, [1895] 1 Ch. 141, followed. An application for a rehearing, where the order has not been drawn up and perfected, is neither an appeal nor an application in the nature of an appeal; and it is, therefore, not excepted from the jurisdiction of a Local Master by the exception (c) to the Rule of Court promulgated on the 14th October, 1907, in regard to the jurisdiction of Local Masters. Until the applicant got his order, the matter of the application could not be said to be *res judicata*:—*Semble*, that on the rehearing the Local Master would have the right to exercise his discretion as to the admission of additional material. Order of the Local Master at Moose Jaw, 16 W. L. R. 169, affirmed. *Coe* v. *Smiley* (1911), 16 W. L. R. 486, Sask. L. R.

Order of Judge in Chambers — *Power to discharge or vary — Order made without jurisdiction — Application to Judge sitting in Court — Staying execution pending appeal.*]—An order made by a Judge in Chambers may be set aside or discharged on notice by the Judge sitting in Court.—An order staying execution, upon the judgment in favour of the plaintiff pronounced by Harvey, J., at the trial, pending an appeal to the Court *en banc*, was made by Stuart, J., in Chambers, upon the plaintiff's solicitor consenting, although only the trial Judge had jurisdiction to make such an order. The plaintiff's solicitor afterwards found that he

had been mistaken as to his authority to consent and asked Stuart, J., to discharge or vary his order; and Stuart, J., thereupon intimated that the order would be discharged upon the plaintiff moving formally as in Court, or upon the defendants consenting to an order being issued as in Court; reserving leave to the defendants to move before Harvey, J., to stay the execution.—The Supreme Court Act, s. 39, and the Judicature Ordinance, ss. 3 and 5, authorise this practice. *Nestler* v. *Dominion Meat & Cattle Ranching Co.* (1910), 13 W. L. R. 241.

Originating summons — *Rule 245, Judicature Ordinance — Application to sell property alleged to have been fraudulently conveyed — Parties — Necessity for naming — Sufficiency of description of property.*]—The plaintiff applied by originating summons under Rule 245, Judicature Ordinance, for an order for the sale of a certain interest in the estate of one Broley, "amounting to upwards of $1,000," to which it was alleged the defendant was entitled, and which he had fraudulently conveyed to his wife, who was served with a copy of the summons but who was not specifically named therein:—*Held*, that, as Lila Jones, the wife of the defendant, was the person principally interested in the application, she should have been specifically cited to appear, and the general direction "to all parties concerned," with service on Lila Jones, was not a sufficient compliance with the Rule.—2. That the property to be sold was not described with sufficient certainty. *Lamb-Watson Lumber Co.* v. *Jones*, 1 Sask. L. R. 386.

Originating summons — *Service out of the jurisdiction — Order authorising — Copy served not a true one — Absence of prejudice — Rule 538 — Irregularity — Affidavit — Cause of action.*]—An affidavit setting out and verifying the plaintiff's cause of action, but not stating that in the belief of the deponent the plaintiff has a good cause of action, is sufficient to support an order for service *ex juris*.—2. The grounds of an application for service *ex juris* need not be specifically stated as such; but it is sufficient if the affidavit shew such facts as will enable the Court to determine if the cause of action is one in which an order for service *ex juris* may be made.—3. Where the plaintiff includes the order for service *ex juris* in an originating summons, and in the copy served the terms of the order are incorrectly stated, such an irregularity will not affect the service, as there is no obligation upon the plaintiff to serve a copy of the order for service *ex juris*, and the defendant, therefore, could not be prejudiced. *Shore* v. *Hewson*, 7 W. L. R. 634, 1 Sask. L. R. 72.

Particulars — *Discovery—Which should be had first?*]—"There is no hard and fast rule as to the class of cases in which particulars should precede discovery or discovery be ordered before particulars, but the Judge must exercise a reasonable discretion in every case after carefully looking at all the facts and taking into account any special circumstances." *Waynes Merthyr Co.* v. *D. Radford & Co.*, [1896] 1 Ch. at p. 35, followed. Order made allowing plaintiff to examine for discovery within 10 days, and to deliver particulars within one week after discovery has been obtained. *Townsend* v. *Northern Crown Bank* (1909), 14 O. W. R. 727, 1 O. W. N. 63, 19 O. L. R. 480.

Particulars — *Motion for before delivering defence — Rule 312.*]—*Held*, that there is no case made for plaintiff giving any further particulars than what is set out in statement of claim. Defendants must plead in a week. *McCall* v. *Cane & Co.* (1909), 14 O. W. R. 789, 1 O. W. N. 95; affirmed, 14 O. W. R. 916, 1276, 1 O. W. N. 151, 288.

Particulars — *Statement of defence — Postponement till after examination of plaintiff for discovery — Limited particulars.*]—In a libel action defendants directed to give particulars of statement of defence. Without waiting for plaintiff's examination for discovery particulars to be limited to ground of defendants' belief that words complained of are true. *Timmins* v. *National*, 10 W. L. R. 81.

Petition — *Presentation to Court — Order of reception — Stamps.*]—A *requête civile* not being legal without a valid judicial order of reception, it must be presented to the Court and must be stamped when and as required by law. *Perrault* v. *Bernard*, 9 Que. P. R. 272.

Place of trial named in writ of summons not specially indorsed—Different place of trial named in statement of claim—Irregularity — Nullity — Amendment — Costs. *Dellebough* v. *Frederick*, 12 O. W. R. 1121.

Plaintiff out of jurisdiction—*Power of attorney — Art. 177, C. P. — Form of document.*]—Under the provisions of Art. 177, C. P., the power of attorney which a plaintiff not residing in the province of Quebec is bound to produce, need not necessarily be in authentic form or legalised. *Serling* v. *Levine*, 10 Que. P. R. 221.

Practice — *Writ of summons — Issue in wrong district — Setting aside — Irregularity in moving.*]—Where the provisions of the Judicature Ordinance fix the judicial district in which a writ of summons must issue in any action, a writ issued in the wrong judicial district is a void, not merely an irregular, proceeding, which cannot be cured by an order transferring the cause into the proper district. Judgment of Scott, J., reversed. — Remarks by Scott, J., on the proper practice where a summons to set aside proceedings for irregularity is itself irregular in omitting to give the grounds relied upon. *Saskatchewan Land and Homestead Co.* v. *Leadlay*, 6 Terr. L. R. 82.

Procedure — *Opposition — Motion to reject — Sufficiency of the allegations.*]—The fact that it is not alleged in an opposition whether a female opposant is contractually or judicially separated, may cause prejudice to the plaintiff contestant, but it is not a sufficient reason for dismissing the opposition. From the moment that it is alleged that the opposant is separate as to property and maritally authorised, her husband being a party to the opposition, the opposition is sufficient in law, but such an allegation may

give rise to a motion for particulars. When the plaintiff moves for the dismissal of the opposition because the opposant's domicil is not specially mentioned therein, if it is alleged that the opposant is defendant's wife, that is sufficient in law, because the married woman's home is that of her husband, and, therefore, the opposition reveals the opposant's domicil. The fact that the opposant's marriage contract is not produced may give rise to a motion to have it filed (Rule of Practice 62), but it is not sufficient to have the opposition dismissed as being frivolous and unfounded. Plaintiff alleges in his motion that the opposition does not shew by virtue of what title, nor when, the opposant acquired the effects seized. The opposant not only alleges that she is their owner, but also that she is in possession of them. These allegations are sufficient in law, at least, to prevent the dismissal of the opposition upon motion. As to the date when opposant acquired or took possession of the effects, there may be reason for a motion for particulars on plaintiff's part.—Plaintiff sets up as a ground for dismissing the opposition the want of stamp upon the original of the opposition. It appears that the copy of the opposition was stamped upon the day of its return. In the present case, the plaintiff has failed to establish any prejudice.—Plaintiff demands the dismissal of the opposition because it contains no election of domicil. Upon this objection, the Court orders the opposant to file an election of domicil within a fixed delay. In default of her so doing the plaintiff may ask for the rejection of the opposition, and, in any case, condemns opposant to pay the costs upon plaintiff's motion. *Robillard* v. *Larauche & Gauthier*, 16 R. de J. 23.

Quo warranto — *Right to hold office of school trustee — Motion for leave to file information — Manitoba King's Bench Act, s. 92 — Criminal Code — "Crown side."*]— Motion for leave to file an information by way of *quo warranto* calling upon the defendant to shew cause why he held his seat as school trustee for a certain district:—*Held*, that the application was properly made by a notice of motion, not by *rule nisi*. *Rex ex rel., Tuttle* v. *Quesnel*, 11 W. L. R. 96. See 10 W. L. R. 722, 19 Man. L. R. 20, 23.

Reference for trial — *Motion for judgment — Costs.*]—Where there is a reference to a Master or referee to try an action and dispose of the costs, a motion to the Court for judgment on his report is necessary. *Murphy* v. *Corry*, 12 O. L. R. 129, 7 O. W. R. 574.

Replevin action — *Bond N. S. Order 45, Rules 2 and 5.*]—No affidavit is required to be filed under Rule 2, where the distress is for rent. Bond filed being defective in form and with one surety only, it was set aside, leave being given to file a new one as of date of one set aside. *McDonald* v. *Praught*, 7 E. L. R. 231.

Sales by order of the Court — *Leave to bid — Judge delegating authority to the clerk of the Court.*]—Apart from a sale by private contract sanctioned by a Judge, there are two methods which may be adopted to effect sale when an order for sale is necessary: (1) a sale "by proceedings altogether out of Court," or (2) by auction or tender "with the approbation of a Judge."—Rules 450, 451 Jud. Ord. 3, English Order 51, Rules 1a and 3.—It is the duty of the Judge to determine who shall have the carriage of the sale, to ascertain the particulars of the property and encumbrances thereon, whether encumbrancers will consent to the sale, the nature of the title, whether special conditions are necessary and what is the best method of sale. None of these duties should be delegated. It is contrary to our practice to give leave to bid to the person having conduct of the sale. *Cummings* v. *Somerad*, 2 Alta. L. R. 82.

Service of papers — Garnishing summons — Mistake in copy served — Name of clerk of Court omitted — Refusal to set aside service — Costs. *Milner* v. *Marriot*, 7 W. L. R. 793.

Service of papers — Service on party personally — Notice of examination of witnesses — Nova Scotia Acts of 1887 c. 15, s. 1 — Solicitor — Practice. *McNiel* v. *McDonald*, 40 N. S. R. 629.

Service of papers — Service on solicitor — Thrusting document under door — Date of receipt. *Dwyer* v. *Hyde*, 40 N. S. R. 622.

Service of papers — *Service on solicitors — Firm — Domicil — Election — Change in firm — Demand for peremption — Declaration — Filing.*]—When a firm of advocates which has deposited in the office of the Court the declaration required in regard to a firm, with an election of domicil, appears and acts in an action as attorney *ad litem* for one of the parties, the service of proceedings, particularly of a demand for peremption, at the domicil chosen, is valid, even after a change made in the composition of the firm by the substitution of a new partner for an old one who retires, and if the firm has not deposited a new declaration in the office to replace the first one, and if a substitution of an attorney in the case has not been made. *Duperreault* v. *Miron*, 16 Que. K. B. 168.

Service out of jurisdiction — *Action for breach of contract to be performed within the jurisdiction — King's Bench Act—Rules 201 (e), 202.*]—The plaintiff, a resident of Manitoba, sued the defendant, a resident of Saskatchewan, for commission on the sale for the defendant of land situated in Saskatchewan. The bargain respecting the agency was closed between the parties at Winnipeg, when the defendant agreed to pay a certain commission in case the plaintiff found purchasers:—*Held*, that the plaintiff had a right, under sub-rule (e) of Rule 201 of the King's Bench Act, to serve the statement of claim out of the jurisdiction without obtaining a prior order for leave to do so, for, although there was nothing provided as to where the commission should be payable, yet it would be the duty of the defendant to pay to the plaintiff at his residence in Winnipeg any commission earned by him, and so there would be, in case of non-payment, a breach within Manitoba of a contract which, according to the terms thereof, ought to be

performed within Manitoba.—*Reynolds* v. *Coleman*, 36 Ch. D. 453, followed:—*Held*, also, that, if a plaintiff relies upon Rule 202 of the King's Bench Act, he must not only establish the existence of assets within the jurisdiction owned by the defendant to the amount of $200, but he must also obtain an order for leave before service out of the jurisdiction will be allowed. *Gullivan* v. *Cantelon*, 5 W. L. R. 469, 16 Man. L. R. 644.

Special case — *Question of fact — Proceedings extra cursum curiæ.*]—A special case asking the Court to determine suggested or possible points of law in advance of an agreement or determination as to the facts, is not to be encouraged. *National Trust Co.* v. *Dom. Copper Co.* (1909), 14 B. C. R. 190.

Special leave to stand over.]—Absent debtor suit made a *remanet* at third term—same effect as if special leave to stand over were granted. *Ex p. Stewart* (1871), Pet. P. E. I. R. 242.

Suing by next friend — *Side bar — Attachment.*]—Plaintiff had been represented in this action by next friend and the action had been dismissed. A side bar had been taken out for payment of costs, which were duly taxed, but next friend refused to pay same. Order absolute for attachment issued against next friend. *McGaw* v. *Fisk*, 6 E. L. R. 373.

Summons for directions — *Venue fixed by order — Subsequent application to change —Power of Judge — Order XXX.*]—On a summons for directions the usual order was made, *inter alia* fixing the place of trial at New Westminster. There was nothing said as to venue, and no objection raised on this application. Subsequently the defendant applied to have the venue changed to Fernie, on the grounds of convenience of witnesses and the necessity for a view of the *locus in quo*. This application was refused:—*Held*, on appeal (Clement, J., dissenting), that the omission of the solicitor's agent to keep open the question of venue until he was properly instructed should not, in the circumstances, be permitted to work an undue hardship on the defendant.—Directions given under Order XXX. have not the finality of ordinary orders. *Foss* v. *Hill*, 8 W. L. R. 224, 13 B. C. R. 403.

Third party notice — *Motion to discharge — Partnership — Sale of mining claim — Re-sale at higher price, but no part of the increase was paid to original seller.*]—*Held*, that he should not have to bear the burden of supporting the second sale to plaintiffs. Third party notice discharged with costs. *Miller* v. *Sernia Gas Co.*, 2 O. L. R. 546, followed, *Oakley* v. *Silver* (1909), 14 O. W. R. 1198; 1 O. W. N. 272.

Trial by jury — *Case where the plaintiff is French and the defendant a corporation — Claim for a bi-lingual jury.*] — A French plaintiff suing a corporation in a cause where there is a trial by jury can not demand that it shall be composed of equal numbers of persons speaking French and persons speaking English. The corporation alone has the right to make this demand. *Martin* v. *Brothers of Charity*, 18 Que. K. B. 268.

Writ of summons — *Service out of jurisdiction — Con. Rules 162, 164, 246.*]—An order allowing service to be made out of the jurisdiction, not saying where effected, was properly served on defendant at Vancouver, B.C. Where the order fixed 30 days from service of statement of claim as time for delivering statement of defence, *held*, unauthorised, as C. R. 246 allows eight days to deliver defence from expiration of time for appearance. *Armstrong* v. *Proctor* (1909), 14 O. W. R. 765, 1 O. W. N. 82.

See Absconding Debtor — Account — Administrator Pendente Lite — Affidavit — Appeal — Arbitration and Award — Arrest — Assessment and Taxes — Attachment of Debts — Attachment of Goods — Bail — Bailiff — Bankruptcy and Insolvency — Bond — Canada Temperance Act — Certiorari — Company — Consolidation of Actions — Constitutional Law — Contempt of Court — Contract — Conversion — Costs — Courts —Criminal Law — Crown Lands — Defamation—Discovery — Elections—Evidence — Exchequer Court of Canada — Execution — Executors and Administrators — Extradition — Husband and Wife — Infant — Injunction — Interdiction — Interpleader — Judgment — Land Titles Act — Lis Pendens—Lis pendance — Lunatic — Malicious Prosecution and Arrest — Master in Chambers — Mechanics' Liens — Mines and Minerals — Money in Court — Mortgage — Opposition — Particulars — Parties — Partition — Payment — Peremption — Pleading — Procuration — Receiver — Replevin — Revendication—Revivor — Rule Nisi — Saisie-conservatoire — Saisie-Gagerie — Seamen's Act—Settlement of Actions — Ship — Solicitor — Stay of Proceedings — Tabal — Vacation — Vendor and Purchaser — Venue — Will — Witnesses — Writ of Summons.

PRAIRIE FIRE ORDINANCE.

Conviction — Appeal after plea of "guilty" — Application of Ordinance in incorporated town — Offence — Evidence—Amount of penalty on a first conviction — Amendment — Reduction. *Rex* v. *Boid* (Sask.), 8 W. L. R. 65.

See Constitutional Law—Fire.

PRAIRIE FIRES ACT.

See Fire.

PRECATORY TRUST.

See Will.

PRE-EMPTION.

See CROWN LANDS—LAND ACT, B.C. — WATER AND WATERCOURSES.

PREFERENCE.

See BANKRUPTCY AND INSOLVENCY — CHOSE IN ACTION, ASSIGNMENT OF — COLLECTION ACT, NOVA SCOTIA — MECHANICS' LIENS.

PREFERENCE SHARES.

See COMPANY.

PREFERENTIAL LIEN.

See COMPANY.

PRELIMINARY OBJECTIONS.

See PARLIAMENTARY ELECTIONS.

PRESCRIPTION.

Acquisitive prescription — *Title to goods — Agreement for hiring and sale — Presumption — Proof of intervension.*]—One who takes possession of movable effects under a lease or hiring, with the agreement that he shall become owner of them after fulfilment of the conditions and payment in full of the rent, upon which the lessor shall convey to him, having begun his possession as the tenant of another, is always presumed to possess by the same title, and therefore cannot, even at the end of ten years, set up an acquisitive prescription of the effects, without establishing that there has been, in the interval, interversion of his title in the possession.—*Per* Archibald, J., dissenting, that the act designated as a lease or hiring was in reality a sale, and the tenant was in fact a purchaser. Therefore, his possession, from the outset, was for himself and not for another; it was a useful possession which gave him the right of prescription, and there was no need for him to establish an interversion of title. *Macfarlane* v. *Irwin*, 35 Que. S. C. 82.

Negative prescription — *Interruption —Judicial demand — Service by publication in newspapers of order to appear.*]—Interruption of negative prescription takes place by a judicial demand in proper form duly served upon the debtor. If, by reason of his absence, service is made by two insertions in newspapers of an order to appear, as provided in ART. 136, C. P., it is only complete and effectual to interrupt, by the second insertion. Hence, if the term of prescription expires between the first and second, there is no interruption. — *Gauthier* v. *Charlebois*, 35 Que. S. C. 104.

Purchaser of an immovable, who fails to register his title, cannot invoke the ten years' prescription under ART. 2251 C. C., against a third party who has purchased the same property from the same vendor, for a valuable consideration, whose title is registered. Lavergne, J. (*dissentiente*). *Lacroix & Nault* v. *Rousseau* (1900), 18 Que. K. B. 455.

See EASEMENT — FISHERIES — INSURANCE — LIMITATION OF ACTIONS — PENALTY — RENTES CONSTITUEES — TRESPASS —WATER AND WATERCOURSES—WAY.

PRESIDENT OF BANK.

See BANKS AND BANKING.

PRESSURE.

See BILLS OF SALE AND CHATTEL MORTGAGES—FRAUDULENT CONVEYANCE.

PRESUMPTION.

See DEATH — DEED — EVIDENCE—GIFT — HUSBAND AND WIFE — INDIAN — INSURANCE — JUSTICE OF THE PEACE — LANDLORD AND TENANT — MARRIAGE— PARENT AND CHILD — PAYMENT — REGISTRY LAWS — SCHOOLS — SHIP— TRADE UNION — WATER AND WATERCOURSES—WAY—WILL.

PRESUMPTION OF DEATH.

See DISTRIBUTION OF ESTATES.

PREVENTIVE OFFICER.

See REVENUE.

PRINCIPAL AND AGENT.

1. AGENT'S COMMISSION ON SALE OF GOODS.

Advances by agent — Agent's right of action against principal — Lien. *Smith, Tyger & Co.* v. *Zwicker & Sons*, 3 E. L. R. 194.

Agent to sell patent — *Patent actually sold by principal—Commission—Character of the agency — Damages.*]—Riddell, J., *held* that where an owner acts *mala fide* in the sale of goods for the purpose of preventing an agent from making a commission, the agent is entitled to damages. *Wilson* v. *Deacon* (1911), 19 O. W. R. 433, 2 O. W. N. 1229.

Agent who is paid commission on sales by his principal as the latter might make deliveries and obtain payments, is an ordinary creditor; he has no right to seize by conservatory attachment whatever particular moneys may remain due for goods delivered and the work done by him in connection therewith. *Gourdeau* v. *Lyon & Dequise* (1910), 12 Que. P. R. 89.

Agreement by joint owners of mining claims for development — *Work.*]—Action for price of goods sold and delivered. Defendants were joint owners of six mining claims under an agreement for development, which was held to constitute a partnership. After it was dissolved defendant C. shewed it to plaintiffs, not informing them of the termination of his authority, and obtained goods: — *Held*, defendants liable, C. being their agent. *Alice* v. *Braund*, 13 O. W. R. 424.

Commercial usage—*Custom of the parties—Evidence—Commencement of proof in writing.*]—An allegation of a custom and commercial usage is good in law, especially when it is alleged that this custom and usage have always been accepted by the parties in their business dealings and particularly in the transaction which was the basis of the action. An order to a broker or agent, to sell goods on commission, is a civil contract which cannot be proved by oral testimony, and, in a suit by such agent to recover his commission, he cannot testify in his own favour, at least until he has offered commencement of proof in writing. *Laflamme* v. *Dandurand*, 26 Que. S. C. 499.

Commission paid to agent — *Purchase of goods for principal — Liability to account — Remedy — Action.*]—The manager of an industrial company who buys machines for the company must account to the company for sums paid to him by the sellers of the machines by way of commission on the price; and the remedy by action is open to the company to compel him to pay over the sums so received. *Mistabetchouan Pulp Co.* v. *Paquet*, 29 Que. S. C. 211.

Conditions of payment of commission — *Burden of proof — Refusal of principal to accept orders — Grounds for—Factor.*]—1. A commercial agency or an agency on commission is a contract in its nature *à titre onereux*, and the onus is on the party who invokes the conditions of payment contracted for to prove the contract.—2. The condition of approval of the orders obtained by the agent does not depend upon the caprice or the arbitrary decision of the principal; the refusal to accept must rest on sufficient grounds.—3. An agent simply authorised to receive orders for his principal abroad, and who is not in possession of the goods, is not a factor in the sense of Art. 1738, C. C. *Kelly* v. *Hamon*, 35 Que. S. C. 305.

Evidence.]—The appellants dealt in electrical supplies at Halifax, and had at times sold goods on commission for the respondents, a company manufacturing electrical machinery in Montreal. In 1897 the appellants telegraphed the respondents as follows: "Windsor electric station completely burned. Fully insured. Send us quotations for new plant. Will look after your interest." The reply to this was: "Can furnish Windsor 180 Killowatt Stanley two phase complete exciter and switchboard, $4,900, including commission for you. Transformers, large sizes, 75 cents per light . . ." The manager of the appellants went to Windsor, but could not effect a sale of this machinery. Shortly afterwards a travelling agent of the respondents came to Halifax and saw the manager, and they worked together for a short time trying to make a sale, but the agent finally sold a smaller plant to the Windsor company for $1,800. The appellants claimed a commission on this sale, and on its being refused brought an action therefor:—*Held*, Gwynne, J., dissenting, that the appellants were not employed to effect the sale actually made; that the respondents offered the commission only on the sale of the specific plant mentioned in the answer to the request for quotations; and that there was no evidence of any course of dealing between the two companies which would entitle the appellants to such commission. Judgment in 33 N. S. R. 156 affirmed. *Starr, Son & Co.* v. *Royal Electric Co.*, 29 C. L. T. 323, 30 S. C. R. 384.

Principal preventing agent from carrying out sale — *Agreement by agent with rival company.*]—Action for commission on the sale of a threshing engine and separator. Plaintiff introduced the purchaser, but was prevented by action of certain officers of defendant's company from completing the sale. In plaintiff's contract with defendant he was not to sell or canvass for any threshing machines except those manufactured by defendants. His action of entering into an agreement with another company under the circumstances was not a violation of his agreement with the defendants. Plaintiff allowed half of commission. *Graham* v. *Can.* 11 W. L. R. 170.

Remuneration of agent — *Contract—Salary — Customary charges.*]—An agent appointed to carry out a business for his principal under a written agreement which provides for his remuneration by the payment of a stated sum and a commission on sales to be made by him, is not entitled to commission on the acceptance and payment of drafts, usually charged by agents, but not mentioned in the agreement. *McPherson* v. *Brice*, 31 Que. S. C. 218.

Right of agent to recover where sale not completed.]—The defendants entered into an agreement in writing to pay the plaintiffs a commission of five per cent. upon all sales effected in the district of H. and vicinity, on condition that the plaintiffs would give their best services as might be desired from time to time, etc. The plaintiffs assisted the defendants to obtain a contract with the city of H. for the purchase of one of their engines, to be constructed according to specifications attached, provided

the engine, when completed, should undergo certain tests to the satisfaction of persons to be appointed by the city for that purpose. The engine, when completed, failed to undergo the stipulated tests and was not accepted: —*Held*, that the plaintiffs, notwithstanding, were entitled to their commission. *Austen Bros.* v. *Canadian Fire Engine Co.*, 42 N. S. R. 77, 3 E. L. R. 222, 4 E. L. R. 277.

Sale of business — *Quantum meruit.*] —Agent introduced purchaser to principal, who closed the sale at a lower price than that named to agent. Divisional Court *held*, that principal could not accept agent's purchaser and repudiated all liability. Recovery would not necessarily be upon the higher price named, but would be upon a *quantum meruit*. *Toulmin* v. *Miller*, 58 L. T. 96, followed. *Cronk* v. *Cormack* (1910), 19 O. W. R. 145, 2 O. W. N. 1027.

Sale of goods by agent — Commissions —Territory — Contract. *Banfield* v. *Hamilton Brass Mfg. Co.*, 1 O. W. R. 293, 2 O. W. R. 837.

Summary matters — *Action for reimbursement of overpaid commission — Exception to the form.*]—An action by a trader to be reimbursed by a salesman of the amount of overpaid commission is summary, coming under ss. 3 and 7 of Art. 1150 C. P. *Office Specialty Co.* v. *Muir*, 11 Que. P. R. 44.

Territory — Assistance of principal in making sales — Contract — Evidence — Counterclaim — Negligence of agent — Injury to goods — Burden of proof — Act of God. *Mathieson* v. *Murphy*, 7 W. L. R. 479.

Time for payment — Rate of commission — Contract — Correspondence — Payment for samples sent to agent. *Hovenden* v. *O. C. Hawkes Limited*, 7 O. W. R. 132, 437.

Transfer of agency for sale of goods —*Agreement to pay percentage on goods sold by transferee.*] — After discovery an embarrassing amendment was allowed to the statement of claim. No defence was pleaded to this amendment:—*Held*, on appeal, that the trial Judge should not have given judgment as he should not have allowed the amendment. Appeal allowed. *Anderson* v. *Olsen* (1909), 12 W. L. R. 262.

Usurious transactions — *Commission of five per cent. besides interest—Customary allowance for transacting business.*]—Where a merchant supplied goods, money, promissory notes and other commercial instruments to country customers and where accounts, returns and settlements were made from time to time at their convenience with produce from the upper country, transferred by vessels and barges, the Privy Council *held*, that a commission of five per cent. on all advances besides interest, under the circumstances, was not an usurious transaction, but a customary allowance for the trouble and inconvenience of transacting the business. *Pollock* v. *Bradbury* (1853), C. R. 2 A. C. 46.

2. AGENT'S COMMISSION ON SALE OF LANDS.

Absence of contract — Services rendered — *Quantum meruit. Deneau* v. *Lemieux*, 4 E. L. R. 93.

Action to recover — *Sale not effected through plaintiffs, but by other agents.*]— Plaintiffs brought action to recover a commission for effecting the sale of certain property in Toronto.—Britton, J., *held*, 18 O. W. R. 894, 2 O. W. N. 938, that although plaintiff's agent accompanied defendant vendor and the ultimate purchaser to see the property, the plaintiff did not bring the purchaser into relation with defendants before a sale honestly made by the defendants through other agents and without any knowledge that plaintiffs had seen the purchaser. Action dismissed with costs. *Burchill* v. *Gowrie*, C. R. [1910] A. C. 259, followed. Divisional Court *held* that the agent was not entitled to his commission as he was not an exclusive agent, and there was no contract, but a mere offer, which had not been accepted. *Robins* v. *Hees* (1911), 19 O. W. R. 277, 2 O. W. N. 1150.

Agent bringing principal and purchaser together — *Sale on new terms — Quantum meruit.*]—Where a sale of land is effected by the principal to persons introduced by the agent, such agent is entitled to remuneration, notwithstanding that the price realised was less than that at which the property was originally listed. *Milestone Land & Loan Agency* v. *Lucksinger*, 7 W. L. R. 497, 1 Sask. L. R. 61.

Agent bringing vendor and purchaser together — Land subsequently sold on terms different from those on which agent authorised to sell — Pleading—Amendment. *Ings* v. *Ross* (N.W.T.), 6 W. L. R. 612.

Agent bringing vendor and purchaser together — Negotiations broken off—Subsequent renewal and conclusions at higher price without intervention of agent. *Philip* v. *Bauer* (B.C.), 5 W. L. R. 187.

Agent employed to find purchaser— *Sale by principal to purchaser found by agent.*]—Appeal from order 9 W. L. R. 646, dismissed. Plaintiff had earned commission by producing a purchaser who actually bought. *Hughes* v. *Houghton*, 11 W. L. R. 100.

Agent finding purchaser.]—Action by agent for balance of commission. He obtained a purchaser, an agreement was signed, a deposit paid, and purchaser went into possession. Plaintiff agreed to wait for his commission until a loan made or the property sold again. The purchaser subsequently abandoned the property, and the defendant cancelled the agreement:—*Held*, he was now liable to pay the commission, although no loan made or sale made. *McCallum* v. *Russell* (1909), 12 W. L. R. 267.

Agreement for commission — Forfeited deposit — Right of agent to expenses —Commission on deposit. *Grace* v. *Hart*, 23 C. L. T. 239.

Agreement for sale procured by agent — Terms of sale not authorised by principal. *Boyle* v. *Grassick* (N.W.T.), 2 W. L. R. 99, 284.

Agreement to pay commission.]—A plaintiff who sues as a real estate agent and claims $3,25 as a commission of 2½ per cent. agreed upon for procuring the purchase of real estate for the price of $13,000, may prove the agreement by testimony. He may also urge his claim as one *de in rem verso* (Art. 1046, C. C.), and prove in like manner his services, their value and a customary commission of 2½ per cent, on such transactions. *Zaid* v. *Delicato*, 37 Que. S. C. 159.

Agreement to pay commission only in event of purchase-money being paid *Cancellation of sale by consent—Subsequent re-sale — Bona fides.*] — The defendants sold land to B. through the instrumentality of the plaintiffs acting as agents for the defendants. The defendants agreed to pay the plaintiffs $2,400 as commission by instalments, the dates for payment of the instalments being contemporaneous with the dates agreed upon by the defendants and B. for the payment of the instalments of the purchase-money by the latter. The agreement between the plaintiffs and defendants contained a proviso that the amount payable thereunder should be payable only in case the defendants should receive the amounts due under the agreement with B. B. made only one payment under his contract, and the plaintiffs received their proportion of that. B. failed to make the other payments, and the contract between B. and the defendants was cancelled by consent, B. returning his copy to the defendants, who retained the amount paid to them:—*Held*, that the plaintiffs were not entitled to recover the balance of their commission, although B. subsequently re-purchased the land from the defendants, there being nothing in the evidence to lead to the suspicion that the cancellation of the first agreement and the making of the second was for the purpose of evading payment of the plaintiffs' claim.—*Glendinning* v. *Cavanagh*, 40 S. C. R., distinguished. *Hammer* v. *Bullock* (1910), 14 W. L. R. 652.

Agreement to pay commission on agent obtaining purchaser — *Vendor and purchaser brought together through medium of third person.*]—An agent to earn his commission must be direct cause of the sale. He cannot mention it to a person who afterwards mentions it to the purchaser. The agent must bring vendor and purchaser together. *Vachon* v. *Stratton*, 10 W. L. R. 157, 2 Sask. L. R. 72.

Amount of commission — Evidence—Dealings with father and son. *Land* v. *Gesche* (N.W.T.), 2 W. L. R. 456.

Authority for manager of company to employ agents — *Agreement as to remuneration — Purchaser found by agent—Secret arrangement to divide commission with manager of company.*]—Action by real estate agent to recover commission.—*Held*, (1) that the plaintiffs were employed to find a purchaser at a commission of 5 per cent.; (2) that the purchaser had not broken off all negotiations, but negotiated directly with vendors; (3) that plaintiffs are not estopped from recovering owing to secret arrangement with company's manager to divide commission. Judgment in plaintiffs' favour for half commission. *Miner* v. *Magic Lumber Co.*, 10 W. L. R. 242.

Binding purchaser — *Subsequent negotiations — Appeal — Reversal of findings of fact.*]—The defendant commissioned the plaintiff to sell his house and lot, and agreed to pay 5 per cent. commission; the plaintiff offered it to R., the tenant, who paid the rent to the plaintiff as agent for the defendant, who did not want to buy at the time; the defendant became dissatisfied at the plaintiff's not being able to sell, and told him he was going to put the property in other agents' hand for sale, but not withdrawing it from the plaintiff's, and that his price was $3,000 net, and whoever sold it was to look for remuneration to what he could get a purchaser to pay above that sum; another agent sold to R. for $3,150, the defendant realising $3,000:—*Held*, that the plaintiff was not entitled to commission in respect of the sale. Observations on reversing a finding of fact on a trial in which the evidence was not taken in shorthand. *Johnson* v. *Appleton*, 11 B. C. R. 128, 1 W. L. R. 14.

Breach of duty — *Secret profit.*]—D. represented to the manager of a land corporation that he could obtain a purchaser of a block of land, and was given the right to do so up to a fixed date. He negotiated with a purchaser who was anxious to buy but wanted time to arrange for funds. D. gave him time, for which the purchaser agreed to pay $500. The sale was carried out, and D. sued for his commission, not having then received the $500:—*Held*, reversing the judgment appealed from, 14 Man. L. R. 253, 23 C. L. T. 26, that the consent of D. to accept the $500 was a breach of his duty as agent for the corporation, which disentitled him to recover the commission. *Davidson* v. *Manitoba & North-West Land Corporation*, 21 C. L. T. 51; *Manitoba & North-West Land Corporation* v. *Davidson*, 34 S. C. R. 255.

Commission on sale — *2½% allowed.*]—Action for a commission for sale of Humberstone Farm to one John Firstbrook, for $24,750, and plaintiff claimed $1,237.50. At trial, Sir John Boyd, C., gave plaintiff's judgment for above amount. Divisional Court *Held*, that plaintiff's did not in fact effect a sale, and upon the evidence the Court could not say that they really did anything which proved to be of advantage to defendants, or to bring the price up to the amount ultimately obtained by the defendants. And that a commission of 2½% would be abundantly ample compensation. The appeal allowed to extent of reducing the amount to $618.75, and directed judgment to be entered for that amount with costs of action. No costs of appeal. *Waddington* v. *Hambleshaw* (1910), 15 O. W. R. 824.

Completion of contract *by owner on altered terms—Efficient cause of sale.*]—An agent, instructed to secure a purchaser for lands, introduced a prospective purchaser who associated himself with other persons, whose identity was unknown to the agent, to carry out the purchase of the property. The individual thus introduced and his associates

subsequently carried on negotiations with the owner personally which resulted in the purchase, on altered terms, of the property in question, together with other lands, by his associates alone while he retired from the transaction. The owner refused to pay the agent any commission on the sale on the ground that he had not been the efficient cause of the sale which was finally made as above stated:—*Held*, reversing, in part, the judgment appealed from, 3 Sask. L. R. 286, W. L. R. , that as the steps taken by the agent had brought the owner into relation with the persons who finally became purchasers, he was entitled to recover the customary commission upon the price at which the property in question had been sold. *Burchell* v. *Gowrie and Blockhouse Collieries*, C. R. [1910] A. C. 250, applied. *Stratton* v. *Vachon* (1911), 44 S. C. R. 295.

Conflicting evidence — Corroboration. *Scott* v. *Benjamin* (N.W.T.), 2 W. L. R. 528.

Contract — Condition — Payment of part of price—Option—Abandonment. *Wiley* v. *Blum*, 10 O. W. R. 595.

Contract — *Consideration — Revocation of agency.*]—The plaintiffs, being entitled to a commission for finding a purchaser for the defendant's farm placed in their hands for sale, consented to forego the commission on the defendant giving them the special sole right to sell the land for a fixed higher price within a time named:—*Held*, that the defendant could not revoke the agency thus conferred, and was liable in damages for having, before the expiration of the time limited, notified the plaintiffs that he would not sell. —A special agreement of agency founded on a distinct and valuable consideration cannot be revoked at the will of the principal. *Richardson* v. *McClary*, 3 W. L. R. 141, 16 Man. L. R. 69.

Contract—Construction—Evidence. *McCallum* v. *Williams* (N. S. 1910), 9 E. L. R. 141.

Contract — *Efforts of agent.*]—An agent employed to sell land upon commission is entitled to recover commission upon a sale resulting from negotiations brought about by his efforts. *Schuchard* v. *Drinkle*, 7 W. L. R. 844, 1 Sask. L. R. 16.

Contract — Sale of coal mining areas—Option—Original terms of sale not carried out—Manager of company acting as agent—New contract of sale—Right to commission. *Burchell* v. *Gowrie Mines* (N.S.), 6 E. L. R. 420.

Contract of agency — Construction — Termination — *Quantum meruit. Buckworth* v. *Nelson & Fort Sheppard Ry. Co.*, 8 W. L. R. 43, 9 W. L. R. 490.

Contract to pay commission — *Construction — "Completion of the sale"—Execution of binding agreement.*]—A dispute having arisen as to the plaintiff's right to a commission on the sale of certain property belonging to the defendant, the former claiming $5,000, the latter denying liability for anything, the parties compromised at $2,000, and the defendant gave the plaintiffs a letter which was in part as follows: "In connection with the sale of *(description)* from Mrs. Cordingly and myself to John A. Lock *et al.*, I hereby agree that on the completion of the said sale, I will pay your firm a commission of $2,000 , this amount to be paid on completion of the deal." The purchaser had previously made a deposit of $2,000, but had not signed a formal agreement of purchase. A few days afterwards the formal agreement was executed by all parties, and a further payment of $8,000 was made. The purchaser made default in payment of further instalments of the purchase money, and the defendant took back the land, retaining all money paid, and released the purchaser from further liability. The defendant resisted the action for the $2,000 commission on the ground that the sale had not been completed within the meaning of his letter. He had, however, on several occasions after the agreement had been executed asked time for payment of the $2,000:—*Held*, that, interpreting the letter in the sense in which the parties intended the words to be understood at the time, as gathered from the document itself and the surrounding circumstances and the defendant's promises to pay, what the parties meant by the words "completion of sale" and "completion of the deal" was the execution of a binding agreement of sale; and the plaintiffs were entitled to recover. *Haffner* v. *Cordingly*, 7 W. L. R. 764, 8 W. L. R. 743, 18 Man. L. R. 1.

Contract to pay commission — *Duration and expiry.*]—A principal who commits the sale of an immovable to a real estate agent, on commission, for a period of 6 months, and after the expiration of that time, renews the mandate, under modified conditions, for a further period of 6 months, and afterwards himself sells the property, owes no commission to the agent. The facts, (a) that the latter had put up an advertisement board on the property with his address thereon, which was not removed after the period of the renewed mandate up to the time of the sale; (b) that the purchaser, whose attention was attracted by this advertisement, first applied to the agent before dealing with the owner, and (c) that the latter had written a letter giving the agent liberty to sell at a figure clear to himself (the owner), higher than that afterwards obtained, do not imply a continuance of the agency, nor an undertaking to pay a commission, nor do they afford a commencement of proof in writing of such an undertaking. *Donovan* v. *Hyde* (1908), 18 Que. K. B. 319, 6 E. L. R. 205.

Employment of agent — *Evidence — Appeal from trial Judge's findings of fact.*] —Action for commission for finding and introducing a purchaser for land owned by the defendant. The plaintiffs were carpenters occupying a shop on the property as tenants of the defendant. They were not real estate agents, but had occasionally earned commissions on sales. The plaintiffs had discussed price and terms with the defendant on several occasions with the view of their affecting a sale, and on one occasion had introduced to him a prospective purchaser, and it was agreed that if that sale went through the

plaintiffs should be entitled to a commission, but no general agency to sell had been conferred upon them. One Forrester, passing by the property and thinking that it might be suitable for his purpose, entered the plaintiffs' shop and inquired of the plaintiff Robertson if the property was for sale. Robertson informed him it was. Did he know the owner. Yes, Mr. Carstens. And the price? $16,000. Could it not be bought for less? Robertson would inquire, and at once called up the defendant by telephone. What followed is thus stated in the judgment of the majority of the Court, reversing in part the findings of fact by the trial Judge. Robertson told the defendant that he had a prospective purchaser for his property and asked his best terms. The defendant said $15,000. Robertson then asked if the defendant would pay his commission out of that, and the defendant said he would. Robertson told the defendant he would have the purchaser call and see him. He then quoted the new price to Forrester, wrote the defendant's name and address on a card which he handed to Forrester, and asked him to present it to the defendant when they met. The defendant met Forrester by appointment the same evening, when, after some negotiations, he gave Forrester an option on the premises for $14,000 cash. The sale was completed next day for that sum. Forrester did not mention Robertson's name to the defendant, and the latter said he did not associate Forrester with his telephone conversation with Robertson. The defendant saw the plaintiffs a few hours after the completion of the sale, when the plaintiffs promptly claimed their commission:—*Held*, that the defendant was put upon inquiry when a prospective purchaser appeared a few hours after the conversation with Robertson, and he should have ascertained that Forrester was the person referred to by Robertson, and that, upon the above findings, the plaintiffs were entitled to commission on the $14,000 at the usual rate. *Cathcart* v. *Bacon*, 49 N. W. R. 331, and *Quist* v. *Goodfellow*, 110 N. W. R. 65, followed. *Robertson* v. *Carstens*, 18 Man. L. R. 227, 7 W. L. R. 742, 9 W. L. R. 397.

Employment of agent — *Sale effected through instrumentality of agent.*]—Action for commission on sale of land. Judgment given for plaintiff at trial. An appeal dismissed. Plaintiff has made out a *prima facie* case. *Lalonde* v. *Caravan*, 11 W. L. R. 243.

Employment of agent by vendor to find purchaser — Contract — Acceptance of purchaser found—Sale not completed owing to fault of vendor—Right to payment for services. *Bagshawe* v. *Rowland* (B.C.), 7 W. L. R. 158.

Evidence to prove husband's agency for wife — *Building contract — Mechanic's lien.*]—*Held*, in an action to enforce a mechanic's lien, that a husband's authority to enter into a contract on behalf of his wife, for the construction of stone foundations on four lots of land belonging to her, was sufficiently established by proofs of the following facts:—1. Prior to the date of the contract the wife entered into what was called a building-loan agreement in respect of each of the four lots. Each agreement provided, amongst other things, that she would forthwith proceed to erect a frame building with stone foundation on the lot named. These agreements were signed by the wife personally. Subsequently four several applications for loans on the several lots were made. These applications were signed by the husband in the wife's name, and the wife acted upon them and recognized the loans made pursuant thereto.—2. During the progress of the plaintiff's work the wife came with her husband and saw the work proceeding, but made no objection to it, and she and her husband went frequently to the loan company's office together, and gave directions as to the buildings. *Gillies* v. *Gibson*, 7 W. L. R. 243, 17 Man. L. R. 479.

Exchange — Agents bringing parties together — Evidence — Conflict — Probabilities—Reversal of finding of fact of trial Judge. *Thordarson* v. *Jones*, *Thordarson* v. *Heale* (Man.), 7 W. L. R. 106.

Exchange of lands — *Double commission.*]—An agent acting for and representing the vendor of real estate is not entitled, in the absence of an agreement to that effect, to recover from the purchaser a commission on the value of a property belonging to the latter, which was accepted by and transferred to the vendor in part payment of the price. *Broome* v. *Gault*, 19 Que. S. C. 523.

Exchange of properties negotiated for principal — *Exchange effected with agent's partner — Position of agent incompatible with duty to principal.*]—R., a real estate agent, introduced defendant to plaintiff, also a real estate agent. The latter received from defendant instructions to sell the interests of defendant in certain lands. An exchange was effected of a portion of these interests for a farm owned by R. in Missouri. Plaintiff now sued for a commission:—*Held*, that he cannot recover as he was serving the interests of his partner R., rather than that of the defendant. *Onsum* v. *Hunt* (1910), 12 W. L. R. 680.

Exclusive right of sale — *Commission —Contract.*]—In order to vest a real estate agent with the exclusive right of sale of an immovable, and entitle him to a commission, there must be a contract in writing, or, at least, an equivalent admission on the part of the owner, of the existence of a contract. The mere statement of a price which the owner is willing to take, and of a commission which he is willing to pay, does not constitute such a contract. *Mainwaring* v. *Crane*, 22 Que. S. C. 67.

Failure to prove contract of employment as agent — *Failure to procure purchaser able to carry out purchase.*]—Action for commission on sale of hotel premises. The purchaser appeared willing and ready to pay but was not able. Plaintiff's action dismissed. *Coward* v. *Lloyd*, 11 W. L. R. 328.

Affirmed (1909) 12 W. L. R. 497.

Farm — *Sale effected without aid or knowledge of agent.*]—Plaintiff, a real estate agent, brought action to recover a commission of 2½ per cent. on the sale of defendant's farm to one Scott. Plaintiff was wholly ignorant of Scott's existence until after the sale of the farm, and defendant did not know or hear of Scott until he entered into nego-

tiations with him for the sale of the farm: —*Held*, that plaintiff was not entitled. Action dismissed. *Willis* v. *Colville* (1909), 14 O. W. R. 1019, 1 O. W. N. 212.

Finding purchaser — Contract — Purchaser declining to complete. *Copeland* v. *Wedlock*, 6 O. W. R. 539.

Finding purchaser — *Subsequent sale to another — Personal liability of vendor — Property standing in name of another—Special circumstances.*]—The defendant, living in New York, placed a farm in the hands of the plaintiff and S., two different real estate agents in Winnipeg, for sale. The plaintiff found a purchaser at $12 per acre in cash, and informed the defendant by letter. The defendant replied accepting the offer, but asking the plaintiff to call on S., and arrange regarding commission so as to avoid having to pay more than one commission. The plaintiff did not communicate with S., but introduced his purchaser to the defendant's solicitor in Winnipeg. This purchaser paid the solicitor $500 on account, and was ready and willing to pay the balance on receipt of a transfer. Meantime S. also made a sale of the farm at the same price. This latter sale was carried through by the defendant, who paid S. the usual commission: —*Held*, that the plaintiff was also entitled to his commission, as he had done all that was necessary to earn it; and that, notwithstanding that the title to the property was, to the knowledge of the plaintiff, in the defendant's father, from whom the defendant had a power of attorney to sell and convey it, the defendant's letters, statements, and conduct throughout justified the plaintiff in looking to the defendant alone for his commission. *Bell* v. *Rokeby*, 15 Man. L. R. 327, 1 W. L. R. 124, 531.

Hotel property — *Purchaser found by agent—Principal declining to complete sale —Right to commission.*]—Action for commission. Agent found purchaser who was ready to buy, but after terms settled, defendant, the vendor, wished some of the terms varied, resulting in the purchaser backing out. As plaintiff had done all he could, he is entitled to judgment. *Cuthbert* v. *Campbell* (1909), 12 W. L. R. 219.

Information furnished by agent — *Sale not made by agent—Quantum meruit.*] —The plaintiff's testator agreed to pay the defendant, a broker, a commission on his obtaining a purchaser for the testator's hotel property, who could purchase at prices and on terms agreeable to the testator. The defendant found a man (B.) who was willing to purchase the property, on behalf of himself and two associates (M. and R.) at the testator's price, but the terms as to cash payment did not suit them, and they decided not to buy. M. and R. afterwards negotiated directly with the testator, and agreed to purchase the property from him at the price before named, but on terms as to cash payment more favourable to them. They did not know the defendant, nor that he had the property for sale, and the testator did not know that they had come to him as a result of the defendant's negotiations with B., or that the defendant had been in any way instrumental in procuring them as purchasers: —*Held*, upon these facts, Johnstone, J., dissenting, that the defendant was not entitled to a commission on the sale to M. and R., nor to payment on the basis of a *quantum meruit* for his services.—*Locators* v. *Clough*, 17 Man. L. R. 659, approved and followed. —Judgment of Newlands, J., 10 W. L. R. 157, affirmed. *Vachon* v. *Straton* (1910), 14 W. L. R. 3, 3 Sask. L. R. 286.

Introduction of prospective purchaser — Subsequent sale — Revocation— Agency — Dealing with another agent — Scheme to deprive agent of commission. *Hunter, Cooper & Co.* v. *Bunnell* (Man.), 3 W. L. R. 229.

Land agent.]—The defendant, knowing that the plaintiff was a land agent, arranged with the plaintiff to procure for him a purchaser for a lot of land of his at a named price. Through the plaintiff's intervention a proposed purchaser was procured, and a purchase discussed; the result, however, was that a lease was entered into of the premises for three years, with a collateral agreement giving him the option of purchasing within a year, which he exercised, and purchased the property:—*Held*, that the plaintiff was entitled to his commission from the defendant. *Morson* v. *Burnside*, 20 C. L. T. 169, 31 O. R. 438.

Mill — Employment as agent — Evidence —Remuneration. *Monsees* v. *Tait* (N.W.T.), 4 W. L. R. 322.

Mining property—*Contract—Alteration —Evidence—Option of purchase for cash— Substituted agreement—Basis for payment of commission.*]—In an action for an agent's commission for bringing about a sale of property, the question is—what are the terms of the particular contract?—*Held*, on the evidence, that the original contract between the plaintiff and defendants in regard to commission had been superseded by a subsequent agreement, which was the final agreement, binding on both parties.—This agreement was made after the plaintiff had introduced the purchaser, C., to the defendants, and the defendants had given C. an option of purchase, and provided for payment of commission, not only on the existing C. option, under which the purchase-price was to be entirely in cash, but also "under any agreement which may hereafter be substituted by C. or his assigns." These words were struck out of the document as produced in Court, and the alteration initialled by the plaintiff:—*Held*, that evidence to shew what occurred at the time of the execution of this document leading up to the alteration was admissible; and that evidence, being admitted shewed that it was clearly understood by both plaintiff and defendants that commission was to be paid only under the circumstances therein set forth.—The cash sale was not carried out, but a new and different agreement was made between the defendants and C. whereby the principal part of the purchase-price was payable in shares: —*Held*, that the contract was to pay commission only in the event of the original option being taken up; and the plaintiff, having received his commission on such cash payments as were made under it, was not entitled to anything more by way of commission based on the agreement as to the

shares.—No fraud being alleged in the pleadings, evidence pointing in the direction of fraud was excluded. *Beveridge* v. *Aweya & Co.* (1910), 15 W. L. R. 634. B. C. R.

Mining property — *Introduction of purchaser—Effective cause of sale.*]—Plaintiff brought action to recover an agreed commission on the purchase money of a sale of a mine by defendant company. Privy Council, *held*, that where an agent, employed to sell property on commission, introduces to his principal an intending purchaser, and the principal behind the back of the agent, and without his knowledge, sells to that person so introduced, on terms which the agent had advised his principal not to accept, the agent is entitled to the commission as his act was the effective cause of the sale. Judgments of the Supreme Court of Canada and of the Supreme Court of Nova Scotia reversed; judgment of the Official Referee restored. *Burchell* v. *Gowrie, C. R.*, [1910] A. C. 250, 80 L. J. P. C. 41, [1910] A. C. 614, 103 L. T. R. 325, 8 E. L. R. 532.

Followed in *Soger* v. *Sheffer* (1911), 18 O. W. R. 485, 2 O. W. N. 671.

Distinguished in *Robins* v. *Hees* (1911), 18 O. W. R. 894, 2 O. W. N. 938. Affirmed 19 O. W. R. 277; 2 O. W. N. 1150.

Applied in *Stratton* v. *Vachon*, 44 S. C. R. 395.

Misrepresentation — *Mistake.*] — Action for commission for sale of hotel property. Plaintiffs obtained a purchaser and had an agreement for sale executed. Defendant disputed payment of commission as agreement was not the real agreement. Judgment for plaintiff. *McCuish* v. *Cook*, 9 W. L. R. 304. Appeal allowed. 10 W. L. R. 349.

Negotiation with purchaser — *Subsequent sale by principal on different terms—Purchaser not procured by agent—Quantum meruit.*]—Where the plaintiffs, who were agents for the sale of the defendants' hotel property, saw a person mentioned to them by the defendants as a likely purchaser, but did not procure him as a purchaser, and the defendants themselves afterwards effected a sale to the same person, but on different terms and at a lower price than those upon which the plaintiffs had been instructed to sell:—*Held*, that they were not entitled to a commission nor to payment for their services on a *quantum meruit* basis.—*Reser* v. *Yates*, 41 S. C. R. 577, followed.—*Boyle* v. *Grassick*, 2 W. L. R. 284, distinguished. *Blackstock* v. *Bell* (1910), 14 W. L. R. 519, 3 Sask. L. R. 181.

Negotiations for purchase — Agent a member of purchasing syndicate—No contract made — Subsequent contract through another agent — Introduction by plaintiff. *Murray* v. *Craig*, 10 O. W. R. 888.

Payment on plaintiff producing purchaser—*Refusal of defendant to make sale—Non-fulfilment of condition.*]—The defendant agreed for a good consideration that, if the plaintiff would, within a time fixed, produce to him a *bona fide* purchaser willing to enter into an agreement to purchase certain lands at named prices and ready and willing to pay one-quarter of the purchase money in cash, and who had signed an offer in writing therefor, then, he, the defendant, would pay to the plaintiff 25 per cent. commission on such purchase price, in case the defendant refused to make the sale. On the 13th March, and within the limited time, an agent of the plaintiff received from A. M. Lewis an offer in writing to purchase the lands in question, on the terms and at the prices mentioned in the defendant's agreement, coupled, however, with the statement that, if not accepted before 10 o'clock a.m. on the 16th March, the offer would be withdrawn. The agent at once wrote to the plaintiff informing him of the offer and its condition, and urging haste in communicating it to the defendant, but without disclosing the name of the purchaser. The plaintiff, who lived in Winnipeg, received the letter on the morning of the 14th, and made every effort by telegram and letter to induce the defendant, who lived in Gretna, to accept the offer, informing him fully of the terms of the offer and its conditions, but not giving the name of the purchaser, which the plaintiff did not then know himself. The defendant wrote by first mail to his solicitor in Winnipeg, instructing him to see the plaintiff and make inquiries, and communicate the result by telephone in the evening of the 15th. The solicitor met the plaintiff in the afternoon of the 15th, and ascertained all particulars, including the name of the purchaser, and spoke to the defendant over the long distance telephone between 6 and 7 o'clock in the evening, when he received instructions to accept the offer; but, through some mischance, the plaintiff was not informed of this in time to allow him to notify Lewis of the acceptance before 10 o'clock on the 16th, and the offer was withdrawn at that hour.—The plaintiff sued for the 25 per cent. commission, contending that he had produced a purchaser in accordance with the agreement, and that, under the circumstances, it should be held that the defendant had refused to make the sale: — *Held*, that the plaintiff could not recover.—*Per* Howell, C.J.A., that the plaintiff did not produce a *bona fide* purchaser willing to enter into such an agreement as was referred to. An offer, which had to be accepted in less than two days after the defendant received it, was not an offer contemplated by the agreement.—*Per* Phippen, J.A., that the plaintiff had to produce a purchaser, and neither his telegram nor his letter did this. The earliest production was when the name was mentioned to the defendant's solicitor, and the solicitor was entitled to a reasonable time to communicate the name to his client. *Rogers* v. *Braun*, 4 W. L. R. 40, 16 Man. L. R. 580.

Percentage rate — On what amount commission payable — Change in form of transaction — Continuity of transaction — Substitution of purchaser. *Cavanagh* v. *Glendinning*, 10 O. W. R. 475.

Procuring purchaser — *Company law — Commercial corporation — Contract — Powers of general manager.*]—A land broker volunteered to make a sale of real estate owned by a trading corporation, and obtained from the general manager a statement of the price and other particulars, with that object in view. He brought a person to the manager who was able and willing to purchase at the price mentioned, and who,

after some discussion, made a deposit on account of the price and proposed a slight variation as to the terms. They failed to close, and the manager sold to another person on the following day. The broker claimed his commission as agent for the sale of the property, having found a qualified purchaser at the price quoted:—*Held*, affirming the judgment in 14 Man. L. R. 650, Taschereau, C.J.C., and Girouard, J., *dubitantibus*, that the broker could not recover a commission, as he had failed to secure a purchaser on the terms specified. Under the circumstances, as the owner did not accept the purchaser produced and close the deal with him, there could be no inference of the request necessary in law as the basis of an obligation to pay the plaintiff a commission. *Per* Taschereau, C.J.C., and Girouard, J., that the general manager of a commercial corporation could not make a binding agreement for the sale of its real estate without special authorisation for that purpose. *Calloway* v. *Stobart Sons & Co.*, 35 S. C. R. 301.

Procuring a purchaser.]—In an action by land agents for commission on the sale of land, the trial Judge found, on conflicting evidence, that the plaintiffs had procured the purchaser who bought from the defendant, although the plaintiffs did not obtain a deposit or a writing from the purchaser:—*Held*, that there was no reason to differ from the finding, and, upon it, the plaintiffs were entitled to their commission.—Judgment of a County Court Judge affirmed. *Ross* v. *Matheson* (1910), 13 W. L. R. 490.

Procuring purchaser for land—*Terms of purchase — Security.*] — In an action by land agents to recover a commission as remuneration for their services in procuring a purchaser for land placed by the defendant in their hands for sale:—*Held*, upon the evidence, that the plaintiffs had not procured a purchaser upon the defendant's terms, which included the giving of security by the purchaser if only $1,000 was paid in cash; and the plaintiffs could not succeed. *Millar & Ross* v. *Napper* (1910), 14 W. L. R. 335.

Procuring purchaser ready and willing to buy — *Terms of sale.*]—Plaintiff sued the executrix of S. to recover commission on the sale of certain property. The trial Judge entered a non-suit, and an appeal was dismissed. Plaintiff's authority was limited, and did not confer the power of entering into a binding contract without further consultation with the vendor, and the additional term giving the purchaser the privilege of paying off at any time was unauthorised. *Egan* v. *Simons*, 11 W. L. R. 319.

Procuring purchaser ready and willing to carry out purchase — *Conditions —Deposit of price — Compliance with instructions—Vendor refusing to complete— Remuneration for procuring purchaser.*]—A broker instructed to sell lands for a price to be deposited in a bank pending arrival of clear title, procured a purchaser who made the deposit to his own credit without appropriating it to any special purpose. On refusal by the vendor to complete the bargain, the broker sued him for a commission or remuneration for the service rendered:—*Held*, reversing the judgment in *Yates* v. *Reser*, 1 Sask. L. R. 247, 7 W. L. R. 848, Idington, J., dissenting, that there had not been such compliance with the terms of the instructions as would entitle the broker to recover commission or remuneration for his services in procuring a purchaser. *Reser* v. *Yates*, 41 S. C. R. 577.

Purchase by agent in his own name —*Non-disclosure of existence of intending purchaser—Subsequent agreement for sale at an advance—Sale to agent set aside—Return of chattel property—Damages for conversion.*]—The plaintiff had retained a company, of which the defendant was secretary, as his agents for the sale of a farm. The defendant, in negotiation with M., an intending purchaser, offered him the farm, stock, and implements for $6,500, the plaintiff having named $6,000 as the price of the farm, stock, implements, and crop. While M. was considering the offer, the defendant himself, without disclosing the facts as to M., offered to give the $6,000 asked by the plaintiff, and an agreement was signed accordingly for the purchase by the defendant of the farm, stock, implements, and crop for $6,000. A few days later the defendant made an agreement with M. to sell him the farm, stock, implements, and a part of the crop for $6,900. The plaintiff, learning of this shortly afterwards, repudiated his agreement with the defendant, and brought this action to set it aside. M. then asked for a release from his contract, and the defendant released him:—*Held*, that the defendant was the plaintiff's agent, and, as he did not disclose to his principal the fact that the property had been offered to M. for $6,500 without the crop, and that M. was then considering the offer, the transaction between the plaintiff and defendant could not stand.—The defendant took the stock, implements and crop out of the plaintiff's possession by replevin proceedings.—*Held*, that the plaintiff was entitled to a return of such of the goods as had not been converted and to damages for the conversion of part. *Newstead* v. *Rowe* (1910), 14 W. L. R. 509, 3 Sask. L. R. 176.

Purchase of land—*Secret commission received by agent from vendor—Liability to account.*]—The defendant, as agent for the plaintiffs, bought for them 70 acres of land, and received from the vendor a present of 5 acres of land, which he sold for $1,000:—*Held*, that this was a secret commission or profit which belonged to the plaintiffs as the defendant's principals; and they were entitled to recover from him $1,000. *Morrison* v. *Thompson*, L. R. 9 Que. B. 480, followed. *Mitchell* v. *Sparling* (1910), 14 W. L. R. 268, 3 Sask. L. R. 213.

Purchase of land by agent—Compensation—Liability as trustee—Indemnity — Account — Mortgage — Release of surety. *Murphy* v. *Brodie*, 1 O. W. R. 429, 681, 2 O. W. R. 106, 3 O. W. R. 508.

Purchaser found—*Agreement for lower price—Quantum meruit.*] — The plaintiffs, whom the defendant knew to be real estate agents, called on the defendant and ascertained from him that his house was for sale at $14,000, nothing being said about a com-

mission. Shortly afterwards, the plaintiffs introduced a purchaser for the property, who, after inspection, authorised the plaintiffs to offer $12,500. On this offer being communicated to the defendant, he told the plaintiffs that he would not accept any less than $14,000, and that he wanted that net, which the plaintiffs understood meant clear of commission. The plaintiffs tried to induce the purchaser to buy on these terms, but he afterwards dealt with the defendant directly and bought the property for $14,000:—*Held*, Perdue, J., dissenting, that the plaintiffs were entitled on a *quantum meruit* to recover the full amount of the usual commission on the $14,000. *Wolf* v. *Tait*, 4 Man. L. R. 59, *Wilkinson* v. *Martin*, 8 C. & P. 1, and *Morson* v. *Burnside*, 31 O. R. 438, followed. *Aikins* v. *Allan*, 24 C. L. T. 154, 14 Man. L. R. 549.

Purchaser found—*Alteration of terms without agent's intervention—Evidence — Credibility—Appeal.*]—The defendant had a property for sale which he had placed in the hands of several estate agents. The plaintiff, who was not known to the defendant to be a real estate agent, and who had no office as such, went to the defendant, ascertained that the property was for sale, and asked the terms, which the defendant gave him. The plaintiff tried to find a purchaser; and, at a subsequent interview, he told the defendant that he had found one. In answer to the defendant, the plaintiff gave the name of the purchaser. The defendant stated the terms as before, but said he would require a larger cash payment than the plaintiff had previously understood would be accepted. The plaintiff then said that the purchaser would take the property on these terms, and brought the purchaser to the defendant. The purchaser then proposed that, instead of $10,000 cash, he should pay $5,000 cash and $5,000 in six months —the other payments to be as agreed on— to which the defendant acceded, and the sale was carried out. There was some conflict of testimony as to whether the defendant understood that plaintiff was working for a commission on the sale, but the trial Judge, in dismissing the action, said that he did so with hesitation, and that all the witnesses had impressed him with the honesty of their belief in their statements:—*Held*, that the Court on appeal was in as good a position to judge of the evidence and its effect as the trial Judge, and that the plaintiff was entitled to the usual commission on the sale. *Wolf* v. *Tait*, 4 Man. L. R. 59, followed. Where there are two persons of equal credibility, and one states positively that a particular conversation took place, whilst the other positively denies it, the proper conclusion is that the words were spoken and that the person who denies it has forgotten the circumstances. *Lane* v. *Jackson*, 20 Beav. 535; *King* v. *Stewart*, 32 S. C. R. 483; *Wilkes* v. *Maxwell*, 24 C. L. T. 150, 14 Man. L. R. 599.

Purchaser found by agent—*Sale by principal to—Intermediate purchaser — Option — Absence of collusion.*]—The defendants "listed" a lot with the plaintiff, a land agent, for sale at $15,000. R. saw the plaintiff's "for sale" notice on the lot, and spoke to the plaintiff about it; R. said the price was too high. The plaintiff, after seeing the defendants, who said they would cut the price down a little, offered R. the property for $14,500, and R. said he would think about it. D., also a land agent, and known as such to one of the defendants, approached that defendant and asked him his price for the property, and was told $15,000. D. paid the defendants $50, and the defendants, by a writing, gave D. the right, for a defined period, to purchase the property at $15,000. D. then, without taking a conveyance from the defendants, sold to R. at $14,750, of which he paid the defendants $14,250, and kept $500 for himself. D. said that the defendants, after the writing was signed, promised him a rebate of 5 per cent.:—*Held*, on the evidence, reversing the judgment of Lampman, Co.C.J., the trial Judge, that the bargain between D. and the defendants was made in good faith, and not with collusive intent to defeat the plaintiff of his commission. D., without knowledge of what the plaintiff had done in bringing the property to the attention of R., got his option to purchase, and paid $50 for it; he came in contact with R. not by reason of anything that the plaintiff had done; and the defendants were not aware until after the whole transaction was closed that R. was the purchaser. D. was not an agent, but a purchaser; the defendants understood that D. was purchasing for himself; and the reduction in price was not by way of commission. And, on these facts, the plaintiff was not entitled to a commission on the sale. *White* v. *Maynard & Stockham* (1910), 15 W. L. R. 388, B. C. R.

Purchaser found by principal—Subsequent negotiations with agent. *Lawrence* v. *Moore* (Man.), 3 W. L. R. 139.

Purchaser introduced by agent — *Sale concluded by other agents — Agent's right to commission.*]—D. C. *held*, that where plaintiff first introduced the purchaser to the vendor he was entitled to his commission although the transaction was concluded through other agents.—*Burchill* v. *Gowrie*, C. R., [1910] A. C. 250, followed. *Sager* v. *Sheffer* (1911), 18 O. W. R. 485, 2 O. W. N. 671.

Purchaser introduced by third person—Sub-agency of third person—Evidence of. *Prittie* v. *Richardson*, 8 O. W. R. 983.

Purchaser not accepted—*Terms of employment of agent.*]—The defendant having placed his property in the hands of several real estate agents for sale, the plaintiff called upon him and asked him if it was for sale and inquired as to the price and terms. The defendant then wrote out the price and terms on a slip of paper, which he gave to the plaintiff, knowing that the plaintiff's object was to try to find a purchaser, effect a sale, and earn a commission, although nothing was said about it. The plaintiff shortly afterwards found and introduced to the defendant a purchaser for the property, ready, willing, and able to take it on the terms mentioned, but, after some negotiations, the defendant refused to carry out the sale and sold to another purchaser at a higher price; — *Held*, affirming the judgment of Killam, C.J., (Perdue, J., dis-

senting), that the plaintiff had only been authorised to find a purchaser who would be accepted by the defendant, and that, in the absence of any express contract for remuneration to the plaintiff, the only promise that could be implied from what had taken place amounted to this: "My property is for sale in the hands of several agents at the price and on the terms which I give you; I do not ask you or employ you to sell it for me; but I will allow you to try to sell it, and, if you succeed in finding a purchaser whom I shall accept, I will pay you the usual commission;" and that as the defendant did not sell to the purchaser introduced by the plaintiff, the latter was not entitled to anything for his work. *Wolf* v. *Tait*, 4 Man. L. R. 59, distinguished. *Calloway* v. *Stobart*, 24 C. L. T. 148, 14 Man. L. R. 650.

Purchaser procured by agent — *Commission on price paid—Practising advocate.*]—Where P. employed C. to sell real estate at a stated price for a commission of 5 per cent., and C. having found a purchaser, M., the sale was not completed, but further negotiations were carried on between P. and M. alone, with C.'s consent, and resulted in a sale for a sum exceeding that originally sought, C. was held entitled to recover his commission on the price actually paid. The fact that C. was a practising advocate was no bar to his claim. *Cricksbank* v. *Prud'homme*, 31 Que. S. C. 313, 3 E. L. R. 23.

Purchaser procured by agent — Finding that agent not employed by defendants. *Couse* v. *Banfield* (Man.), 7 W. L. R. 19.

Purchaser procured by agent — *Sale to another — Contract — Quantum meruit.*]—The defendant employed the plaintiffs, real estate agents, to sell certain property at a certain price, agreeing to pay a commission. They procured a purchaser able and willing to pay the price, and submitted a written offer. On receipt of the offer, the defendant, making no objection to it, said he wanted to look into the matter, and used the offer as a lever to close a pending offer of his own to another person at the same price, in order to save the commission:—*Held*, that the plaintiffs had done all they were called upon to do when they obtained a purchaser ready and willing to purchase, and that they were entitled to their commission.—*Sibbald* v. *Bethlehem Iron Co.*, 83 N. Y. 378, at p. 383, specially referred to. *Marriott* v. *Brennan*, 10 O. W. R. 159, 14 O. L. R. 508.

Purchaser refused to carry out contract — Divisional Court held that no bar to agent's right to commission as he had a contract signed in proper and intelligible terms. *Hunt* v. *Moore* (1911), 19 O. W. R. 73, 2 O. W. N. 1017.

Quantum — Evidence — Corroboration. *Gwartney* v. *Olcson* (N. W. T.), 2 W. L. R. 80.

Real estate agents have a right to a commission once they have substantially accomplished their duty as such agent and this even when the proposed deal fails through no fault of theirs; and, particularly, when the agreement, owing to the principal's refusal to do so, is nearly completed. *Gariepy* v. *Johnson* (1910), 17 R. L. n. s. 143.

Recorder's Court of Montreal—*Jurisdiction—Salary—Sale of real estate and commissions—Certiorari—C. P. 1293, 63 V. c. 58, s. 484.*]—A commission on the sale of real estate implies a mandate, not a hiring of services. The expressions "wages" or "salary" do not embrace that of "commission." An employee who sells real estate in consideration of a commission of so much per cent. with a minimum salary of $50 per month, has no right of action before the Recorder's Court of the city of Montreal to recover a balance due him; a judgment granting it to him will be quashed on certiorari. *Montreal East Real Estate Co.* v. *O'Connor* (1910), 12 Que. P. R. 120.

Refusal of purchaser to complete—*Quantum meruit—Agreement.*]—After the plaintiff had procured a purchaser ready and willing to carry out the purchase of the property in question, on terms satisfactory to the defendant, the proposed purchaser discovered that the north wall of the building on the property was out of plumb and slightly overhung the adjoining lot, and called on the defendant to make good the title to the building, which formed part of the property bought. Being unable or unwilling to make good the defect in title or to make satisfactory terms with the owner of the adjoining lot, the defendant proposed to the purchaser that the agreement of sale should be cancelled, and it was cancelled accordingly:—*Held*, following *McKenzie* v. *Champion*, 4 Man. L. R. 158, *Wolf* v. *Tait*, 4 Man. L. R. 59, *Prickett* v. *Badger*, 1 C. B. N. S. 296, *Roberts* v. *Barnard*, 1 Cab. & E. 336, and *Fuller* v. *Eames*, 8 Times L. R. 278, that the plaintiffs had earned and were entitled to be paid a compensation for their services in finding a purchaser, not necessarily the amount agreed on as commission, but a compensation as on a *quantum meruit* or by way of damages, and that in the circumstances it was competent for the trial Judge to award compensation equivalent to the amount of the commission agreed on had the sale gone through:—*Held*, also, following *McKenzie* v. *Champion*, that the plaintiffs were entitled to be paid notwithstanding the fact that they had not procured the purchaser to execute a binding agreement of purchase. *Brydges* v. *Clement*, 24 C. L. T. 96, 14 Man. L. R. 588.

Remuneration for services in procuring purchaser—*Contract by land agent with director of vendor company—Authority of director—Ratification—Implied representation of authority from principal—Quantum meruit.*]—One M., then a director of the defendant company, in a conversation with the plaintiff, assured him that if he, the plaintiff, would procure a purchaser for the property in question, owned by the company, he felt sure the company would quote the price at $550,000, and, in the event of a sale, would pay the plaintiff a commission of $50,000, but any abatement of the price down to $500,000 was to be borne by the plaintiff. There was no evidence that M.

had any authority to sell the property or employ an agent to find a purchaser. After M. became president of the company, the property was sold for exactly $500,000 by the company to a purchaser to whom the company had been introduced by the plaintiff, to the knowledge of M.:—*Held*, that the company were not liable to the plaintiff either for a commission on the sale or for the value of his services as on a *quantum meruit*.—*Held*, also, that M. was not liable to the plaintiff for any misrepresentation of authority from the company to enter into the alleged contract with the plaintiff, or for failing to prevent the company from selling the property for $500,000 or less. *Brent* v. *Arrowhead Lumber Co.*, 18 Man. L. R. 632, 8 W. L. R. 594, 10 W. L. R. 339.

Reopening negotiations — Agent's advertising expenses. *Thompson* v. *King*, 1 O. W. R. 119.

Revocation of agency — Special agreement — Breach — Damages — Sale by owner. *Richardson* v. *McCleary* (Man.), 3 W. L. R. 141.

Revocation of agent's authority to sell at particular price — *Purchaser found by agent—Sale by principal.*]—On the 8th January the defendants "listed" land for sale with the plaintiff, a land agent, at $6,000, but four days later told the plaintiff that, as property had gone up, they would want $6,000 net. On that day the plaintiff had brought the property to the notice of C., but C. had not seen it, and had not decided to purchase. The plaintiff then changed his advertisement of the sale of the property so as to make the price read $6,500, instead of $6,000, and tried to get C. to pay $6,300, but he refused, and eventually bought for $6,000 direct from the defendants:—*Held*, that the defendants had properly revoked the plaintiff's authority to sell at $6,000; and the plaintiff was not entitled to commission on the sale. *Holmes* v. *Lee Ho & Lon Poy* (1910), 15 W. L. R. 226.

Sale made but afterwards rescinded. *Carruthers* v. *Fischer* (Man.), 5 W. L. R. 42.

Sale made by principal after termination of agency.]—The defendants, by writing dated the 29th October, 1909, agreed to give the plaintiffs (estate agents) the only right and privilege up to the 1st November, 1909, to sell a certain hotel property; the price of the hotel to be $65,000; the terms of payment and other particulars were stated in the writing. By another writing, bearing the same date, the defendants agreed to pay the plaintiffs $1,000 as commission for effecting a sale of the hotel "as per option given this date." The plaintiffs did not effect a sale or procure a purchaser under their contract, but the property was sold on the 20th November, 1909, by the defendants, as the result of negotiations carried on between the defendants and the purchaser, on terms different and less satisfactory to the defendants than those on which the plaintiffs were empowered to sell. The plaintiff claimed the $1,000 mentioned in the second writing as commission; but at the trial sought to amend so as to claim on a *quantum meruit*, contending that the relation of buyer and seller had been brought about by their agency, and that they were, therefore, the efficient cause of the sale:—*Held*, that the plaintiffs were not entitled to the commission nor to a sum based upon a *quantum meruit*. *Toulmin* v. *Miller*, 58 L. T. 96, followed, *Boyle* v. *Grassick*, 2 W. L. R. 284, distinguished. Judgment of Newlands, J., 14 W. L. R. 549, affirmed. *Blackstock* v. *Bell* (1911), 16 W. L. R. 363, Sask. L. R.

Sale not brought about by agent—*Efforts to obtain purchaser—Contract by payment for services.*]—Plaintiff sued for balance of moneys collected by defendants, who counterclaimed, saying that they had acted as plaintiff's agents in sale of property and were entitled to a commission. As defendants could not show that they had brought about a sale, counterclaim dismissed; judgment for plaintiff. *Sam Chong* v. *Lee*, 11 W. L. R. 200.

Sale of coal mine areas—*Option.*]—Action for commission. It had been agreed to give plaintiff a commission of 10 per cent. if he would sell certain coal mining properties for cash. He failed and subsequently the defendants carried through a sale with the same parties with whom plaintiff had been negotiating, but for bonds and stock, terms on which they could have sold before plaintiff given instructions to sell for cash:—*Held*, that plaintiff was not entitled to commission and action dismissed. *Burchell* v. *Gowrie*, 6 E. L. R. 420. Affirmed by Supreme Court of Canada, 7 E. L. R. 351.

Sale of goods — Agent holding himself out as principal by principal's authority—Set-off. *Turner* v. *Beaton*, 4 E. L. R. 328.

Scope of authority — Agent in charge of branch office of lumber dealers—Authority to take promissory note of third person in discharge of debt—Repudiation by principal—Retention of note as collateral security—Ratification—Evidence — Action for debt. *McDonald* v. *Lawlor*, 7 W. L. R. 639.

Secret bargain between purchaser and agent of vendor.]—F., an agent of the defendant company, agreed with the plaintiff that he would withhold 18,000 acres of the company's lands from sale for 16 days to give the plaintiff's an opportunity to complete negotiations for the sale of the land, and promised that if he sold the land he should receive a commission of 2½ per cent. The plaintiff afterwards entered into negotiations with one G., who represented a number of investors desiring to purchase a large quantity of land, but G. was not prepared to bind himself at once and wanted time to make financial arrangements and at the same time to have the opportunity kept open, and agreed to pay the plaintiff $500 if he would give him the desired time. The plaintiff then agreed to and did give the time and reported to F. that he had done so, but did not inform F. that he expected to be paid for it. The plaintiff never received the $500, nor any part of it, and G. and his associates carried out the purchase of 18-

400 acres of the company's lands at the price agreed on:—*Held*, that, although the secret bargain was a breach of the plaintiff's duty to the defendants, and, if the money had been received, the plaintiff would have to account for it to them, yet it was not such as to disentitle the plaintiff to the stipulated commission for the service which he had fully performed. *Boston Deep Sea Fishing Co.* v. *Ansell*, 39 Ch. D. 339, and *Coleridge* v. *Bierley*, 11 O. R. 267, followed. *Davidson* v. *Manitoba & North-West Land Corp.*, 22 C. L. T. 305, 23 C. L. T. 26, 14 Man. L. R. 292.

Special contract — *Non-performance.*] The plaintiff alleged that he was employed as a broker to effect a sale of the defendant's property for $35,000, on certain terms, before the 1st February, 1910. When that day arrived, the plaintiff had not made a sale nor had he found any purchaser ready and willing to buy. At most he had implanted the germ of an idea which might or might not develop into a club or other organisation capable of buying, which organisation when formed might or might not buy the defendant's property. The defendant acted in good faith; he co-operated with the plaintiff until the time within which the plaintiff was to effect a sale had expired. The institution sought to be formed by the plaintiff never was organised; but, after the 1st February, 1910, an institution of an entirely different character was formed, and to it the property was sold without any aid of the plaintiff:—*Held*, that the plaintiff's employment was not general, but special—to make a sale at $35,000 by a fixed date. After the 1st February, 1910, the defendant was under no further obligation to the plaintiff. The plaintiff did not perform his part of the contract; consequently the defendant was under no liability to him. *Bridgman* v. *Hepburn*, 13 B. C. R. 389, 8 W. L. R. 28, 42 S. C. R. 228, referred to. *Counsell* v. *Devine* (1911), 16 W. L. R. 675, Man. L. R.

Special employment of agent to sell land within limited time — *Agent procuring purchaser—Revocation of authority—Quantum meruit—Ascertainment of amount.*] —The defendant signed a letter giving the plaintiffs, who were real estate brokers, the exclusive agency for 10 days for the sale of a lot of land at a price and on terms specified. The plaintiffs advertised and made special efforts to sell, and succeeded within 10 days in finding a purchaser ready and willing to close upon the defendant's terms. Before this, however, the defendant had been in negotiation with another purchaser, to whom he afterwards sold, and he notified the plaintiffs after they had advertised and made efforts to sell, but before they found their purchaser, that he did not wish them to do anything further in the meantime:—*Held*, that this amounted to a revocation of the plaintiffs' agency; that the plaintiffs were prevented by the act of the defendant from earning their full commission; that the defendant could not, in the circumstances, revoke without liability; and that the plaintiffs were entitled to recover upon a *quantum meruit* for their services, and were not limited to the actual value of the time given or the moneys expended, but were entitled to a substantial sum. *Rowan* v. *Hull*, 3 Am. & Eng. Ann. Cas. 884, followed. *Aldous* v. *Swanson* (1910), 14 W. L. R. 186.

Affirmed (1910) 15 W. L. R. 292.

Sub-agent—Failure to establish employment as agent. *McGill* v. *Levasseur* (N. W. T.), 4 W. L. R. 14.

Substantial compliance with authority.]—A real estate agent employed to find a purchaser for land, who finds a purchaser ready and willing to purchase upon terms which, although not identical with those in contemplation at the time of his employment, are satisfactory to the owner, is entitled to compensation for his services, notwithstanding that no sale is actually made by reason of refusal of the owner to sell the property for reasons unconnected with the terms of purchase. *McKenzie* v. *Champion* (1885), 12 S. C. R. 649, followed:—*Semble*, where in the proposed vendor's instructions to the agent there is not something to indicate that it was his intention to give the agent authority to sell, it will be inferred that the authority extended only to finding a purchaser. *Boyle* v. *Grassick* (1905), 6 Terr. L. R. 292.

Terms of employment — *Purchaser found by principal — Agent's services in effecting sale—Quantum meruit.*]—The defendant (appellant) employed the plaintiff (respondent) to find a purchaser for certain land at a certain price clear of all commission. The land was subsequently sold to a purchaser found by the principal, but at a price less than that at which it was listed. The agent performed some services in connection with the sale, but was unable to sell at the price authorised:—*Held*, Lamont, J. dissenting, that, as the agent was not instrumental in bringing the vendor and purchaser together, and as his employment was of a special character, namely to sell the land at a specified price, which he was unable to do, he was not entitled to a commission or to recover for his services upon a *quantum meruit*.—*Per* Lamont, J., that, as the agent had performed certain services in connection with the sale, which services were recognised by the principal, he was entitled to recover on a *quantum meruit*. *Munro* v. *Beischel*, 1 Sask. L. R. 238, 8 W. L. R. 63, 846.

Time limit for procuring purchaser —Waiver. *Donovan* v. *Hyde*, 3 E. L. R. 302.

Vendor ignorant that purchaser sent by agent — *Circumstances to put vendor on inquiry.* — A vendor who has placed his property in the hands of his agent for sale on commission will not be liable to the agent for commission if he afterwards sells to a purchaser in ignorance that such purchaser has been sent to him by the agent (*Locators* v. *Clouch*, 17 Man. L. R. 659), unless there are circumstances sufficient to put the vendor upon inquiry as to whether the purchaser was not in fact sent to him by the agent.—*Lloyd* v. *Matthews*, 51 N. Y. 124, followed.—In this case the circumstances were held to be such as to put the defendants upon such inquiry, and that as their manager had failed to make sufficient inquiry, and the purchaser had had in fact been sent by the plaintiff, the defendants were

liable for his commission on the sale. *Hughes* v. *Houghton Land Co.*, 18 Man. L. R. 686, 9 W. L. R. 646.

Vendor's agent — Secret commission from purchaser — Recovery from agent by vendor—Agent's commission from vendor—Knowledge of vendor. *Webb* v. *Mellermott*, 3 O. W. R. 365, 644, 5 O. W. R. 566.

Voluntary agent — *Absence of evidence to show employment as agent—Absence of ratification.*]—The plaintiff, a land agent, was held not entitled to a commission upon a sale of land made by the defendants to a purchaser, although the land was brought to the notice of the purchaser by the plaintiff, and although the plaintiff had obtained from a clerk of the defendants a list of the properties for sale, which included the one so sold, and had been told by the clerk that he would be entitled to the regular commission if he brought about a sale of any of them, the clerk having no authority, the plaintiff having had no communication with any officer of the defendants, no contract of agency, and no ratification or recognition of his voluntary agency. *Heffner* v. *Northern Trusts Co.* (1910), 14 W. L. R. 403.

Withdrawal from agreement—*Finding as to cancellation — Compensation for services.*]—The plaintiffs, real estate agents, made an agreement with the defendant by which they undertook to subdivide certain land for him and to sell it. By the agreement the plaintiffs were to have a commission of 15 per cent. for making sales, drawing agreements, making all collections, and generally looking after the property. The plaintiffs made no sales, nor collections, but they drew agreements, and had a survey and plan of the property made, which met with the approval of the defendant:—*Held*, that the plaintiffs were not entitled to the commission of 15 per cent., but were entitled to be paid for their services as upon a *quantum meruit*: —*Semble*, that the agreement was an illegal one, because the plaintiffs agreed, in consideration of the 15 per cent., amongst other things to draw agreements, and they did not come within the exception in s. 7 of the Conveyancers Act, R. S. M. 1902 c. 35.—*Held*, also, that the defendant had the right at any time before a sale was made to withdraw from the agreement, compensating the plaintiffs for anything done by them under it; and, upon the evidence, that the defendant had cancelled the agreement before the plaintiffs had obtained signatures to agreements for purchase of the defendant's land.—*Held*, also, that the amount paid into Court by the defendant was a sufficient compensation for the plaintiff's services. *McMillan* v. *Barratt* (1911), 16 W. L. R. 209, Man. L. R.

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3. Authority of Agent.

Agent for sale of land—*Payment of purchase money to agent — Ratification by vendor — Misappropriation by agent—Evidence—Correspondence—Action for specific performance of contract—Contract admitted —Who stands the loss by misappropriation?*] —An action for specific performance of a contract for sale by defendant to plaintiff of certain lands. Defendants admitted the contract, and the real question was which party was to bear the loss of the purchase money—$850—paid by purchaser to defendant's agent, Weaver, and by him misappropriated? Defendant, who resided at Vancouver, B.C., placed the property for sale in the hands of Weaver, a real estate agent at New Liskeard, and the latter obtained from plaintiff an offer for the property, which defendant accepted.—Mabee, C.J.Ex.D., *held*, that the evidence shewed that defendant, with full knowledge, ratified the unauthorised act of his agent Weaver in receiving the purchase-money from the vendor; that such payment was good payment to the defendant, and that the plaintiff was entitled to specific performance, with the costs of action. *Hendry* v. *Wismer* (1911), 18 O. W. R. 350, 2 O. W. N. 560.

Authority of manager of branch bank — *Security held by bank — Further charge upon by stranger—Notice to bank — Communication to manager—Bank giving up security — Damages for depreciation.*]—H. borrowed money from the defendants' branch bank at E., in Alberta, and assigned to the defendants, as security for its repayment, a chattel mortgage upon chattels in Ontario, made to H., and delivered a duplicate original of the chattel mortgage to the defendants. While the defendants were assignees of the chattel mortgage and held the duplicate original, the plaintiffs and H. arranged that the plaintiffs should lease to H. certain property in E., and should advance $300 to H. to improve the demised premises. Accordingly, a lease was executed, which contained a clause to the effect that the chattel mortgage, subject to the defendants' prior claim, should stand as a security for the repayment of the $300. The lease was executed and the $300 advanced some time in March, 1908. The lease was deposited with the defendants at their branch, and the attention of the then manager of the branch, J., was specially called to the clause referred to. J. assured the plaintiffs that they would be protected. J. left the service of the bank in November, 1908, and was succeeded as manager by A. In December, 1908, J., who had become an estate agent at E., inquired of the bank the amount required to discharge the liability of H. to the bank, and the amount, being ascertained and stated, was paid by a solicitor to the bank, and A., having no knowledge of the plaintiff's claim or of the contents of the lease, handed to the solicitor the duplicate original of the chattel mortgage, together with the plaintiffs' copy of the lease, suppose it was H.'s copy. The solicitor was acting for C., to whom H. had sold the mortgage:—*Held*, Stuart, J., dissenting, in an action for damages for wrongfully delivering up the documents, that, in the circumstances, the defendants were chargeable with notice of the indebtedness of H. to the plaintiffs, and of the charge, to the extent of the amount thereof, upon the moneys accruing under the mortgage, and were liable to the plaintiffs, and the measure of the damages was the face-value of the security, that is, $300 and interest.—*Per* Harvey, C.J.:—The defendants, having disregarded the notice, and handed over the documents which the notice informed them belonged to the plaintiffs to some one who was not entitled to them, were liable to the plaintiffs for the damages resulting. The plaintiffs relied on the assurance of J., and

that was within the scope of J.'s authority, for, although the plaintiffs were strangers to the bank, the transaction was one connected with and partly for the benefit of customers of the bank. No presumption was to be drawn or assumption to be made as to what the law of Ontario was, the mortgage being upon chattels there. But, if the law were to be treated as the same as that of Alberta, it would not help the defendants, for the rights under a chattel mortgage are the primary rights of ownership of the chattels mortgaged, coupled generally with the rights to sue the mortgagor. This latter right could, perhaps, be protected by an assignee by notice, but the other rights would pass by the assignment without regard to notice. There can be no question that any man is damnified by deprivation of the documents which are the primary evidence of his rights.—*Per* Beck, J.:—The special clause in effect operated as a derivative mortgage, the subject of which was not only the moneys accruing under the principal mortgage, but also the instrument itself, that is, the particular original duplicate in the hands of the defendants, and (following *Hochelaga Bank* v. *Larue*, 13 W. L. R. at p. 117) it was a wrongful act to deliver over this instrument. The defendants did more than that. They, in effect, assigned the residue of the moneys payable under the mortgage. Assuming that the assignment from H. to the bank was not filed, the possibility that H. could have sold the mortgage by reference only to the duplicate filed in Ontario was not a reason for relieving the defendants from the consequences which actually flowed from their wrongful act, and which, in the ordinary course, could not have arisen.—*Per* Stuart, J.:—The defendants were not liable for the agreement made by J., for it was not within the scope of his authority; and the defendants had no notice of the plaintiffs' claim; the documents did not constitute notice; and the mere oral notice to J. was not sufficient to affect the defendants. *Auld* v. *Traders Bank* (1910), 16 W. L. R. 24. Alta. L. R.

Breach of duty by agent—*Interest in purchase of principal's lands intrusted to agent for sale — Non-disclosure—Resale at profit—Liability of agent to account to principal—Liability of persons associated with agent in purchase and resale—Partnership —Notice—Fraud—Damages.*] — The defendant B., an estate agent, was authorised by the plaintiff to sell for him 225 acres of land for the best price obtainable, but not for less than $30 an acre, B. to receive a commission. On the 3rd March, 1906, or later, B. sold or pretended to sell the land for the plaintiff to the defendant C. at $35 per acre, B. and the defendant M. having between them a half interest with C. in the purchase. The purchase was completed and the land transferred to C., and on the 8th August, 1906, the defendant D. became the purchaser from C. at $125 per acre. The facts were not disclosed to the plaintiff, and he did not know until after the sale to D. that B. and M. had an interest with C.:—*Held*, that B. and C. were in fact partners in an arrangement for the purchase and disposition of the land, and that C. was liable, equally with B., to account to the plaintiff for the profits; but that M. was led by B. to believe that C. was the purchaser from the plaintiff, and that B. was buying from C., and not that B. and C. were buying from the plaintiff; and nothing was brought home to M. which should make him liable to the plaintiff.—*Per* Newlands, J., dissenting as to C., that, as the contract could not be set aside because of the sale to D., who was a *bona fide* purchaser for value without notice, the only remedy of the plaintiff against C. and M. was in damages for any loss sustained by the plaintiff; and there was no fraud on the part of the defendants C. and M. nor any damage sustained by the plaintiff on account of the sale to them.—Judgment of Johnstone, J., 13 W. L. R. 248, varied. *Pommerenke* v. *Bate* (1910), 15 W. L. R. 542, 3 Sask. L. R. 417.

Cheque — *Promissory note—Banks and banking—Principal and agent — Power of attorney—Fraud of agent — Knowledge of payee.*] — While defendant was absent in Europe, he gave an employee, B., a power of attorney to sign cheques, etc., in connection with his business. Plaintiff and B., who were friends, had exchanged several accommodation notes. This action was to recover the amount of a cheque signed in name of defendant company, *per pro* B., given to L. and endorsed to plaintiff. The Quebec Court of Review held he cannot recover, as he was bound to enquire the scope of the power of attorney, and there had been acts of connivance between him and B. *Vigand* v. *De Werthemer*, 6 E. L. R. 173.

Cheque given to agent as deposit on script to be purchased — *Purchase by agent — Cheque handed to vendor — Attempted revocation of authority.*] — The plaintiff alleged that he gave a cheque for $200 to the defendant company to pay as a deposit on a purchase by the company of land warrants for him, and that before the purchase he revoked the authority. The defendant company proved that they entered into a contract in writing to so purchase, and, on receipt of the plaintiff's cheque, handed over to him the contract; and further, that they did not get the money on the cheque, but handed it over to the person from whom they had purchased, and that person received the money thereon. No negligence was charged or proved against the defendant company:—*Held*, that the plaintiff could not succeed in the action as framed, and it should be dismissed, without prejudice to an action against the company framed as by purchaser against vendor.—Judgment of a County Court reversed. *Dart* v. *Coward Investment Co.* (1910), 14 W. L. R. 52.

Contract — Breach—Terms. *Western Commission Co.* v. *Moore*, 9 O. W. R. 499.

Contract by agent — *Conditional authority — Liability of agent — Disclosed principal — Intention of agent not to bind himself—Foreign principal—Amendment — New cause of action—Warranty of authority—Deceit.*] — The defendant instructed the plaintiff to make certain surveys for two foreigners, residing abroad, and shewed him letters from the foreigners which authorised him, the defendant, to get the surveys made, but only on condition that payment should be made out of dividends to accrue to the foreigners on shares in a company of which

the defendant was managing director. The plaintiff did the work, and received from the secretary of the company a payment on account thereof, which, the secretary said, was charged to the two foreigners. The plaintiff sued the defendant, as principal, for the balance:—*Held*, that the defendant acted solely as agent, and the fact that his principals were foreigners did not make him liable. The question is always one of intention, and the defendant did not intend to bind himself. The defendant might be liable in some other form of action, based on warranty or authority or deceit; and the dismissal of this action should be without prejudice to the plaintiff bringing another action.—No amendment was asked for in this action; and, *semble*, if it had been, it would not have been granted, as it would have been in effect to substitute another cause of action.—*Jenkins* v. *Hutchison*, 18 L. J. Q. B. 274, and *Lewis* v. *Nicholson*, 21 L. J. Q. B. 311, followed. *Taylor* v. *Davenport* (1910), 14 W. L. R. 257.

Contract made by agent — Scope of authority — Principal not bound. *Goderich Elevator Co.* v. *Dominion Elevator Co.*, 4 O. W. R. 175.

Contract of agent — *Ratification after repudiation.*]—A principal can ratify a contract made by his assumed agent, after the principal has repudiated it and has refused to be bound by it.—The rule as to ratification by a principal of acts done by an assumed agent is that the ratification is thrown back to the date of the act done, and that the agent is put in the same position as if he had authority to do the act at the time the act was done by him. *Pickles & Mills* v. *Western Assurance Co.*, 40 N. S. R. 327.

Contract to buy apples — *Money advanced — Apples and barrels purchased — Person receiving advances failed to pay — Liability of person advancing the money.*]—Defendant Brown, as Canadian representative of several British firms of commission merchants, advanced money to defendant Nugent to buy apples with, Nugent agreeing to consign to said firms, for sale, all apples so purchased. Nugent purchased plaintiff's apples and some apple barrels from him. He failed to pay for the barrels, and plaintiff brought action against both defendants for the price of the barrels and for damage for improper culling his apples. Pleadings were noted as closed against Nugent, and the action against Brown was tried by Morrison, Co.C.J., who *held* that Nugent was an agent of Brown and gave plaintiff judgment for $450 and costs. Divisional Court *held*, that Brown only acted as Nugent's banker. The agreement for sale by plaintiff of his apples was with "Nugent." No one else was the purchaser, either jointly with Nugent or as principal for whom Nugent was acting only as agent. Nugent was not acting for Brown as Brown's agent, therefore the appeal should be allowed with costs and the action, as against Brown, dismissed with costs. *Rex* v. *Van Norman*, 14 O. W. R. 659, distinguished. *Gilbert* v. *Brown* (1910), 15 O. W. R. 673.

Contract to pay commission—*Parties brought together by agent, but without knowledge of vendor—Quantum meruit.*]—The defendant listed his property with the plaintiffs, real estate agents, for sale at a fixed price and on named terms. The plaintiffs mentioned the property to one F., who thereafter negotiated with the defendant for the purchase of the property, and concealed from him the fact that the plaintiffs had sent him. The defendant then, without any knowledge of the plaintiffs' intervention, sold to F., on terms less advantageous to himself than those contemplated in the agreement between the plaintiffs and himself. There was nothing in the circumstances to put the defendant upon his inquiry as to whether the plaintiffs had sent F. to him:—*Held*, that the plaintiffs could recover neither a commission on the sale nor anything for their services by way of *quantum meruit*. *Cathcart* v. *Bacon*, 49 N. W. Repr. 331, and *Quist* v. *Goodfellow*, 110 N. W. Repr. 65, followed.—*Lloyd* v. *Mathews*, 51 N. Y. 125, *Mansell* v. *Clements*, L. R. 9 C. P. 139, and *Green* v. *Bartlett*, 14 C. B. N. S. 681, distinguished. *Elvin* v. *Clough*, 7 W. L. R. 742, 8 W. L. R. 590; *Locators* v. *Cloush*, 17 Man. L. R. 659.

Contract to pay commission—Vendor and purchaser brought together by agent's procurement—Evidence — Remuneration of agent—*Quantum meruit*. *Bent* v. *Arrowhead Lumber Co.* (Man.), 8 W. L. R. 594.

Custom of trade — *Sale of goods — Contract—Necessity for acceptance by principal.*]—Manufacturers' agents have neither by law, nor by custom of trade, in Quebec, other powers than those given them by the contract of mandate with their principals, and persons dealing with them as put upon inquiry to ascertain the extent of such powers. When, therefore, goods are purchased at a stated price from such an agent, who has only the power to take orders subject to approval, there is no contract of sale binding on the principals that will make them liable for non-performance. *Mathys* v. *Ehrenbach*, 32 Que. S. C. 19.

Delegation—*Statute of Frauds—Written memorandum — Withdrawal of authority.*]—An agent "thereunto lawfully authorised" within the Statute of Frauds, cannot relegate his authority.—An agent who, at the time of making a contract, has failed to bind his principal by a written note or memorandum within the statute, cannot sign an effectual note or memorandum after his authority as agent to sell has been withdrawn. *Stevenson* v. *Smith*, 7 W. L. R. 161, 13 B. C. R. 213.

Delegation of authority — *Agency generally — Railway — Expropriation of lands — Arbitration — Award.*]—When the power given by one party to another by an instrument in writing is of such a nature as to require its execution by a deputy, by the law in force in Lower Canada the party originally authorised as the agent may appoint a deputy. By an Act of the Canadian Legislature, 13th & 14th V. c. 116, a company were incorporated for the purpose of making a railway, with power to purchase and take land required for the railway.

either by agreeing with the owners of the land for the price and compensation to be given, or, if the matter could not be settled, by referring to arbitration. A contract was afterwards entered into between the company and certain contractors for completion of the railroad; by this contract it was agreed that the contractors were to complete the railroad at their own expense and charges, and pay any claim which might be made against the company, including the purchase of lands required, and the company were to exercise, or permit the contractors to exercise, as the case might be, any of the powers vested in them by the Act of Incorporation, as fully, amply and effectually, as if the company itself had exercised such powers and performed the works; and, in the exercise of such powers, the contractors were to use the name of the company, if deemed necessary. The contractors, who resided in England, afterwards, by a power of attorney which recited the above contract, deputed R. as their agent, with full power, on their behalf, to construct the railroad and to enter into contract for the purchase of the land, and to settle any claim for land or other damages, and generally to execute and perform all such acts and things in reference to the purchase of land as fully and effectually as the contractors might do. The company required part of Q.'s land, and before the contract for the completion of the railroad had been in treaty with him for the taking such land, but could not agree upon the terms. Q. had, in consideration of the company's compulsory power of purchase under the Act, let them into possession. An agreement, or bond of arbitration, was afterwards entered into by R. and Q. to refer the matter to arbitrators, "*amiables compositeurs*," to ascertain the amount that the company should pay to Q. for the land. In this agreement R. was described as the agent and attorney of the contractors for the works upon the railroad, "acting in this behalf in the name of the company under authority to that effect contained in the contract between the company and the contractors." The arbitrators awarded a certain sum for land and for damages sustained by Q. to be paid by the contractors. Q. applied to the company for payment, who referred him to the contractors, who refused to pay the amount. Q. then brought an action against the company in the Superior Court in Lower Canada to recover such amount. The company pleaded in defence that the contractors, by the contract, were alone liable, and that R. had no authority either from them, or the contractors, to refer the matter to arbitration of "*amiables compositeurs*." Upon appeal *held* (affirming the judgments of the Courts below), first that the contractors both by the express language and the necessary effect of the contracts with the company, were to be considered vested in the company by the Act of Incorporation, in the name of the company, and to buy lands, and to make the company liable to third parties with whom they had contracted in the name of the company, to the performance of any engagement entered into on their behalf, although, as between the contractors and the company, the former were bound to supply the necessary funds. Second, that the contractors under the contract had power to delegate to an agent powers similar to those vested in them by the company, and that under the power of attorney executed by the contractors, R. possessed the same powers of acting and rendering the company liable, as the contractors themselves had under the contract. Third, that the company had no power to transfer their rights created by the Canadian Act, 13th & 14th V. c. 146, to the contractors, so as to relieve themselves from the responsibility which the Legislature had attached to the exercise of their powers. Fourth, that the action was properly brought against the company upon the award as the contract with the contractors in no degree altered the position of the company with third parties, and that the agreement with R. was made on the company's behalf, for although the company had a right, as between themselves and the contractors, to require the contractors to make payments, yet, as the contractors' agent, R., had entered into no personal engagement with Q., the contract with the company was *res inter alios acta*, with which Q. had nothing to do. Fifth, that the submission to arbitration of "*amiables compositeurs*" was the proper course to pursue. *Quebec & Richmond Rw. Co.* v. *Quinn* (1858), C. R. 2 A. C. 431.

Dispute as to employment of plaintiffs as agents — Evidence—Purchaser found by plaintiffs—Sale negotiated apart from plaintiffs—Right to commission. *Duck* v. *Daniels*, 7 W. L. R. 770.

Employment of agent — Evidence. *Robertson* v. *Carstens*, 7 W. L. R. 742, 9 W. L. R. 397.

Employment of agent to find purchaser — *Contract — Acceptance of purchaser—Sale not completed through fault of vendor.*]—In an action by an agent to recover the amount of his commission, he must shew that he has produced to the principal a purchaser ready, willing and able to enter into a binding agreement to purchase; and the agent is entitled to his commission if, the parties having been shewn to be agreed upon the terms, the sale is subsequently prevented by the fault or default of the vendor. *Grogan* v. *Smith*, 7 Times L. R. 132, followed. *Bagshawe* v. *Roland*, 7 W. L. R. 158, 13 B. C. R. 262.

Employment of agent to find purchaser at named figure—*Introduction of purchaser—Subsequent sale at lower figure.*]—H., being pressed by his mortgagees, applied to B. to procure a loan of $58,000. Negotiations to that end by B., and also further efforts to procure a sale of certain of the property for $56,000, failed. Subsequently the person with whom B. was negotiating was introduced by his (the prospective purchaser's) banker to the agent of the mortgagees, and a sale was brought about for $50,000, H. paying the agent a commission. In an action by B. against H. for a commission for having first introduced the purchaser:—*Held*, Morrison, J., dissenting, that B. was engaged to find a purchaser at a certain figure, and, having failed to do so, he was not entitled to a commission on a sale, although made to the person originally introduced by him.—*Per* Hunter,

C.J.:—When, *prima facie*, the agreement is to pay a commission on a named figure, it is for the agent to shew in the clearest way that the intention of the parties was to pay a commission on any figure at which the sale goes through. *Bridgman* v. *Hepburn*, 8 W. L. R. 28, 13 B. C. R. 389.

Exchange — *Agent bringing parties together — Evidence — Quantum meruit — Appeal — Reversal of judgment on facts.*]—The defendant listed his property with the plaintiffs, real estate agents, for sale. They then introduced to him a probable purchaser, who afterwards arranged with the defendant an exchange of some lots of his own for the defendant's property:—*Held*, that the plaintiffs were entitled to one-half the commission that they would have earned if they had effected a sale of the property.—The Court reversed the trial Judge's findings of fact. *Thordarson* v. *Jones*, *Thordarson* v. *Hale*, 7 W. L. R. 106, 17 Man. L. R. 295.

Finding purchaser — Contract—Sale to another—Previous option — Findings of fact—Appeal. *Markle* v. *Blain*, 11 O. W. R. 505.

Finding purchaser — Purchase not carried out because of restrictions as to land —Contract. *Holloway* v. *Covert*, 11 O. W. R. 433.

Husband and wife—Authority of husband as agent—Sale of goods to husband on his credit—Erection of house on wife's land—Action against wife for price of materials—Payment by wife to husband while latter regarded as principal. *Arbuthnot* v. *Dupas* (Man.), 2 W. L. R. 445.

Husband and wife — *Contract—Preparation by architect of plans for building —Remuneration — Land owned by wife—Buildings to be erected for company—Findings of trial Judge—Reversed in part by Divisional Court.*]—Action to recover amount of an account for services as an architect in preparation of plans. The trial Judge found for plaintiff, giving judgment against husband, wife and company. A Divisional Court dismissed the action against husband and company. As the Court of Appeal could not say both trial Judge and Divisional Court were wrong, appeal dismissed. *Leanor* v. *Hyslop*, 13 O. W. R. 814.

Husband and wife — *Surrender of lease.*]—Authority to accept surrender of a lease will not be implied from the fact that a husband living with his wife has collected the rents of the property and looked after repairs made. *Rex* v. *Forbes*, *Ex p. Bramhall*, 36 N. B. Reps. 333.

Implied authority of notary public —*Payment—Discharge of mortgage — Evidence—Commencement of proof in writing—Admissions—Objections.*]—A notary public in the province of Quebec has no actual or ostensible authority to receive moneys for his clients under deeds of obligation executed and in his custody as a member of the notarial profession of that province. Admissions to the effect that a notary had invested money and collected interest on loans for the plaintiff do not constitute proof of agency on the part of the notary, nor a commencement of proof in writing under Art. 1233, C. C., and Art. 316, C. P., Que., sufficient to permit the adducing of parol testimony as to the authorisation of the notary to receive the capital so invested, or as to payment thereof alleged to have been made to him as the mandatory of the creditor. The rules of the Civil Code prohibiting parol testimony in certain cases, are not rules of public order which must be judicially noticed, and, where such evidence has been irregularly admitted at the trial without objection, the opposite party cannot on appeal take exception to the irregularity. *Gervais* v. *McCarthy*, 24 C. L. T. 391, 35 S. C. R. 14.

Instructions to architects to prepare plans of proposed building — *Authority of agent — Building not to be erected for principal.*]—The plaintiffs, who were architects, prepared plans for a theatre proposed to be erected on the land of the defendant in a city, having received their instructions from C., who had acted as the defendant's agent in that city (the defendant residing in another country) in the collection of rents and looking after her real estate, etc.:—*Held*, upon the evidence, that the defendant was not liable for the value of the plaintiffs' services in preparing the plans; the theatre was not to be built for her, but for a company, of which C. and one of the plaintiffs were promoters, and her only connection with the enterprise was as a subscriber for shares in the company and lessor of the land upon which the theatre was to be built. *Smith* v. *Crump* (No. 1), (1910), 14 W. L. R. 295.

Limitation — *Notice—Promissory notes —Misapplication of proceeds.*]— A party dealing with an agent is put upon inquiry to ascertain the extent of his powers, and when his authority to sign cheques or notes is limited "to a certain business," his principal is not liable for those given or subscribed by him and of which he has misapplied the proceeds. Cf. *La Granda Hermanos y Ca.* v. *American Electrical & Novelty Manufacturing Co.*, 29 Que. S. C. 444; *La Banque du Peuple* v. *Bryant*, 17 Que. L. R. 103; *Vigued* v. *De Werthemer*, 30 Que. S. C. 229.

Limitation — *Power to borrow money —Notice to third persons.*]—Contracts of agency are construed strictly, and third parties dealing with agents are put upon inquiry to ascertain the extent of their powers. The appointment of an agent to effect sales with instructions to deposit the proceeds in a bank and to draw cheques against the same for running expenses only, gives him no power to borrow money. Hence, no action will lie against a foreign company for the amount of a draft accepted through their local manager, with the above limited powers, for a loan of money, from which they are not proved to have derived any benefit. *Granda Hermanos y Ca.* v. *American Electrical & Novelty Manufacturing Co.*, 29 Que. S. C. 444.

Limitation — *Third parties put upon inquiry—Liability of principal—Funds misapplied by agent.*]—A party dealing with an

agent is put upon inquiry to ascertain the extent of his powers, and when his authority to sign notes or cheques is limited "to a certain business," his principal is not liable for those given or subscribed by him outside that business, and of which he has misapplied the proceeds. Cf. *Granda Horsmanna Co.* v. *American Electrical & Novelty Manufacturing Co.*, 29 Que. S. C. 444, *Vigaud* v. *De Werthemer*, 35 Que. S. C. 436, 6 E. L. R. 173.

Mining property — Commission paid by vendors to broker for introduction to purchaser—Services subsequently rendered by broker to purchaser—Remuneration by transfer of share in property—Action by vendors against broker to recover value of share. *Green* v. *Michie*, 12 O. W. R. 210.

Mining property — Negotiations for purchase — Agent a member of purchasing syndicate — No contract made — Subsequent contract through another agent—Introduction by plaintiff. *Murray* v. *Craig*, 11 O. W. R. 265.

Misrepresentation by contract made in name of principal—*Repudiation by principal—Money paid to agent by person with whom contract made — Right to recover.*]—The defendant, as agent of persons in Manitoba, was authorised by them to sell a block of land in Saskatchewan for $37,000 cash. He made an agreement with the plaintiff, which was reduced to writing and signed by him as agent on behalf of the owners, to sell the lands to the plaintiff for $37,000, of which $1,000 was to be cash, and the balance was to be paid in a foreign country upon the delivery to a bank there of transfers and duplicate certificates of title. The cash payment was made to the defendant. The owners, on being advised of the terms of sale, refused to ratify the contract, taking the position that the defendant had no authority to enter into such a contract. The plaintiff insisted upon the performance of the contract in its entirety or not at all, and the sale fell through. The plaintiff then brought this action for money had and received:—*Held*, treating the action as one of recovery of the money because of misrepresentation on the part of the defendant as to his authority to enter into the contract, or for damages for breach of the contract of warranty implied from the act of the agent in entering into such a contract, that the defendant had in fact exceeded his authority, and that, by entering into and signing the agreement of sale, he had represented to the plaintiff that he had the authority of his principals to the extent represented by the agreement, and the plaintiff was entitled to recover from him $1,000.—*Cherry* v. *Colonial Bank of Australasia*, L. R. 3 P. C. 24, and *Beattie* v. *Lord Ebury*, L. R. 7 H. L. 102, followed. *McManus* v. *Porter* (1910), 15 W. L. R. 269.

Misrepresentation of authority by agent — *Contract for sale of land—Personal liability — Damages.* —1. An agent who, by misrepresentation of his authority, procures a person to enter into an agreement with his principals for the purchase of land, will be personally liable to the intending purchaser for damages in an action for specific performance against himself and his principals, if they afterwards repudiate the agreement and prove that the agent had no authority to bind them. 2. In such a case, the plaintiff is entitled not only to the expenses actually incurred, but also to the loss of the profit he would have made if the bargain had been carried out. *Mancer* v. *Sanford*, 24 C. L. T. 70, 13 Man. L. R. 181.

Notary — *Authority to receive moneys of client — Inference.*]—The authority of a notary to receive funds due to his client cannot be inferred from the fact that he has the documents under which the funds were invested, nor from the fact that he is authorised to receive the interest, nor that he is in general the client's man of business. *Gervais* v. *McCarthy*, 14 Que. K. B. 429.

Partnership in insurance business—*Sale of money orders — Father and son — Holding out as a firm by son — Liability of father.*]—Plaintiffs brought action to recover $1,395.13 and interest, being the amount of certain money orders alleged to have been drawn by John Maughan & Son as agents for plaintiffs, and also indemnity in respect of another order not accounted for. Defendant John Maughan denied any agency for plaintiff either by him or his firm, and asserted that the agency, if any, was with his son individually, and also denied that the son was a member of the firm or had any right to sign the name of John Maughan & Son.—At trial Riddell, J., dismissed the action.—Divisional Court reversed Riddell, J., and entered judgment against both defendants with costs.—Court of Appeal reversed Divisional Court and restored judgment of Riddell, J. Action dismissed with costs, Meredith, J.A., dissenting. *Dom. Exp. Co.* v. *Maughan & Son* (1910), 15 O. W. R. 621, 21 O. L. R. 510, 1 O. W. N. 1031.

Payment made to agent for specific purpose — *Misapplication — Negligence — Liability of gratuitous agent—Work of skill.*] —When plaintiff was going away he left an agreement for the purchase of a lot with the defendant, a real estate agent. The defendant made a payment under it which was repaid by plaintiff. Defendant had paid, however, the wrong party:—*Held*, that there was gross negligence. Judgment for plaintiff. *Worsley* v. *Braxton* (1909), 12 W. L. R. 531.

Percentage rate — *On what amount commission payable — Change of purchaser —Continued transaction.*] — M., owner of mining lands, agreed to give G. a commission for effecting a sale thereof. G. introduced a purchaser to M., and a contract for sale of the lands to said purchaser was executed. This was replaced by a later contract, by which the sale price was reduced in consideration of an incumbrance on the property being paid off by the purchaser, who borrowed the money for the purpose, and assigned his interest in the contract to the lender, also signing a release in favour of M. of any claim against him on the contracts. M. afterwards sold the mining lands to a person buying for the lenders of the money to pay off the incumbrance. In an action by G. for his commission:—*Held*, that he was entitled to the commission on the full amount

received for the land as finally sold.—*Held*, also, that the sale of the land was not a transaction independent of the contract with the purchaser introduced by G., but was a continuance thereof. — Judgment appealed from. *Cavanagh* v. *Glendinning*, 10 O. W. R. 475, affirmed; Davies, J., dissenting. *Glendinning* v. *Cavanagh*, 40 S. C. R. 414.

Pledge credit of principal — Advertising contract — Manager of hotel—Ostensible authority — Liability of proprietor — Correspondence — Conflict of evidence — Credibility of witnesses. *H. W. Kastor & Sons Advertising Co.* v. *Coleman*, 6 O. W. R. 791, 11 O. L. R. 262.

Power of attorney — *Authorisation of action — Delay in production.*]—1. The attorney appointed by a non-resident plaintiff must be a resident of the Province of Quebec, and not a person only temporarily present therein. 2. It must appear that the plaintiff, or his attorney, has authorised the institution of the suit. 3. An action will not be dismissed on account of plaintiff's failure to produce a proper power of attorney, if he has shewn willingness to comply with the order of the Court, but an additional delay will be granted to him. *Glasgow and Montreal Asbestos Co.* v. *Canadian Asbestos Co.*, 5 Que. P. R. 20.

Power of attorney — *Its sufficiency to take proceedings — C. P. 177* (7).] — A power of attorney by which a party "est autorisé à administrer ses propriétés . . . à les vendre pour le prix et aux conditions qu'il jugera à propos, enfin à faire tout ce qu'il pourrait faire lui-meme s'il était personnellement présent," include not only the power to collect the rental due, but also the taking of such proceedings as may be necessary to force the debtor to pay the same. *Furois* v. *Labadu* (1909), 11 Que. P. R. 233.

Procuring purchaser — Agreement entered into — Misrepresentations — Promissory note in lieu of cash payment — Mistake in written agreement. *McCuish* v. *Cook*, 9 W. L. R. 304.

Procuring purchaser ready and willing to carry out the purchase—Purchaser not complying with vendor's condition as to deposit with bank — Deposit actually made but so as to be withdrawable at purchaser's option — Refusal of vendor to complete — Agent not entitled to commission. *Yates* v. *Reser*, 7 W. L. R. 848.

Promissory notes — *Authority of agent — Husband acting for wife.*]—Where a wife separated as to property is carrying on business as a trader, and the husband is acting as her manager under a general power of attorney, the wife is liable to *bonâ fide* holders, for value, of negotiable instruments signed or indorsed by the husband for the purposes of such business, and particularly where there is no pretension that the husband appropriated to his own use any part of the funds obtained on such negotiable instruments. *Quebec Bank* v. *Jacobs*, 23 Que. S. C. 167.

Purchase of horse by agent—*Ratification.*] — Defendant employed R. to drive some persons into the country. One of the horses was injured and R. obtained a horse from the plaintiff giving a memorandum that $140 would be paid for it:—*Held*, in action for price of horse, that no completed sale nor ratification by defendant. *L'Hirondelle* v. *Taft*, 10 W. L. R. 398.

Purchaser not found by agent — Contract for payment of commission—Sale effected at lower price — Assistance in closing sale — Remuneration—*Quantum meruit*. *Munroe* v. *Beischel* (Sask.), 8 W. L. R. 65, 846.

Ratification — *Conflicting evidence — Reversing finding of trial Judge.*]—The defendant, the owner of a summer resort hotel, engaged a person to manage and conduct it for a season, agreeing that the latter should have the entire control and management of the hotel. Out of the gross receipts 15 per cent. was to be paid to the defendant for rent, and all profits were to be equally divided:—*Held*, that a contract for advertising the hotel was within the scope of the manager's authority as agent for the defendant, and that the defendant was bound by it.—*Held*, also, upon conflicting evidence, reversing the finding of the trial Judge, that the contract was in fact authorised or ratified by the defendant. — *Per* Boyd, C.:—Where two witnesses of apparently equal credibility contradict each other as to particular statements or conversations, acceptance should be given rather to one who remembers what happened than to one who denies, probably because he does not remember. Another rule for dealing with such conflicts of evidence is, to consider what facts are beyond dispute and to examine which of the two accounts in conflict best accords with those facts according to the ordinary course of human affairs and the usual habits of life or business.—Judgment of Street, J., reversed. *H. W. Kastor & Sons Advertising Co.* v. *Coleman*, 11 O. L. R. 262, 6 O. W. R. 791.

Sale of goods by agent — *Violation of authority — Notice to purchaser — Bona fides — Factors Act.*]—D. was intrusted by the plaintiffs with carriages for sale, under an agreement in writing by which he was authorised to sell only to responsible persons, and by which it was provided: "None of the purchaser only will be taken for goods in this contract; old machines, horses, or trades of any kind are entirely at the risk of agents, and they will be held strictly responsible for all such notes." D. disposed of two of the carriages to the defendant, taking for one goods to be supplied out of the defendant's shop for the use of his (D.'s) family, and for the other cash and a waggon of the defendant's. In an action by the plaintiffs for a return of the carriages or the value, the jury found that the defendant had no notice or knowledge that D. had no authority to dispose of the carriages in the way he did, that the defendant did not know or believe that D. was merely an agent, but believed he was the owner and had no reason to suppose he was an agent. The Court directed a new trial:—*Held*, *inter alia*, that the provisions of the Factors Act were inapplicable. *Macnutt* v. *Shaffner*, 34 N. S. R. 402.

Sale of horse — Wrongful detention by purchaser as against principal — Damages. *Jordison* v. *Ross* (N.W.P.), 6 W. L. R. 388.

Sale of land — *Authority of agent — Price of sale — Specific performance.*]—M., owner of an undivided three-quarter interest in land at Sault Ste. Marie, telegraphed to her solicitor at that place: "Sell, if possible, writing particulars; will give you good commission." C. agreed to purchase it for $600, and the solicitor telegraphed M.: "Will you sell three-quarter interest, sixty-seven acre pared, Korah, for six hundred, hard cash, balance year? Wire stating commission." M. replied: "Will accept offer suggested. Am writing particulars; await my letter." The same day she wrote the solicitor: "Telegram received. I will accept $600; $300 cash and $300 with interest at one year. This payment I may say must be a marked cheque at par for $300, minus your commission, $15, and balance $300 secured." The property was incumbered to the extent of over $300, and the solicitor deducted this amount from the purchase money, and sent M. the balance, which she refused to accept. He also took a conveyance to himself from the former owner, paying off the mortgage held by the latter. In an action against M. for specific performance of the contract to sell:—*Held*, affirming the judgment of the Court of Appeal (6th November, 1901), that the only authority the solicitor had from M. was to sell her interest for $585 net, and the attempted sale for a less sum was of no effect. —*Held*, further, that the conveyance to the solicitor by the former owner was for M.'s benefit alone. *Clerque* v. *Murray*, 22 C. L. T. 354, 32 S. C. R. 450.

Sale of land — *Authority to make contract — Specific performance.*]—The defendant gave a real estate agent the exclusive right, within a stipulated time, to sell, on commission, a lot of land for $4,270 (the price being calculated at the rate of $40 per acre on its supposed area), an instalment of $1,000 to be paid in cash, and the balance, secured by mortgage, payable in four annual instalments. The agent entered into a contract for sale of the lot to the plaintiff at $40 per acre, $50 being deposited on account of the price, the balance of the cash to be paid "on acceptance of title," the remainder of the purchase money payable in four consecutive yearly instalments, and with the privilege of "paying off the mortgage at any time." This contract was in form of a receipt for the deposit and signed by the broker as agent for the defendant:—*Held*, affirming the judgment appealed from (15 Man. L. R. 205, 1 W. L. R. 417), that the agent had not the clear and express authority necessary to confer the power of entering into a contract for sale binding upon his principal.—*Held*, further, that the term allowing the privilege of paying off the mortgage at any time was not authorised and could not be enforced against the defendants. *Gilmour* v. *Simon*, 26 C. L. T. 456, 37 S. C. R. 422.

Sale of land — *Contract—Statute of Frauds — Evidence — Vendor and purchaser — Specific performance — Appeal — Findings of Judge.*]—1. Although an agent for the sale of land, having only an oral authority from the owner, may sign for him a contract of sale of the land which will be binding under the Statute of Frauds, yet, if disputed, the evidence of the agent should not be accepted as sufficient proof of such authority without corroboration, unless it is of the clearest and most convincing kind and such as bears overwhelming conviction on its face. 2. The authority ordinarily conferred upon a broker employed in the sale of land is limited to the duty of finding a purchaser ready and willing to buy the property at the named price and on specified terms and to introduce him to his principal; and, without a clear and express provision, such authority does not warrant the agent in signing a contract of sale so as to bind the principal. 3. Where the owner has authorised his agent to sell on terms requiring payment of $1,000 cash, this will not authorise him to sign an agreement of sale by which the purchaser is to pay the money "on acceptance of title." 4. Although accepting the findings of the trial Judge as to the credibility of the witnesses, the Court in appeal may review the evidence and reverse the decision arrived at as to the legal conclusions to be drawn from the admitted facts. *Rosenbaum* v. *Belson*, [1900] 2 Ch. 267, commented on and distinguished. *Gilmour* v. *Simon*, 15 Man. L. R. 205, 1 W. L. R. 417.

Services rendered—*Purchaser not found by agent — Negotiations with purchaser — Implied contract — Quantum meruit.*] — *Held*, that when the principal lists lands with an agent, and communicates to such agent the information that a third party has been inquiring with a view to purchasing the land, and as a result of such information the agent opens negotiations with such third party, but fails to make a sale, and the principal thereafter, owing to the neglect or inability of the agent to effect a sale, opens negotiations directly with the third party, and effects a sale at substantially the price originally listed the agent cannot be said to have introduced the purchaser or so assisted to effect a sale as to entitle him to recover his commission. *Thompson* v. *Milling*, 8 W. L. R. 622, 1 Sask. L. R. 150.

Substantial compliance with authority — *Pleading — Amendment.*]—A real estate agent employed to find a purchaser for land, who finds a purchaser ready and willing to purchase upon terms which, although not identical with those in contemplation at the time of his employment are satisfactory to the owner, is entitled to compensation for his services, notwithstanding that no sale is actually made, by reason of refusal of the owner to sell the property for reasons unconnected with the terms of purchase.—*McKenzie* v. *Champion*, 12 S. C. R. 649, followed.—*Semble*, where in the proposed vendor's instructions to the agent there is not something to indicate that it was his intention to give the agent authority to sell, it will be inferred that the authority extended only to finding a purchaser. *Boyle* v. *Grassick*, 6 Terr. L. R. 232, 2 W. L. R. 99, 284.

Transfer of land by agent — *Exceeding instructions — Notice to transferee of condition against registration — Effect of registration — Certificate of title — Cancellation — Security for advances — Fraud—*

Costs.]—When a transfer of land is made by a principal to his agent to enable him to secure advances of money, but upon the express condition that it shall not be registered, and such transfer is subsequently delivered to a third party, who, with notice of the condition, advances money, if such third party subsequently causes the transfer to be registered and certificate of title to be issued, the registration and certificate will be set aside at the suit of the principal; but the third party will not be ordered to retransfer the property to the principal.—*Semble*, that he is entitled to hold the transfer as security for his advances.—*Per* Beck, J.—If the effect of the transaction be that the third party intended to make the advance only if given a transfer without conditions attached, while the transferor insisted upon the condition against registration, there was no "*consensus ad idem*;" and if the agent subsequently procured an advance and delivered the transfer, the transferee should be ordered to deliver up the transfer to the principal; but, in the special circumstances of this case, the transferee was entitled to retain them as security.—Where charges of fraud are made, rather as a conclusion of law from the facts stated, than as a direct statement of facts, though the Court does not make an affirmative finding of fraud, the plaintiff will not be deprived of costs, at least when as in this case, there is evidence to indicate that the actions of the defendant (in registering the transfer, etc.), caused damage to the plaintiff. *Beere* v. *Northern Bank*, 7 W. L. R. 432, 1 Alta. L. R. 228.

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4. Rights and Liabilities of Principal and Agent as Against Third Persons.

Action by principal for price of goods sold — *Agent holding himself out as principal* — *Set-off of agent's debt.*]—When the buyer of goods from an agent knows that the person he is dealing with is only an agent, he cannot set off a claim against the agent in an action by the principal for the price of the goods, although the ownership of the goods may have been transferred to another principal before he bought and without his knowledge. So far as the claim of set-off is concerned, it is immaterial whose agent the buyer thought him to be.—*Boulton* v. *Jones*, 2 H. & N. 564, distinguished. *Wood* v. *John Arbuthnot Co.*, 4 W. L. R. 305, 16 Man. L. R. 320.

Breach of duty by agent — *Interest in purchase of principal's lands intrusted to agent for sale* — *Non-disclosure* — *Resale at profit* — *Liability to account to principal.*]—The defendant B., an estate agent, was authorised by the plaintiff to sell for him 225 acres of land for the best price obtainable, but not less than $30 per acre, B. to receive a commission. On the 3rd March, 1906, or later, B. sold, or pretended to sell, the land for the plaintiff to the defendant C. at $35 per acre, B. and the defendant M. having between them a half interest with C. in the purchase. The purchase was completed and the land transferred to C., and on the 8th August, 1906, the defendant became the purchaser from C. at $125 per acre. The facts were not disclosed to the plaintiff, and he did not know that B. and M. had an interest with C. until after the sale to D.:—*Held*, that the plaintiff was entitled as against B., C., and M., to the profits derived from the sale to D.—No agent will be permitted to enter into any transaction in which he has a personal interest in conflict with his duty to use his best endeavours to promote the interests of the principal, except with the consent of the principal given after all the material circumstances and the exact nature and extent of the interest of the agent have been fully disclosed. *Pommercau* v. *Bate* (1910), 13 W. L. R. 248, 3 Sask. L. R. 51.

Company — Liability of—Holding out of person as general manager — Costs. *Davis* v. *Bidwan Lake Navigation Co.*, 1 O. W. R. 229.

Contract —*Mandatory* — *Account* — *Salary* — *Condition precedent.*]—Where a person agrees, in consideration of a fixed monthly salary, to obtain custom and business in Montreal for a firm of brokers in New York, and, for that purpose, is constituted and holds himself out to the public as their representative, the contract between them is one of mandate rather than of lease and hire of work, and the obligation arises from it for the mandatory to account to his principal, as provided in Art. 1713, C. C. This obligation is a condition precedent to the exercise by the mandatory of the right to bring suit for wages or salary. *Violett* v. *Sexton*, 14 Que. K. B. 360.

Execution against agent — *Seizure of goods intrusted for sale—Fraud—Sheriff.*]—On the evidence it was found that an arrangement, between merchants and an insolvent person, against whom there were unsatisfied judgments—whereby the former supplied the latter, as their agent, with goods to be exchanged with Indians for furs, which were to be delivered for sale to the merchants, who were to retain from the proceeds of the sale of the furs the invoice price of the goods, plus 10 per cent. thereon and 2½ per cent. of the selling price of the furs, the agent getting all further profit as his remuneration—was established as against the defence that it was an arrangement in fraud of the agent's creditors; and it was held, that such an arrangement was not legal, and that therefore the merchants were entitled to damages against the deputy sheriff, who had seized some furs comprised in the agreement under an execution against the agent. *MacDonell* v. *Robertson*, 1 Terr. L. R. 438.

Fraud and misrepresentation of both principal and agent—*Rescission of contract* — *Common intention* — *Practice*—*Parties to action*—*Amendment of pleadings.*]—Co-owners who are not partners may severally maintain action against a vendor for rescission of a contract of sale on the ground of fraud and misrepresentation whereby they were induced to purchase, and all other co-owners are not necessary parties to the action. The fact of the defendants having changed their position by paying over to a third party money received pursuant to the contract which it is sought to rescind, will not affect the plaintiff's right to rescind, if such payment over was not in fact pursuant

to the contract. Where a contract is induced by false representation of an agent, proof of knowledge of authorisation of such representation on the part of the principal is not necessary to rescind the contract. *Milburn* v. *Wilson*, 31 S. C. R. 481, followed. Where a principal and his agent are both guilty of fraud, and obtain money by fraud, judgment will be given against them both to recover the amount. *Evans* v. *MacMicking* (1909), 2 Alt. L. R. 5.

Insurance agent — *Agreement to give notice of further insurance — Omission — Liability — Gratuitous undertaking—Mandate.*]—The defendant, a general insurance agent, undertook gratuitously to have an additional $500 policy placed on the property of the plaintiffs; and, before completion of this transaction, he also undertook, at the plaintiffs' request, to notify the companies already holding policies of the additional insurance, as was required under their policies. A loss occurred and, owing to the defendant having failed to give such notice, the plaintiffs were placed in the power of the insurance companies and had to accept $1,000 less than they otherwise would have received:—*Held*, that the transaction was one of mandate. If the defendant had not entered upon the execution of the business intrusted to him, he would have incurred no liability, but, having undertaken to perform a voluntary act, he was liable for negligently performing it in such a manner as to cause loss or injury to the plaintiffs. *Coggs* v. *Bernard*, 1 Sm. L. C. 182; Judgment of Lount, J., 4 O. L. R. 541, 22 C. L. T. 372, 1 O. W. R. 554, affirmed. *Baxter* v. *Jones*, 23 C. L. T. 258, 6 O. L. R. 360, 2 O. W. R. 573.

Insurance agent — *Breach of duty — Neglect to insure — Damages — Amendment.*]—The defendant, who was the agent of a fire insurance company, was applied to by the plaintiff for an insurance upon certain buildings. The defendant filled out a form of application, which was signed by the plaintiff's uncle and guardian, and received the premium, but neglected to insure. The buildings having been burnt, the plaintiff was held by the trial Judge entitled to recover their value as damages. But his decision was reversed by the full Court, which held that the plaintiff's case was not proved; that at most it was proved that the defendant was to forward the application to a loan company, the holders of a mortgage on the premises in question, and that the company were to be expected to apply for the insurance; and an amendment to make that case was refused. *Henry* v. *Beattie*, 23 C. L. T. 30, 250.

Judgment obtained against agent—*Election — Claim to rank on assets of company — Principal in winding-up proceedings.*] — The Bank of Hamilton made advances to C. trading under the name of M. Company and T. Company, both unlimited companies. C., without the bank's knowledge, assigned her interests to an incorporated company, taking fully paid-up stock therefor. The bank continued to make advances to C. L., to whom the bank assigned their claim, sued C. and the two unlimited companies and obtained judgment. On the winding-up of the incorporated company L. sought to rank as a creditor:—*Held*, that he could not, having elected to sue C. *Re Toronto Cream and Butter Co., Ltd., Luxton's Case*, 13 O. W. R. 673.

Liability of agent for price of goods supplied to principal — Credit given to agent — Estoppel — Company — Partnership. *Starr M. Co.* v. *Spike*, 40 N. S. R. 627.

Moneys advanced by bank to agent —Liability of principal — Evidence—Authority of agent — Letter — Construction — Burden of proof. *Merchants Bank* v. *Sterling*, 7 O. W. R. 67, 741.

Possession of goods — *"Intrusted" — Estoppel.*]—A limited meaning is to be given to the term "agent" as used in R. S. O. c. 150. It is to be restricted to mercantile agents, and does not include every one who may act and who has possession of the property. An agent within the Act must be one who is intrusted with the possession as agent for sale in a mercantile transaction, or for a purpose connected with the sale of the property:—*Held*, that an agent who had obtained possession of certain lumber from the master of a vessel without authority from the owner, was not intrusted with the possession, and the owner was entitled to recover the price against the purchaser, although the latter had paid the agent. *Mosher* v. *Keenan*, 20 C. L. T. 529, 31 O. R. 658.

Proof of agency — *Indemnity.*] — Whenever persons assume the character of duly authorised agents, they must prove their agency or indemnify third parties against the consequence of its absence. *Letellier* v. *Boivin*, 16 Que. S. C. 428.

Purchase by agent of land for principal — *Title taken in agent's name — Seizure by creditor of agent — Opposition by principal — Validity.*]—An agent who buys land in his own name, and has the formal title thereto vested in himself, does not acquire the property in and right thereto; and an opposition entered by his principal to the seizure of the land by virtue of a judgment obtained by a creditor against the agent, is well founded. *Revillon Brothers Limited* v. *Boivin*, 15 Que. K. B. 314.

Purchase of goods—*Purchase in agent's name — Insolvency of agent — Claim by curator.*]—Goods bought by an agent for his principals, for which he was to be paid a commission, are the property of the principals even when bought in the name of the agent. *In re Lemelin*, 22 Que. S. C. 87.

Sale of goods — *Payment to agent of vendor — Forged receipt — Warning.*]—The defendant had bought goods of the plaintiff through an agent of the plaintiff who came to the defendant to take an order. The goods were delivered to the defendant by the agent, accompanied by a signed invoice of the plaintiff, upon which was written, "Pay no account without my written authority." Afterwards the agent of the plaintiff came to collect the amount due for the purchase, and the defendant said that he would pay him upon an order or receipt of the plaintiff. The

agent came back with an account receipted and signed with the name of the plaintiff, and the defendant paid him. The signature of the plaintiff was forged, and the agent was not authorised to receive payment of the account:—*Held*, that, in these circumstances, the defendant, having been warned not to pay without an order signed by the plaintiff, should have assured himself that the signature presented to him was really that of the plaintiff, and the latter was entitled to recover the amount of the account. *Girard* v. *Beauchemin*, 18 Que. S. C. 111.

Sale of goods by agent — *Knowledge of purchaser — Sale for account of principal.*]—A sale by an agent, without mentioning his position of agent, of an article which the purchaser knows to be the property of the principal, is regarded as made for the account of the latter. *Pomerlau* v. *Maheu*, 31 Que. S. C. 190.

Sale of goods by agent in his own name — *Recourse of principal against purchaser.*] — A sale of goods belonging to a principal, made by the agent in his own name, the agent receiving the price, leaves the principal without recourse against the purchaser, even when the principal himself has made the shipment and delivery of the goods sold. *Huard* v. *Banville*, 31 Que. S. C. 27.

Sale of goods to agent — *Liability of principal for price — Evidence — Inference —Appeal — Reversal of judgment.*]—Up to the 1st July, 1906, the defendant's son, J. G. L., carried on a meat business in the firm name of J. G. L. & Co., and the plaintiffs supplied goods to him for that business. At that time the defendant, who was the principal creditor of J. G. L., employed one S. to manage the business at a salary of $75 a month. S. afterwards represented to the plaintiffs, though without the defendant's authority, that the defendant would be responsible for future goods supplied for the business, and that he, S., would see the plaintiffs paid, and he then ordered more goods, which the plaintiffs supplied. They, however, charged these goods to J. G. L. & Co., and not to the defendant. The defendant was not asked by the plaintiffs whether he was the proprietor or not:—*Held*, reversing the decision of Dubuc, C.J., 6 W. L. R. 206, that the facts did not warrant the inference that the business had been in fact transferred to the defendant as his business, or that S. had any authority to order goods from the plaintiffs on the defendant's credit; and that the defendant was not liable. *Gordon* v. *Leary*, 7 W. L. R. 533, 17 Man. L. R. 383.

Undisclosed principal—*Action against agent — Election — Purchase of judgment— Equities — Notice.*] — The plaintiff sold a judgment for more than $9,000 against K. to G., who was acting as agent for Mrs. K., to whom he at once assigned the judgment, and received $1,000 from her therefor; G., by his instructions from Mrs. K., was limited to $1,000 as the purchase price of the judgment, but, as he was interested in the architect's commission which he expected to receive out of the erection of a building proposed to be erected on the land against which the judgment was registered, he agreed to pay the plaintiff $1,000 in cash and $500 when the roof of the building was completed or at the latest on the 1st January, 1906, and he also agreed to enforce the judgment against K., and pay the plaintiff half the proceeds he received; his agreement with the plaintiff was contained in two writings, one being an assignment from the plaintiff to G. of all the plaintiff's rights under the judgment for $1,000, and the other containing the additional terms, of which Mrs. K. was not aware when she bought from G.: G. failed to pay the plaintiff the additional $500, and the plaintiff sued for it in a County Court; and, although the fact came out in evidence during the trial that G. in buying the judgment had been acting as Mrs. K.'s agent, the plaintiff took judgment against G. Subsequently the plaintiff sued G. and Mrs. K. to have the assignment set aside or to have Mrs. K. declared a trustee for the plaintiff:—*Held*, that the plaintiff by taking judgment against G., founded upon his promise contained in one of the documents which made up the transaction, elected to treat him as the sole principal, and that Mrs. K. bought the judgment without any knowledge of the agreement between the plaintiff and G., and so was not bound by its terms. *Semisch* v. *Guenther*, 10 B. C. R. 371.

Undisclosed principal — *Action by agent — Addition of principal as party — Building contract — Guarantee — Breach— Representation as to ownership — Damages.*] —A husband who was superintending for his wife the erection of a building on her property, after correspondence with contractors in which the building was referred to by them as "your building" and by him as "my building," took a guarantee from them that "your roof will remain water-proof." In the correspondence and contract the expression "your town" was also used. The wife was not mentioned. The roof proved defective. In an action by the husband and wife for damages:—*Held*, that the expressions employed did not necessarily imply that the husband was the owner of the roof or the building, but were used as conveniently descriptive of the matter under discussion, and that it was competent for the wife to shew that he was her agent, and to recover damages for its breach.—*Held*, also, that the husband, not being either a party or privy to the contract, could not recover for its breach. *Lucas* v. *de la Cour*, 1 M. & S. 249, and *Humble* v. *Hunter*, 12 Q. B. 310, distinguished. *Abbott* v. *Atlantic Refining Co.*, 22 C. L. T. 411, 4 O. L. R. 701, 1 O. W. R. 701.

Undisclosed principal — *Action by for price of goods — Addition of agent as party — Amendment — New trial — Promissory note — Promise to pay money and deliver goods.*]—In an action brought by the plaintiff in his own name, as undisclosed principal, on a contract made by M. with the defendants for the sale of an organ, the evidence disclosed that the sale was made by M. in his own name, and the defendants had no knowledge until long afterwards that the plaintiff had any connection with the transaction. An application to add M. as a plaintiff was refused by the trial Judge:—

Held, on appeal, that the application should have been granted, even though it was not made until after the conclusion of the trial.—There was no ground for sending the case back for a new trial, all the grounds of defence having been raised against the plaintiff that could be raised against M.—A document which provides for something to be done by the maker in addition to the payment of money, viz., the delivery of goods, is not a promissory note within the meaning of the Act, and cannot be sued on as such. *Travis* v. *Forbes*, 2 E. L. R. 389, 41 N. S. R. 226.

Undisclosed principal — *Sale of goods to agent on his credit—Payment to agent—Discharge of principal.*]—A person who sells goods to the agent of an undisclosed principal, believing the agent to be the principal, may sue the principal on discovery of the facts, and the principal will not be discharged from liability by having made payment to the agent before such discovery, unless the conduct of the seller has been such as to make it unjust for him to call upon the principal for payment, or unless the character of the business is such as naturally to lead the principal to suppose that the seller would give credit to the agent alone. *Irvine* v. *Watson*, 5 Q. B. D. 102, and *Heald* v. *Kenworthy*, 10 Ex. 739, followed. *Arbuthnot* v. *Dupas*, 15 Man. L. R. 634, 2 W. L. R. 445.

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5. Sale of Mine.

Commission—*Introduction of purchaser.*]—Where a broker, on the instruction of the vendor of mineral claims, introduces a purchaser, he is entitled to his commission even though the sale be effected wholly through another agent. *Osler* v. *Moore*, 8 B. C. R. 115.

Option given to agent to purchase —*Estoppel — Termination of agency—Revival—Onus.*]—The plaintiff obtained from the defendants an option on a mining property, to expire on the 31st May, 1902, under an agreement by which he undertook to find a purchaser for the property for $27,000 for a commission of $5,000, but with a provision that, in case it might be found necessary to make a reduction in the price of the property, the commission payable to the plaintiff should be 20 per cent. on the purchase price. Some time before the expiration of this option, on the 12th March, 1902, the plaintiff wrote the defendants informing them that he had failed to bring about a sale of the property, but that he had induced a person whose name was mentioned to join with him in purchasing it, and making a cash offer of $15,000 for the property as it stood, payable in 30 days, and saying, among other things: "This is only a game of chance as far as I am concerned, for I am now a buyer instead of a seller . . . this is a cash offer . . . and it is all I can afford or will offer whether accepted or rejected." The offer was not carried into effect, and the defendants having subsequently made an arrangement to sell the property to other persons, the plaintiff claimed commission:—*Held*, that the relationship established between the plaintiff and defendants under the first arrangement, which was practically that of principal and agent, was terminated when the plaintiff made his offer of the 12th March, and that the plaintiff, having then elected to associate himself with the parties who were proposing to purchase the property, was estopped from claiming remuneration from the defendants in connection with the sale made subsequently; also, that the relationship between the plaintiff and defendants having been severed on the 12th March, the burden was on the plaintiff to shew, by express evidence, that it was subsequently revived. *Fleming* v. *Withrow*, 38 N. S. R. 492, 1 E. L. R. 6.

Option — *Secured by agent — Remuneration—Commission—Quantum meruit—Conditions.*]—Plaintiff brought action to recover a commission as remuneration for his services in securing for defendants an option to purchase certain mining claims which defendants failed to take up.—Britton, J. (16 O. W. R. 358, 1 O. W. N. 880) *held*, upon the evidence, that plaintiff was acting for defendants and upon their instructions and was entitled to be paid for his services, and if defendants sought to make the pay for work done conditional upon the defendants taking the property and selling it, realising a profit from such sale, the onus was upon them, and that onus had not been satisfied. Judgment for plaintiff for $2,185 with costs. —Divisional Court *held*, that the evidence shewed that plaintiff was not to be paid unless the claims were sold, and this defendants were unable to do, as vendors would not extend time for payment; that there was nothing in the evidence to indicate any bad faith on part of defendants. Appeal allowed, and action dismissed with costs. *Cahill* v. *Timmins* (1910), 16 O. W. R. 980, 2 O. W. N. 73.

Purchase of mine — *Agent's commission—Evidence as to whether on buying or selling price of mine—Onus — Finding of fact.*]—Plaintiff was to have 10 per cent. commission for purchasing a mine. The contract was not in writing. The purchase price was $3,450 and the selling price was $20,000. The dispute was whether the 10 per cent. commission was to be paid on the buying or selling price.—Middleton, J., *held*, that plaintiff had established his case. Judgment for plaintiff for $2,000 and costs. Judgment for defendant on a counterclaim for $003.20 and $25 costs with set-off *pro tanto*. *Endelman* v. *Rothschild* (1910), 16 O. W. R. 925, 2 O. W. N. 25.

Remuneration of agent — *Written agreement for commission — Oral promise of expenses and remuneration if no sale—Findings of jury.*]—The defendant gave instructions in writing to the plaintiff respecting the sale of a coal mine on terms mentioned, and agreed to pay a commission of 5 per cent. on the selling price, to include all expenses. The plaintiff failed to effect a sale. He brought an action to recover expenses incurred in an endeavour to make a sale, and reasonable remuneration. The jury found that the plaintiff was entitled to compensation of $9,667.62, and also answered questions as follows:—(1) Did the defendant

in the middle of 1890 verbally authorise the plaintiff to do his best to sell her mine, and if so, was any compensation mentioned at the time? (2) In view of concessions made subsequently, we believe there was. (b) A promise of fair treatment in case of no sale. (2) Were the documents signed later intended to represent all the terms? Yes, had sale been effected. (3) If the documents were not so intended, what agreement was come to? Answer to question (1) expresses our view:—*Held*, that judgment was properly entered for the plaintiff on these findings; that the agreement as found by the jury was not illusory; that the findings supported the judgment; and that the verdict was not one which the jury could not reasonably find. *Harris* v. *Dunsmuir*, 9 B. C. R. 303.

Written contract — *Collateral oral agreement — Findings of jury — New trial.*]—An agent employed to sell a mine for a commission failed to effect a sale, but brought action based on an oral collateral agreement by the owner to pay "expenses" or "expenses and compensation" in case of failure. The jury found, in answer to a question by the Judge, that "we believe there was a promise of fair treatment in case of no sale." —*Held*, reversing the judgment in 9 B. C. R. 303, Taschereau, C.J.C., and Killam, J., dissenting, that this finding did not establish the collateral agreement, but was, if anything, opposed to it, and, the real issue not having been passed upon, there must be a new trial. *Dunsmuir* v. *Lowenberg, Harris & Co.*, 24 C. L. T. 117, 34 S. C. R. 228.

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6. MISCELLANEOUS CASES.

Account — Contract — Construction — Parol variation — Competing business — Goods supplied — Profits — Remuneration —Damages — Special services — Method of accounting — Burden of proof — Disbursements. *Pain* v. *Code*, 5 O. W. R. 677, 6 O. W. R. 833.

Account — Contract — Construction — Reformation — Liabilities of sureties for agent — Alteration in contract—Conditions of bond. *Great West Life Assce. Co.* v. *Mooring*, 6 O. W. R. 176, 690.

Account — Sale of goods — Onus. *Henry* v. *Nelson* (Man.), 2 W. L. R. 32.

Accounting by agent — *Alleged agreement with agent to give up agency.*]—Plaintiff company appealed from an order made at the Ottawa Weekly Court on a motion by way of appeal by defendant from report of the local Master, finding defendant liable to plaintiff in the sum of $2,013.11. Defendant had been agent for plaintiff company at Ottawa, and claimed to be entitled to $1,000, under an alleged agreement to give up said agency. Anglin, J. (12 O. W. R. 1123), allowed the claim for $1,000 and reduced the amount due plaintiffs to $676.79.—Divisional Court reversed Anglin, J., holding that, as defendant at the time alleged agreement was said to have been made, was in default in accounting for collections made by him at his agency, it was highly improbable that any such agreement was made. Report of local Master restored with costs to plaintiff company. *McCarthy* v. *McCarthy* (1910), 15 O. W. R. 408, 1 O. W. N. 500.

Accounts — *Interest — Costs of preparing receipt — Inventory of estate—Costs of suit — Trustee.*]—An agent refusing to give an account and pay over balance is chargeable with interest. — Costs disallowed to an estate agent of preparing a receipt containing a schedule of leases and securities delivered up to the principal.—Costs of suit against an agent for an account ordered to be paid by him where he had disregarded requests for an account, and had filed an improper account in the suit. *Simonds* v. *Coster*, 3 N. B. Eq. 329, 1 E. L. R. 544.

Agency for sale of money orders — *Carriers — Contract — Undertaking of agent to account for orders and proceeds—Theft and forgery by servant of agent — Payment —Liability of agent.*]—The defendant, on appointment as agent for the sale of the signed money orders of an express company, agreed in writing to be responsible for the "due issue and sale thereof." An employee of the defendant stole a book of money orders, forged the defendant's counter-signature (which was required), and issued orders which the plaintiffs being unaware of the forgeries, paid, and now brought this action for the amount:—*Held*, that the defendant was not liable, inasmuch as the money orders in question had not been issued or sold by him, and that he had duly accounted for them by shewing that, without negligence on his part, they had been stolen from him, and he was therefore unable to return them.—*Semble*, also, that even if the orders had in fact been countersigned by the defendant, they would not have been binding on the company, inasmuch as to issue them, when the money they represented had not been received by him, would be an act outside the scope of his authority as agent, and for this reason the plaintiff could not recover. *Ireh* v. *Great Western Ry. Co.* (1877-1881), 42 U. C. R. 90, 3 A. R. 446, 5 S. C. R. 179, followed.—*Held*, further, that, even if there was a breach of the defendant's contract, the plaintiffs suffered no damage by it, as they incurred no liability to the payee or transferee of the money orders, inasmuch as neither of the latter would be entitled to sue upon them, there being no privity of contract between them and the plaintiffs. *Dominion Express Co.* v. *Krigbaum* (1909), 18 O. L. R. 533, 13 O. W. R. 364, 924.

Auctioneer — *Sale of property — Concealment of material fact — Action of deceit — Depriving of commission.*]—An action of deceit will lie against an auctioneer who, being employed to effect the sale of a piece of property, concealed from his principal a material fact, by reason of which concealment the latter sold the property for a smaller sum than he could have obtained if he had been in possession of all the facts. Such failure of duty on the part of the auctioneer towards his principal deprives him of any right to the compensation agreed to be paid to him upon the sale being effected. *King* v. *Potts*, 36 N. B. R. 42.

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Broker — *Gambling in stocks — Advances by agent — Criminal Code, s. 201—Promissory note — Consideration.*] — P. speculated on margin in stocks, grain, etc., through C. & Son, brokers in Toronto, and in March, 1901, directed them to buy 30,000 bushels of May wheat at stated prices. The order was placed with a firm in Buffalo, and, the price going down, C. & Son forwarded money to the latter to cover the margins. P., having written the brokers to know how he stood in the transaction, received an answer stating that "no doubt the wheat was bought and has been carried, and whether it has or not our good money has gone to protect the deal for you," on which he gave them his promissory note for $1,500, which they represented to be the amount so advanced. Shortly afterwards the Buffalo firm failed, and P. became satisfied that they had only conducted a bucket shop, and the transaction had no real substance. He accordingly repudiated his liability on the note, and C. & Son sued him for the amount of it:—*Held*, Davies and Killam, JJ., dissenting, that the evidence shewed that the transaction was not one in which wheat was actually purchased; that C. & Son were acting therein as agents for the Buffalo firm; that the transaction was not completed until the acceptance by the firm in Buffalo was notified to P. in Toronto; and being consummated in Toronto it was within the terms of s. 201 of the Criminal Code, and the plaintiff could not recover. — *Held*, also, Davies and Killam, JJ., dissenting, that, assuming C. & Son to have been agents of P. in the transaction, they were not authorised to advance any moneys for their principal beyond the sums deposited with them for the purpose. Per Davies and Killam, JJ. that the transaction was completed in Buffalo, and, in the absence of evidence that it was illegal by law there, the defence of illegality could only be raised by plea under Rule 271 of the Judicature Act of Ontario. Judgment of the Court of Appeal, *Carpenter* v. *Pearson*, 3 O. W. R. 483, reversed. *Pearson* v. *Carpenter*, 25 C. L. T. 26, 35 S. C. R. 380.

Collection of rents — Failure to account — Laches and acquiescence of principal — Repudiation by agent of agency. *Pick* v. *Edwards*, 2 E. L. R. 232.

Commission on advertising secured for principal — *Contract of agency — Advertising "originating in his territory."*] —Plaintiff brought action to recover a commission under an agreement between himself and defendants, by which he was appointed a special agent to secure contracts for advertising for defendants for Toronto and the province of Ontario. The question was as to the right of plaintiff to commission in respect of an advertising contract entered into by the T. Eaton Co. with defendants. Defendants contended that in order to entitle plaintiff to commission, the business must have originated in his territory. In other words not only must the final contract order have been sent from a Toronto office, but the advertising must also have originated in the plaintiff's territory:—*Held*, that the defining clause was intended to avoid difficulties which might, without it, arise as to where the advertising originated, and should be construed to mean the place where the business was obtained; that the plaintiff was to canvass for advertisers in his territory for the defendants and there was to be no limitation of the sphere of action of the plaintiff as defendants contended; that the final contract having been completed by the T. Eaton Co. and delivered to defendants at Toronto, the plaintiff was entitled to his commission. *Gledhill* v. *Telegram Print. Co.* (1900), 13 O. W. R. 1000; affirmed 14 O. W. R. 957, 1 O. W. N. 161.

Contract — Construction — Cancellation —Termination of agency — Account—Damages. *Montreal Canada Fire Insurance Co.* v. *Richmond*, 5 E. L. R. 227.

Contract between agent and insurance Co.—*Commission on renewal premiums — Modification of contract — Acted on by agent—Death of agent—Action by executor to recover commissions.*]—Plaintiff, as executor of deceased life insurance agent, brought action to recover commissions due deceased under a contract with defendant company, which was in the form of a letter, in which defendant company agreed to pay deceased, on renewal premiums during the continuance of the policies secured by him. —Riddell, J., *held* (16 O. W. R. 461, 1 O. W. N. 921), that the company was bound by their contract which had been signed by secretary for managing director and accepted by the deceased. Judgment as asked.—Court of Appeal affirmed above judgment. *Skinner* v. *Crown Life Ins. Co.* (1911), 18 O. W. R. 455, 2 O. W. N. 647.

Contract on behalf of company not formed — Personal liability — Evidence. *Gamble* v. *Spencer* (B.C.), 1 W. L. R. 189.

Contract to build a ship — *Right of lien for money advanced*] — A mercantile house at Newry directs a house at Quebec to contract for the building of a ship, for which they (the Newry House) would send out the rigging. The Quebec House enter into a contract with some ship-builders accordingly. The Newry House then direct their correspondent at Liverpool to send out the rigging; he does so; and it having been actually delivered to the Quebec House:—*Held*, that the property in it was vested in the Newry House, and that the Quebec House had a right to retain it against the Liverpool correspondent, on account of their lien on it for advances made to the builders, and payment of Custom-house expenses, although previously to the delivery they had obtained an assignment of the ship to themselves from the builders, and had registered it in the name of one of the partners in their house. Judgments of the Court of Appeal and of the Court of King's Bench at Quebec, set aside. *Reid* v. *Rogerson* (1839), 1 C. R. A. C. 8, Stuart 412, 1 Knap. 362, 1 R. J. R. Que. 330, 12 Eng. Rep. 357.

Contract to give up agency—*Accounting by agent—Ratification of contract by company—Misconduct of agent—No evidence of — Consideration for giving up agency.*] — Plaintiffs brought action to recover $15,547.39 balance claimed to be due by defendant on the accounts between them. Defendant had been agent for plaintiffs at Ottawa, and

claimed to be entitled to $1,000 under an alleged agreement to give up his agency.—Local Master at Ottawa found defendant liable to plaintiffs for $2,013.11.—Anglin, J., (12 O. W. R. 1123), allowed defendant's claim for $1,000 and reduced the amount due plaintiffs to $676.79.—Divisional Court (15 O. W. R. 408, 1 O. W. N. 500) reversed Anglin, J., and restored the finding of the Local Master, holding that, as defendant at the time the alleged agreement was said to have been made, was in default in accounting for collections made by him at his agency, it was highly improbable that any such agreement was made.—Court of Appeal, *held*, there was no evidence of any misconduct on part of defendant such as would have justified his dismissal without notice: That it was only reasonable that defendant should stipulate for some consideration before giving up his agency and this had been found as a fact. —Judgment of Divisional Court set aside and judgment of Anglin, J., restored, with costs. *McCarthy* v. *McCarthy* (1911), 18 O. W. R. 423, 2 O. W. N. 842.

Contract to supply goods to agent —Proviso against damages for non-delivery —Repugnancy — Indefinite order. *Massey-Harris Co.* v. *Zwicker*, 3 E. L. R. 193.

Contract with an agent — *Ratification —Jurisdiction — Declinatory exception — C. P. 94.*]—In a sale made by a commercial traveller, even under conditions requiring the approval of his employer, the contract is complete at the place where it is made by the traveller. *Walter Blue Co.* v. *Reid*, 11 Que. P. R. 205.

Delivery of scrip—Breach—Return of deposit—Principal and agent—Authority of agent—Costs. *McDougall* v. *Bull* (N.W.T.), 2 W. L. R. 193.

Fraud of agent — *Pleading.*]—The first count of the declaration alleged that the defendant was hired for the purpose of receiving and forwarding to the plaintiffs applications for fire insurance, yet the defendant, not regarding his duty, negligently and wrongfully received and forwarded to the plaintiffs an application for insurance containing statements which he knew at the time to be false, and material to the risk, and the plaintiffs relying upon the truth of the application, accepted the risk, and issued a policy thereon which became a claim, and the plaintiffs were put to great costs in defending an action at law. The second count alleged that the false statements were received and forwarded to the plaintiffs by the defendant fraudulently and in collusion with the applicant against the company:—*Held*, that both counts stated a cause of action and were good on demurrer. *Norwich Union Fire Ins. Co.* v. *McAlister*, 35 N. B. R. 691.

Hotel manager — *Moneys received by— Liability to account.*]—The defendant was the manager of the plaintiffs' hotel and at the close of each day went over the receipts and disbursements and entered a summary thereof in a book, the receipts being classified according to the department of the business from which they were derived, and took over the money which constituted the balance on hand, as shewn by such entries, which he kept in his possession all night, and subsequently made deposits with the plaintiffs' bankers. During the day the money was kept in a safe in the office to which a clerk and a stenographer employed in the office, as well as one of the plaintiffs, who for two or three days in each week took part in the management and supervision of the hotel, had access. When any money was taken out, it was the duty and practice to put in a slip shewing the amount so taken and the purpose. The defendant, while admitting the accuracy of the balance up to a specified date, claimed that he was not responsible thereafter, by reason of his not being then able, through overwork, to actually count the money taken over by him:—*Held*, under the circumstances, and in the absence of a positive statement shewing the inaccuracy of the daily balance, that the defendant was bound to account therefor. *Clayton* v. *Patterson*, 21 C. L. T. 117, 32 O. R. 435.

Invalid contract of agency — *Liability to account.*] — A corporation, acting within its charter powers, that accepts from a bank money orders to be put in circulation, by sale or otherwise, is bound to account for the proceeds and is liable for any balance remaining after deduction of charges. This liability arises from the bare fact of the acceptance of, and the dealing with, the money orders, and is not affected by any irregularity in, or invalidity of, the contract or agreement under which they took place. *Cambridge Corporation* v. *Sovereign Bank* (1909), 18 Que. K. B. 423.

Mandate — *Revocation — Notice — Indemnity — Admission—Offer of settlement.*] — An agreement between the parties, by which the defendants were to pay the plaintiff a fixed sum per month for receiving, storing, handling, and shipping such goods as might be consigned to him for and on account of the defendants, is a contract of mandate; and such contract may be revoked, without notice, at any time by the mandator, whether the mandatary is salaried or unsalaried, subject to his right to be indemnified against all loss directly flowing from the mandator's wrongful act, where he has acted wrongfully or unjustly in revoking the mandate,—which was not proved in the present case. 2. The plaintiff cannot avail himself of an offer contained in a proposition of settlement made by the defendant (but which he, the plaintiff, refused to accept), as a recognition or admission of his demand to that extent. *Gaibert* v. *Atteaux*, 23 Que. S. C. 427.

Mandate — *Settlement by one of two mandators with mandatary — Error — Estoppel.*]—A settlement between one of two co-mandators, acting for himself only, and the mandatary, made when no full account had been rendered by the latter of the execution of his mandate, by which credit is erroneously given for charges payable in equal shares by both mandators, is no bar to an action by the mandator who so settles against the mandatary for a refund of the amount due and payable by his co-mandator. *Sheffield* v. *Lighthall*, 16 Que. K. B. 361.

Negligence of agent — Fire insurance —Liability of agent for failure to secure valid policy for principal — Failure to give

notice of prior insurance — Knowledge of agent — Principal compromising with insurance company — Damages — Costs. *Beaudry v. Rudd*, 14 O. W. R. 197.

Notary — *Loan — Agent of lender to receive payment — Evidence — Admissions —Commencement of proof in writing.*]—In an action for the recovery of the amount of an obligation in which the defendant alleges payment made to the notary who took the *acte*, and the plaintiff denies that the notary was his mandatary, admissions by the plaintiff that his loans were always attested by *acte* before the notary in question, and that he was never himself present at the execution, that in two cases the notary had received payment for him, in special circumstances, that it had happened in other cases that his debtors had remitted money to him through the medium of this notary, do not constitute a commencement of proof in writing of a mandate by the plaintiff to the notary to receive payment of the loan in question. *Dubois v. Charron*, 17 Que. K. B. 132.

Notary — *Mandate — Substitution — Liability for loss.*]—A notary to whom a client intrusts the amount of a loan to remit it to the borrower acts as mandatary *ad negotia*, and as a salaried mandatary, when he shares with the notary of the borrower the usual commission upon the amount of the loan. In the execution of this mandate, in placing the funds in the hands of another than the borrower, in this case of the notary of the latter, he substitutes him for the borrower, and is responsible for loss arising from that fact. *Aiede v. Chaurest*, 30 Que. S. C. 9.

Onions shipped to commission merchants on false representations as to the state of the market — *Delay in selling — Loss to principal — Action for damages.*] — Defendants, commission merchants, at Ottawa, wrote plaintiff, an onion dealer, that onions were selling for 81 a bag and solicited a consignment from him. He shipped a car load, 550 bags, to defendants, who after a delay of two months, sold them for 65 cents a bag. Plaintiff brought action to recover $210.47, balance alleged to be due plaintiff on the sale, but in substance an action to recover damages for breach of duty as agents. At trial jury found for plaintiff and judgment was entered for $191.22. On appeal Divisional Court *held*, that the evidence shewed that there was no such price as 81 per bag obtainable in Ottawa market, and that plaintiff would not have consigned his onions to defendants if they had disclosed the true state of the market to him. That defendants were liable, as it is a duty of an agent to disclose to his principal every material fact concerning the matter of his agency. Appeal dismissed with costs. *Malcolm v. Dom. Fruit Ex.* (1910), 15 O. W. R. 652.

Promissory note made to agent — *Misappropriation of proceeds — Recourse against principal.*]—A person dealing with an agent who gives him as payment a promissory note payable to his (the agent's) order personally, without reference to his principal, has no recourse against the latter to recover the amount which the agent has appropriated after discounting the note. *Beaudoin v. Charrau*, 32 Que. S. C. 361.

Proof of agency — Work and labour— Action for price. *McGhie v. Rabbits*, 2 O. W. R. 323.

Purchase of goods by agent — Commission — Damages. *Henry v. Ward*, 1 O. W. R. 222, 652, 2 O. W. R. 422.

Purchase of goods by agent — Proof of agency — Evidence — Liability of principal to vendor. *Charbonneau v. Sparks*, 12 O. W. R. 876.

Purchase of land by agent — Proof that purchase made for principal — Parol evidence — Statute of Frauds. *Lundy v. Gardiner*, 2 O. W. R. 1104.

Sale and purchase of land—*Contract —Construction — Agency.*]—In an action by the appellant for a declaration that he was entitled as purchaser to a conveyance from the respondent of the property in suit: — *Held*, on consideration of all its terms and of the surrounding circumstances, that the agreement sued upon was not a vendor and purchaser agreement, but an agency agreement; that the appellant never came under any personal liability, present or future, to purchase, the arrangement contemplated being on behalf of third parties who might thereafter be accepted by the respondent. *Livingstone v. Ross*, [1901] A. C. 327.

Sale of goods — Contract — Goods sold by another agent in plaintiff's territory. *Webster v. Luxfer Prism Co.*, 3 O. W. R. 197.

Sale of oil rights — Fraud of agent —Inducing principal to sell rights at inadequate price — Secret profits of agent — Counterclaim by principal against agent — Return of commission paid — Damages. *Myercough v. Merrill*, 12 O. W. R. 390.

Sale of pulpwood — *Contract—Failure to prove agency.*]—Action to recover $438.75, a balance alleged to be due on 525 cords of pulpwood said to have been sold by plaintiff to defendants:—*Held*, that Nesbitt was not defendants' agent nor employee, but that he bought from plaintiffs and sold to defendants. That there was no ratification by defendants of Reckitt's acts. Action dismissed without costs. *Marks v. Michigan Sulphite Fibre Co.* (1910), 1 O. W. N. 834.

Sale of shares — *Broker's commission —Sale not carried out — Pleading.*] — A declaration alleging that the plaintiff was authorised to sell, for a commission, certain shares of a mining company; that he found a purchaser therefor, but that the sale did not take place because the defendants imposed new conditions to the purchaser; is sufficient in law to maintain an action for the recovery of the commission which would have been obtained under the said sale, especially where an acknowledgment to owe and a promise to pay are alleged to have been made by the defendants. *Leet v. Morris, Leet v. Montreal and Oregon Gold Mines (Ltd.)*, 2 Que. P. R. 457.

Sale of shares—Money lent—Indemnity against liability — Account — Evidence — Costs. *McConnell* v. *Erdman*, 6 O. W. R. 451.

Sale of timber limits — Introduction of purchaser — Failure of negotiations — Subsequent sale at reduced price. *Pardee* v. *Ferguson*, 5 O. W. R. 638, 6 O. W. R. 810.

Secret profits — *Trust — Clandestine transactions by broker — Sham purchaser—Commission — Quantum meruit.*] — H., a broker, undertook to obtain two lots for F., as an investment of funds supplied by F. for that purpose, at prices quoted, and on the understanding that any commission or brokerage chargeable was to be got out of the vendors. H. purchased one of the lots at a price lower than that quoted, receiving, however, the full amount quoted from F., and, by representing a sham purchase of the other lot, got an advance from F. in order to secure it:—*Held*, affirming the judgment appealed from, that H. was the agent of F., and could not make any secret profits out of the transaction, nor was he entitled to any allowance by way of commission or brokerage in respect of either of the lots so purchased. *Hutchinson* v. *Fleming*, 40 S. C. R. 134.

Services as agent—Promise of employment—Recovery of money for breach. *Manning* v. *Small*, 2 O. W. R. 204.

Services rendered — *Discovering and staking out mining claims — Husband and wife — Evidence — Corroboration — Trustee — Costs.*]—Plaintiff claimed that defendants, husband and wife, employed him to stake out two mining claims for them, and have the same recorded in the name of the wife. At trial, MacMahon, J., 14 O. W. R. 441, held that the husband had authority to and for wife and she must pay plaintiff's claim. Divisional Court reversed MacMahon, J., and *held*, that the liability of the wife did not arise merely because the real contracting party (the husband) had directed plaintiff to record the claims in the name of the wife. Declaration made that defendant wife held the claims as trustee for defendant husband. Appeal of wife allowed and action against her dismissed without costs. Judgment to stand against him as found by trial Judge, with costs of Court below. *Rasch* v. *Heckler* (1909), 14 O. W. R. 1273, 1 O. W. N. 287.

PRINCIPAL AND SURETY.

Agent for sale of goods — *Surety for —Conditions of bond — Giving time — Discharge of surety — Default — Notice.*]—The plaintiffs entered into an agreement in writing with O. for the sale of carriages, by the terms of which O. was required to obtain from the purchaser of each vehicle, on delivery, his note or cash in settlement, and in all cases where notes were taken, to guarantee the payment of and endorse the notes. The defendant became surety on a bond given by O. to the plaintiffs that O. would perform the conditions of the agreement, and would pay and satisfy all notes and other securities which remained outstanding on its termination. Some of the notes taken by O. having become overdue during the course of the business, the plaintiffs drew on O. for the amounts; O. accepted but failed to pay:—*Held*, that, as the defendant was not to be liable until after the termination of the agreement, and as the time given had elapsed before his liability accrued, the giving of the time did not prevent the plaintiffs from looking to him as surety. If, in any case, time was given, so as clearly to discharge the surety, the amount as to which he was so discharged was severable from the rest of the transaction, and the discharge would only operate *pro tanto*. As, by the terms of the bond, the taking and renewal of notes was contemplated, the surety was not prejudiced by the drawing of drafts as a means of collecting the notes. As to the taking by O. of notes of a different form from that stipulated, it must be shewn that the plaintiffs, by their conduct, prevented the thing from being done, or connived at its omission, or enabled O. to do what he ought not to do, and but for such conduct on the part of the plaintiff, the omission or commission would not have happened; and the mere reception by the plaintiffs of notes taken by O. in another form than that required was not within this principle. A letter from the plaintiffs' manager to the defendant notifying him that notes endorsed by O. were not being paid when due, and that the amount due the company by O. was large and growing, was sufficient to have put the defendant upon his guard. *McLaughlin Carriage Co.* v. *Gland*, 34 N. S. R. 195.

Application of payments—*Mechanic's lien — Declaration of right.*]—The plaintiff, who was a director of a company for which the defendants were doing work, endorsed the company's note in the defendants' favour for part of the defendants' claim. The note was discounted by the defendants, and was dishonoured, and the holders obtained judgment against the plaintiff, who did not, however, pay any part of the claim. Subsequently the defendants obtained, in mechanic's lien proceedings instituted by other creditors, a dividend of eighty-one cents on the dollar of their total claim, including the portion covered by the note:—*Held*, that they were not bound to apply the amount received first in satisfaction of the portion of the claim covered by the note, nor entitled to apply it first in satisfaction of the portion of the claim not covered by the note, but were bound to apply it *pro rata* on the whole claim.—*Held*, also, that the plaintiff was entitled to a declaration of right in this respect, although he had paid nothing on the judgment. *Hood* v. *Coleman Planing Mill and Lumber Co. of Burlington*, 20 C. L. T. 205, 27 A. R. 203.

Assignment of debts — *Promise to make good — Suretyship — Benefit of discussion — Indication of property of debtor.*] —A buyer of immovables who acknowledges in a *contre-lettre* that a cash payment mentioned in the deed of sale consists in reality in the transfer of debts of an equivalent amount due him in New York, of which he undertakes to make a valid assignment to the seller, "*avec promesse de faire valoir*," becomes the surety of the assigned debtors and bound to pay on their default.—A surety to avail himself of the benefit of discussion,

must indicate to the creditor the distrainable property of the debtor, situated in the province, and advance the money necessary to obtain the discussion. *Maucotel* v. *Tétrault*, 28 Que. S. C. 251.

Banks and banking — *Crediting customer with amount of note — Discount — Collateral security — Separate instruments —Sureties in different amounts —Contribution by sureties.*]—A bank, wishing to close an account on which a balance of $1,000 of advances to the customer remained unpaid, took a joint and several demand note for $1,000 of the customer and another as surety, payable to the bank, with interest, and credited the customer's account with its face value, writing the word "disc." before the credit entry:—*Held*, that it was open to the bank to shew that the note was in fact taken as collateral security merely, and not in payment of the balance due so as to release the accommodation makers of two other notes held by the bank as collateral security in respect to the same account.—Sureties by different instruments for the same principal debt are liable to contribute in proportion to the respective amounts for which they have agreed to be sureties.—A person as surety made a note for $3,000 to be held by a bank as security for advances to be made to a customer, and the ultimate balance thereof; and two others, as sureties, made a joint and several note for the like amount and for the same purpose; and another, as surety, made a note for $1,000 for the same purpose.—*Held*, that they were liable to contribute respectively in the proportion of three-sevenths, three-sevenths, and one-seventh of the ultimate balance requiring to be paid off. *Ostrander* v. *Jarvis*, 18 O. L. R. 17, 13 O. W. R. 75.

Bond for fidelity of agent of insurance company — Advances to agent and premiums not paid over — Construction of bond — Application to existing agreement between agent and company — Withholding from surety information as to material facts —Release. *Chicago Life Insurance Co.* v. *Duncombe*, 8 O. W. R. 898.

Collateral security — *Neglect of creditor by which security is lost — Release of surety.*]—Where a creditor accepted a transfer of seigniorial rents from the surety, the rents being transferred to secure the payment of a loan made to the principal debtor, interest, and premiums on a life policy, which had been assigned by the principal debtor to the creditor as security for the debt, and, through the neglect of the creditor to make payment of a premium due, the policy lapsed, the surety is entitled to be released from his obligation of suretyship for so much of the debt as the lapsed policy would have sufficed to extinguish. The principle above stated is not affected by the fact that the surety's agent, with the consent of the creditor, continued to collect the rents, or by the further fact that signification of the transfer of the rents, with the consent of both creditor and surety, was not made upon the tenants. *Wurtele* v. *Trust and Loan Co. of Canada*, 15 Que. K. B. 329.

Conditional warranty — *Notice — Possession of goods.*] — T. wrote a letter agreeing to guarantee payment for goods consigned on *del credere* commission to R., on condition that he should be allowed, should occasion arise, to take over the goods consigned. Shortly afterwards the creditor, without giving any notice to T., closed the agency, withdrew some of the goods, and permitted others to be seized in execution and removed beyond the reach of T. The creditor did not give T. any authority to take possession of the goods as stipulated in the letter of guaranty. In an action by the creditor to recover the amount of the guaranty:—*Held*, that the conditions of the guaranty had not been complied with by the creditor, and that he could not hold the warrantor responsible. *Brown* v. *Torrance*, 20 C. L. T. 270, 30 S. C. R. 311.

Contract between principal and surety — *Action by surety on note before discharging principal's liability.*]—Plaintiff and defendant were joint and several makers, for the latter's accommodation of two notes. Plaintiff took from defendant a note equal in amount to the other two notes and sued on this note a few days before he paid the other two notes:—*Held*, that there was consideration and the defendant must pay. Judgment for plaintiff. *Ruffee* v. *Shaw*, 7 E. L. R. 17.

Death of surety — *Continuance—Powers of executors — Extension of time — Simple contract of suretyship — Release of one surety under seal — Confirmation of original contract.*]—C. and others executed an agreement, not under seal, by which they undertook to guarantee payment of advances by a bank to an industrial company. The guarantee was to be continuing, and the bank could deal with securities for such advances as it saw fit, the doctrines of law and equity in favour of a surety not to apply thereto. One of the sureties wishing to be discharged, a document under seal was executed by the others for the purpose and the parties thereby ratified and confirmed the said guarantee and agreed to be bound as if the discharged surety had never been a party to it. C. having died, his executors and the surviving sureties and the bank executed an agreement acknowledging the amount due by him to the bank, consenting to a renewal of notes covered by the guarantee, and confirming the latter. More than six years after C.'s death, the bank brought action to recover from his executors the amount so acknowledged to be due:—*Held*, that the discharge of the surety by writing under seal did not convert the original guarantee into a specialty, and that the claim of the bank was barred by the Statute of Limitations.—*Held*, *per* Davies, Idington and Duff, JJ., that the executors had no power to continue the guarantee, and the claim against the estate was discharged by time for payment granted the principal debtor.—Appeal dismissed with costs. *Union Bank* v. *Clark* (1910), 30 C. L. T. 631, 43 S. C. R. 289.

Discharge of surety — *Extending time for payment — Promissory notes—Renewal —Accommodation indorser — Collateral security — Notice.*]—T. B. L. and A. C. S. being indebted on several promissory notes to the plaintiffs, who demanded security, the defendant H. A. S., the wife of A. C. S., at his request and without knowing of the pur-

pose for which he proposed to use it, indorsed a blank form of note, which was afterwards filled out as a note made by T. B. L. payable to H. A. S., and endorsed by her and A. C. S., and was then given to the plaintiffs. This note was afterwards renewed, H. A. S. again endorsing a blank form, A. C. S. being made payee and endorsing ahead of H. A. S. While the plaintiff held this latter note, they kept the several notes as security for which they held it renewed, the renewals extending beyond the date of the maturity of the note held as security. In an action on the latter note, H. A. S. pleaded that she was discharged, by reason of the plaintiffs having given time by a binding agreement to T. B. L. and A. C. S., the principal debtors, without her consent: — *Held*, McGuire, J., dissenting, that the renewal of the notes constituted such an agreement and that the rule invoked—that giving time to a principal debtor by a binding agreement without the surety's consent, discharges the surety—was applicable; and that H. A. S. was entitled to a dismissal of the action.—*Semble*, that the fact that T. B. L. falsely stated to the plaintiffs, when they demanded security, that H. A. S. was indebted to him, and asked them if they would accept her endorsement, to which they consented, could not bind H. A. S., as T. B. L. had no authority from her to make the statement. 2. That if notice to the plaintiffs that H. A. S. was merely an accommodation endorser were necessary, the mere fact that she was second endorser on the first note and first endorser on the second note would be sufficient evidence of such notice. 3. The case was distinguishable from that of a person who, being asked for collateral security, brings paper founded on an actual indebtedness to himself. In that case, giving him time would in no case relieve the parties to the paper given as security. *Le Jeune* v. *Sparrow*, 1 Terr. L. R. 384.

Discharge of surety — *Extension of time — Promissory note — Forged renewal.*]—The appellant was a maker of a promissory note along with one of the other defendants, his son, for whose accommodation the note was made. When the note matured it was retired by means of a new note signed by the son, and purporting to be signed by the father. The father's signature was in reality a forgery. The original note was given up by the plaintiff to the son, and was not produced at the trial. Secondary evidence of it was given, and judgment for the plaintiff upon it: — *Held*, that, assuming that the creditor knew at the time of the making of the original note that the appellant signed it as surety only, the surety was not discharged by the extending of time to the principal debtor. *Irwin* v. *Freeman*, 13 Gr. 465, followed. *McIntyre* v. *McGregor*, 21 C. L. T. 25.

Discharge of surety — *Giving time — Prejudice.*]—A surety, relying on the giving of time by the creditor to the principal debtor as a defence on an action for the debt, must now, under s.-s. 14 of s. 39 of the King's Bench Act, 58 & 59 V. c. 6, shew that he has suffered pecuniary loss or damage as the reasonably direct and natural result of the creditor having given the extension of time. The defendant, claiming that he was entitled to be treated as a surety, proved that, relying on the representations of his co-debtor that the debt had been paid and satisfied, he had made a settlement of their partnership affairs and paid a large sum of money to him and given him a formal release, besides handing over to him a large quantity of goods:—*Held*, that this was not evidence to shew that the defendant had been prejudiced by the plaintiffs having given time to the co-debtor, as what the defendant had done was done on the strength of the statements made to him by his co-debtor, and not in reliance on anything the plaintiffs had done or omitted to do. *Blackwood* v. *Percival*, 22 C. L. T. 208, 331, 14 Man. L. R. 216.

Discharge of surety—Guarantee policy —Fidelity of servant — Statements of Master upon application — Incorporation in policy — Alteration in duties of servant — Material misstatements — Ontario Insurance Act. *Hay* v. *Employers' Liability Assurance Corporation*, 6 O. W. R. 459.

Discharge of surety — *Wrongful acts of principal — Failure to give notice of — Findings of jury — Setting aside.*]—The defendants F. W. B. and J. A. K. were sureties on a bond given to the plaintiff association by the defendant B. for the faithful discharge of his duties as an agent of the association. Among such duties were the remittance, at least once in each month, of all moneys or securities collected for or on account of the association, such remittances to be made by bank draft, marked cheque, post office order, or by express. The evidence shewed that B. remitted moneys by his own personal cheques, instead of as directed, and on a number of occasions asked to have such cheques held over for a few days in order to enable him to provide funds to meet them: —*Held*, that these, and other acts of disobedience, under the terms of the agreement, would have justified the dismissal of B.; that it was the duty of the association to have notified the sureties of his derelictions of duty; and that, having failed to do so, and having continued him in their employ with knowledge that he was violating his instructions, they could not recover against the sureties for the default of B.—*Held*, that findings of the jury, negativing knowledge on the part of the association of the irregularities of B., being against the weight of evidence, must be set aside with costs, and a new trial ordered. *Confederation Life Association* v. *Brown*, 35 N. S. R. 94.

Fidelity guarantee—*Alteration of duties of principal — Imposition of greater responsibilities—Release of surety.*]—A contract of suretyship is to be interpreted strictly, and its effect should be circumscribed by and limited to the particular obligations assumed by the surety; therefore the suretyship of one who gives a guarantee against the acts of another is at an end, if the duties of the latter, while apparently, on the whole, remaining the same, are changed to place on him more onerous responsibilities. In this case, the defendant D., having become surety only for the acts of the defendant T. as a simple collector of the plaintiff, his suretyship terminated when the defendant T. ceased to act as collector

to take the more important and onerous office of secretary-treasurer of a new local branch established in the territory where he had acted as collector. *Société des Artisans Canadiens-Français* v. *Trudel*, 26 Que. S. C. 118.

Guarantee of payment of promissory note — Note not presented for payment — Principal and agent — Contract to supply goods to agent — Proviso against liability for damages for non-delivery—Latter clause void as repugnant — Waiver of terms. *Massey-Harris Co.* v. *Zwicker*, 2 E. L. R. 59.

Guarantee policy — *Fidelity of manager of loan company — Misappropriation of moneys — Release of surety — Untrue statements — Conditions of policy — Necessity for setting forth in policy — Incorporation by reference to application — Insurance Act of Ontario, sec. 144 (1), (2)—Construction —Change in duties of manager.*]—Appeal by plaintiffs from judgment of MacMahon, J., 24 C. L. T. 354, 8 O. L. R. 117, 4 O. W. R. 99, dismissing action upon a guarantee policy issued by defendants in favour of plaintiff loan company to secure the fidelity of one Rowley, manager of that company. The guarantee agreement in this case was issued upon and after the proposal or application of the employee, fortified and accompanied by the answers of the company (the employers) touching the duties of the applicant, which answers it was agreed were to be taken as the basis of the contract between the employers (the plaintiffs) and the defendants, the guarantee company. Upon these papers, statements, and representations, the contract was issued and accepted by plaintiffs. On the face of the sealed contract of insurance or guarantee it was recited: "Whereas the employer has delivered to the company certain statements and a declaration setting forth, among other things, the duties and remuneration of the employee, the moneys to be intrusted to him, and the checks to be kept upon his accounts, and has consented that such declaration, and each and every the statements therein referred to or contained, shall form the basis of the contract hereinafter expressed to be made, but this stipulation is hereby limited to such of said statements as are material to this contract." This last clause was apparently the outcome of what was deemed a proper form of expression to comply with sub-sec. (2) of sec. 144: see *Village of London West* v. *London Guarantee and Accident Co.*, 26 O. R. 520, in which the defendants were the company now defendants. If sub-sec. (2) of sec. 144 were alone considered, it appears to contain in *gremio* sufficient to indicate that the terms which go to avoid the contract need not be contained in or endorsed upon the contract "in full." It was enough if the contract "be made subject" to any stipulation as to avoiding the contract by reason of any statement inducing the entering into of the contract by the corporation. In this case the contract was made subject to the preliminary statements and declaration. Besides this, there was an express notice given on the face of the agreement (p. 2) that if any suppression or misstatement of any fact affecting the risk of the company be made at the time of the payment of the first or any subsequent premium . . . this agreement shall be void and of no effect from the beginning. The original untrue statements were made contemporaneously with the first payment of premium, and they were unquestionably material and affected the risk. *Elgin Loan and Savings Co.* v. *London Guarantee and Accident Co.*, 5 O. W. R. 349, 9 O. L. R. 569.

COURT OF APPEAL *held*, following *Hay* v. *Employers' Liability Co.*, 6 O. W. R. 117, that the application in this case, and the statements made by the plaintiffs' president, fully set out in the previous reports, 8 O. L. R. 117 and 9 O. L. R. 569, were incorporated into the policy or contract of guarantee, and made part thereof, and were, in the circumstances, binding on the plaintiffs, though not apparently authorised by any resolution, and that such statements — distinguishing the above case in this respect—were materially untrue, and therefore avoided the policy.—Judgment of a Divisional Court, 5 O. W. R. 349, 9 O. L. R. 569, affirmed. *Elgin Loan and Savings Co.* v. *London Guarantee and Accident Co.*, 11 O. L. R. 330, 7 O. W. R. 109.

Guaranty — *Bill of sale — Extra-provincial company — Goods supplied debtor in excess of sum guaranteed — New Brunswick Statutes, 1903, c. 18, ss. 12, 18.*]—Defendants gave plaintiffs a guaranty binding themselves jointly and severally as principal debtors for goods purchased by W. and any notes given therefor to the amount of $1,000. W. purchased goods to the amount of about $2,000:—*Held*, that there was no fraud. If the guarantor desired to limit the credit apt words should have been used. In the margin of the guaranty were the words: "Possession or title to the goods shall not pass."—*Held*, that there was an absolute sale. Plaintiffs were incorporated under Dominion charter but were not licensed to do business in New Brunswick.—*Held*, that guaranty being obtained by plaintiffs' traveller, who did not reside in New Brunswick, nor had plaintiffs a place of business there, the above Act does not apply. The document in question is not merely an offer, but a perfect and conclusive guaranty. Judgment for plaintiffs with six months' interest. *Heney* v. *Birmingham*, 6 E. L. R. 385.

Guaranty — Consideration — Statute of Frauds — Waiver — Assignment for benefit of creditors. *Sulin* v. *Jarvinen* (B.C.), 5 W. L. R. 189.

Guaranty — *Construction — Continuing security.*]—A firm, being indebted to the plaintiffs for goods supplied, on ordering further goods received from the plaintiffs a telegram:—"Let M. L. (defendant) wire guaranty for payment of all accounts to us, and everything will be satisfactory." The defendant, without apparently having seen the telegram, but having been informed of its contents, telegraphed in reply: "Will guarantee payment of all accounts" for the firm:—*Held*, that the guaranty was a continuing one, and the defendant was liable for accounts incurred or to be incurred. *St. Lawrence Steel and Wire Co.* v. *Leys*, 6 O. L. R. 225. Affirmed 24 C. L. T. 126, 7 O. L. R. 72, 3 O. W. R. 89.

Guaranty — Continuing security — Extent of obligation — Fraud of agent of creditors — Foreign Companies Ordinance—Registration — Penalty — Demand. *Sawyer-Massey Co.* v. *Foster* (N.W.T.), 2 W. L. R. 197.

Guaranty — *Honesty of agent — Notice of default — Proof of loss — Proposal — Conditions — Expenses of prosecution.*]—An action upon a guaranty policy to reimburse the plaintiff for pecuniary loss by the fraud or dishonesty of an agent of the plaintiffs which should amount to embezzlement or larceny. One condition was that on the discovery of fraud or dishonesty the employers should immediately notify the defendants:—*Held*, on the evidence, that the defendants got immediate notice of the fact of the loss, and waived exact compliance with the condition as to notice. 2. That, within a reasonable time after discovery of default, the plaintiffs furnished their claim, with such particulars as proved the cause, nature, and extent of the loss. 3. Whether the incorporation of the proposal in the policy (as was provided for) should be construed as constituting a warranty by the plaintiffs that they would adhere to the course indicated by the answers to questions submitted to the plaintiffs, the surety should be considered as discharged by a departure from that course materially contributing to the loss insured against. The plaintiffs did not furnish reasonable verification of the statements made in the written proposal or the compliance therewith. Therefore, the plaintiffs were not entitled to recover for pecuniary loss; but, having prosecuted their agent, as required by a condition of the policy, they were entitled to be paid the expenses so incurred. *Globe Savings and Loan Co.* v. *Employers' Liability Assurance Corporation*, 21 C. L. T. 512, 13 Man. L. R. 531.

Guaranty — Release of surety—Promissory note collateral to guaranty—Extension of time by days of grace. *McDonald* v. *Bucholtz* (Y.T.), 2 W. L. R. 10.

Guaranty bond — *Counter-bond—Construction — Application to part default — Authority of manager for Canada of English company — Consideration.*]—The plaintiffs had given a bond to the Municipal Commissioner dated the 1st May, 1904, to insure the faithfulness and honesty of the defendant C. as treasurer of the rural municipality of Brokenhead for a term of three years, in the sum of $3,000, and the premium for the three years' insurance was paid in advance. On the 3rd March, 1905, the plaintiffs gave notice in accordance with a provision of the bond, cancelling the guaranty at the expiration of three months, whereby the liability of the plaintiffs was confined to any defalcations [illegible] to the 3rd June, 1905. This action necessitated the vacating by C. of his position as treasurer; but on it being intimated to the council that the plaintiffs would retain liability on the bond, if they got a satisfactory counter-security bond, the other defendants agreed to give such security, and the council voted to reappoint C. The manager of the plaintiffs for Canada, A., then had prepared a form of counter-security bond for the defendants to sign, and, after it was returned to him signed, it was sent to the Municipal Commissioner a document signed by himself purporting to be an endorsement on the original bond reinstating C. for a guaranty of $3,000 dating from the 3rd June, 1905, to the 1st May, 1907. The defendants were not asked to secure the plaintiffs by their counter-bond against past defalcations, and did not know that there were any such, and the wording of their counter-bond did not clearly shew that it was intended to secure the plaintiffs against past defalcations of C. Shortly afterwards the plaintiffs were obliged to pay the amount of their original bond to the Municipal Commissioner in respect of defalcations of C. committed prior to the 3rd June, 1905. They then sued the defendants upon the counter-bond:—*Held*, that, under all the circumstances, the defendants were not liable, as their bond should be held to have relation only to the liability of the plaintiffs under their reinstating contract, and not to that under the cancelled bond.—*Held*, also, that, as there was no evidence that A. had authority from the plaintiffs to make the endorsement he did, the plaintiffs had failed to establish that they had continued the guaranty bond previously in existence, and consequently there was a total absence of consideration for the defendants' counter-bond, and for that reason also they were not liable upon it. *London Guarantee and Accident Co.* v. *Cornish*, 6 W. L. R. 5, 17 Man. L. R. 148.

Immovable pledged as security for debtor's obligation — *Personal action against surety — Demurrer — C. P. 194.*]—There is no personal obligation between creditor and surety when the latter pledges immovable property for another's debt. The surety, in such a case, is liable merely *propter rem*. *Paquin* v. *Chaine* (1910), 12 Que. P. R. 331.

Joint and several promissory note —*Part payment — Statute of Limitations—Effect of payment by one of several joint makers, after enforcement of note barred as his right to contribution from other makers —Voluntary payment — Burden of proof.*]—Plaintiff, defendant and C., the principal, made a joint and several note to L. Payments were made from time to time by C. More than six years after the note became due, plaintiff paid the balance owing on the note and now sought to recover one-half from the defendant:—*Held*, that he cannot recover, the payment having been voluntary. *Patterson* v. *Campbell*, 8 E. L. R. 49.

Judgment against principal — *Res judicata against surety — Evidence — Appropriation of payments — Scope of liability of surety.*]—A judgment against the principal debtor is *res judicata* against his surety, provided that the judgment defines and determines the responsibility of the principal debtor in the matter covered by the security. 2. In this case the judgment against the principal debtor, being based upon the fact that he had neglected to collect certain premiums, and not determining his responsibility as regards money received and not remitted to the plaintiffs, did not decide the question arising in the present action, and therefore did not sustain the allegation of *res judicata* as regards the surety. 3. Evidence cannot, in order to establish *res judi-*

cata, be admitted to determine the nature of debts covered by the amount of a judgment, when the judgment does not determine such debts and does not particularly specify them: Art. 1234 C. C. 4. The surety is not concerned in the appropriation of moneys remitted by the principal debtor to the creditor; the remitting of the money frees the surety from all responsibility. 5. In this case the surety, warranting only the fidelity of the principal debtor in the performance of his duties, will not be responsible for what the creditor has in his own interest, tolerated and even approved in the conduct of his agent. Judgment in 24 Que. S. C. 88 reversed. *Morgan* v. *Western Assurance Co.*, 13 Que. K. B. 49.

Judicial surety — *Appeal — Extent of liability.*]—A judicial security guaranteeing that a party will effectively prosecute an appeal which he has taken to the Court of King's Bench from a judgment of the Superior Court, and will pay the award and all cost and damages which shall be awarded in case the judgment of the Superior Court shall be affirmed, is at an end the moment the judgment of the Superior Court has been reversed by the Court of King's Bench; and the fact that, upon an appeal of the opposite party, the Supreme Court of Canada has subsequently set aside the judgment of the Queen's Bench and restored that of the Superior Court, does not revive the obligation of the surety. *Guertin* v. *Molleur*, 21 C. L. T. 445, 19 Que. S. C. 571.

Liability of wife as surety—*Findings of Referee—Necessity for independent advice —Knowledge of circumstances—Lack of fraud and misrepresentation — Power of wife to make a valid mortgage.*]—Divisional Court *held* that the findings of the Referee cannot be set aside if based upon a reasonable conflict of testimony, and appear to deal fully with all the matters in difference. Where a married woman assumes liability on behalf of her husband, her signature cannot be impeached on the grounds of misunderstanding the circumstances or of fraud or misrepresentation, if she had an accurate knowledge of the circumstances and the fraud or misrepresentation has not been definitely proved. A married woman is not in need of independent advice as to signing a mortgage when the transaction is natural and rational, and she is not living in passive obedience to her husband's direction, and there has been no overpowering influence. *Union Bank* v. *Crate* (1911), 19 O. W. R. 290, 2 O. W. N. 1147.

Mandate — *Negligence — Laches — Release of surety — Pledge — Construction of contract — Principal and agent.*]—Upon the execution of a deed of obligation and hypothec, the plaintiffs became sureties for the debtor, and, for further security, the debtor assigned and delivered to the mortgagee, by way of pledge, a policy of assurance upon his life for the amount of the loan; one of the clauses of the deed provided "for further securing the repayment of the said loan, interest, accessories, and premiums of insurance on the said life policy," that the debtor and sureties, "by way of pledge *à titre d'antichrèse* transferred and made over unto the said lender" certain constituted rents and seigniorial dues. The deed further provided that the agent of the seigniory should remain agent until the loan should be repaid with interest and such insurance premiums as might be disbursed by the creditor, and that the creditor should have the right to dismiss said agent should he fail to make out of the revenues of the seigniory and remit to the creditor the amount necessary for the payment of such interest and the sums disbursed for the insurance premiums. It further provided that the lender should not be responsible to the debtor and sureties for the agent's acts, the debtor and sureties assuming responsibility therefor. The judgment appealed from found, as facts, that the sureties had made a provision in the hands of the creditor for the purpose of payment of the premium out of the revenues assigned, that, for such purposes, the creditor had become the mandatary of the sureties and responsible for the due fulfilment of such mandate, and that there were sufficient funds derived from such revenues to pay a renewal premium which fell due shortly before the death of the debtor, but said premium had been omitted to be paid through some neglect or fault of the creditor in obtaining the funds therefor from the agent. In consequence of the failure of the payment of the premium the benefit of the policy was lost:— *Held*, affirming the judgment appealed from, Idington, J., dissenting, that the deed contemplated the payment of the premiums by the creditor out of the funds assigned, that the creditor had failed to use proper diligence in respect to the payment of the premium, and that the sureties were, therefore, entitled to be discharged *pro tanto*, and the property pledged released accordingly. *Wurtele* v. *Trust and Loan Co.*, 25 C. L. T. 99; *Trust and Loan Co.* v. *Wurtele*, 35 S. C. R. 663.

Obligations of surety — *Seizure of goods — Retention by defendant — Production of goods — Accounting for revenue from —Necessity for action of account.*] — The surety furnished by a defendant in respect of his undertaking to produce, upon the order of the Court, the property seized and to account for the revenue derived from such property, is bound only to the extent of the value of the property really seized, and cannot be adjudged to pay a sum of money as the fruits or revenue derived from such property, so long as an action for an account has not been brought against the defendant for whom he is surety. *Boursier* v. *Bergevin*, 34 Que. S. C. 97.

Official bond — Breach — Defence of negligence — Suppression of facts. *City of Montreal* v. *Boucher*, 3 E. L. R. 142.

Official bond — Want of supervision— Failure to audit accounts. *St. Edward School Commissioners* v. *Employers' Liability Assurance Corporation*, 3 E. L. R. 124.

Payment by guarantor of debt of principal — *Action to recover amount paid from principal — Legal obligation to pay— Request of principal — Acceptance by creditor of offer to guarantee.*]—A creditor offered to fill the defendant's order for goods sent by the plaintiff, the creditor's agent, and to allow him an extra commission if he would guarantee the account. The plaintiff replied that he would guarantee the account for that

season only:—*Held*, that the plaintiff was bound by the guaranty whether he had notice of the shipment of the goods or not, and, being so bound, was entitled to recover from the defendant the amount paid under the guaranty, which, as found upon the evidence by the trial Judge, had been given at defendant's request.—*Sleigh* v. *Sleigh*, 5 Ex. 514, distinguished.—The terms of sale of the goods were "four months, or 5 per cent. off 30 days," and the creditor had taken the defendant's note at four months for the amount of the account, but the plaintiff knew the terms and had agreed to them:—*Held*, that, although the time of payment was thus postponed beyond the time mentioned by the plaintiff in his guaranty, yet he was bound by it, as it should be presumed that he had guaranteed the account payable on the terms to which he, as the creditor's agent, had agreed. *Fraser* v. *Douglas*, 5 W. L. R. 52, 16 Man. L. R. 484.

Promissory notes — *Deposit of collateral securities — Ear-marked fund — Payment — Appropriation of proceeds — Set-off —Release of principal debtor — Constructive fraud — Discharge of surety — Right of action — Common counts — Equitable recourse.*]—K. owed the corporation $33,527.94 on two judgments recovered on notes for $10,000 given by him to R., and a subsequent loan to him and R. for $20,000. M., at the request of and for the accommodation of R., had endorsed the notes for $10,000, and deposited certain shares and debentures as collateral security on his endorsement. K. and R. deposited further collateral security on negotiating the second loan, but K. remained in ignorance of M.'s endorsements and collateral deposit until long after the release hereinafter mentioned. These judgments remained unsatisfied for over six years, but, in the meantime, the corporation had sold all the shares deposited as collateral security, and placed the money received for them to the credit of a suspense account, without making any distinction between funds realised from M.'s shares and the proceeds of the other securities, and without making any appropriation of any of the funds towards either of the debts. On the 28th February, 1900, after negotiations with K. to compromise the claims against him, the agent of the corporation wrote him a letter offering to compromise the whole indebtedness for $15,000, provided payment was made some time in March or April following. This offer was not acted upon until November, 1901, when the corporation carried out the offer and received the $15,000, having a few days previously appropriated the funds in the suspense account, applying the proceeds of M.'s shares to the credit of the notes he had endorsed. These negotiations for compromise and the final settlement with K. took place without the knowledge of M., and K. was not informed of his remaining liability towards M. as surety:—*Held*, by Sedgewick, Girouard, Davies, and Idington, JJ. (reversing the judgment appealed from, 11 B. C. R. 402), that the secret dealings by the corporation with K. and with respect to the debts and securities were, constructively, a fraud against both K. and M.; that the release of the principal debtor discharged M. as surety; and that he was entitled to recover the surplus of what the corporation received applicable to the notes endorsed by him as money had and received by the corporation to and for his use.—*Held* by Maclennan, J., that, on proper application of all the money received, the corporation had got more than sufficient to satisfy the amount for which M. was surety, and that the surplus received in excess of what was due upon the notes was, in equity, received for the use of M., and could be recovered by him on equitable principles or as money had and received in an action at law. *Milne* v. *Yorkshire Guarantee and Securities Corporation*, 26 C. L. T. 456, 37 S. C. R. 331.

Release of surety — *Assignment of mortgage — Covenant — Discharge of part of land.*]—The defendant, when assigning a mortgage on lands to the plaintiffs, covenanted that the mortgagor would pay. The plaintiffs afterwards, without his consent, discharged half the lands from the mortgage on payment of half the mortgage debt:—*Held*, that this was such an alteration of the contract guaranteed as to release the defendant from his liability, whether the amount paid was the full value of the part released or not. *Farmers' Loan and Savings Co.* v. *Patchett*, 23 C. L. T. 285, 6 O. L. R. 255, 2 O. W. R. 702.

Release of surety — *Duty of principal to realise upon securities — Conditional sale agreements — Duty to exercise right of repossession—Transfer of securities to surety.*]—Action on lien notes for price of goods sold and delivered—*Held*, that there is no active duty imposed on plaintiffs as holders of lien notes to repossess themselves of the chattels referred to in said notes, so as to protect the defendant who became surety for the payment of the price of these goods. *Massey* v. *Graham* (1909), 12 W. L. R. 703.

Release of surety — *Rent — Rescission of lease — Damages.*]—A third person who was given security for the payment of rent by a tenant is discharged when the lease is rescinded at the request of the landlord upon a ground other than non-payment of rent, and, the effect of the rescission operating on the day of the institution of the action for rescission, the landlord cannot claim from the surety gales of rent falling due after that date, even when these gales are included in the damages which the tenant has been ordered to pay by reason of the rescission. *Burland* v. *Valiquette*, 24 Que. S. C. 94.

Surety not a third person as against creditor — *Defences open — Insolvent Act, 1875 — Uncontested claim—Judgment.*]—A surety is not a third person as against the creditor secured, and cannot set up defences which the principal debtor would not be allowed to set up. Under the Insolvent Act of 1875, a claim filed in pursuance of s. 104 and not contested, is thereby proved against all concerned in the bankruptcy, and has the effect of a judgment in favour of the claimant. Such a claim has the effect of a judgment against the surety of the assignee in insolvency, without any further proof, and, besides, is only subject to be prescribed at the expiration of 30 years. The surety of a defaulting assignee sued under s. 68 by a creditor, who has filed a claim against the bankrupt, and who, by the provisions of this

section, is entitled to the fruits of such litigation, will not be allowed to set up a plea that the sum secured by him (in this case $5,000) would, if he paid it, be exhausted by the privileged creditors of the bankrupt. *Kent* v. *Letourneux*, 14 Que. K. B. 09.

See BANKRUPTCY AND INSOLVENCY — BILLS OF EXCHANGE AND PROMISSORY NOTES —BOND — CRIMINAL LAW — EXECUTORS AND ADMINISTRATORS — GUARANTY — LIQUOR LICENSES—MORTGAGE.

PRIORITIES.

See COMPANY — EXECUTION — FIXTURES— FRAUDULENT CONVEYANCE — INDIAN LANDS — MECHANICS' LIENS — MORTGAGE—REGISTRY LAWS.

PRISONS.

See CRIMINAL LAW—CROWN.

PRIVATE ACT.

See STATUTES.

PRIVATE INTERNATIONAL LAW.

Interpretation of contracts — *Lex loci — Right of action — Condition precedent — Mortgage — Remedies.*] — Parties to a contract are presumed to adopt the law of the place where it is made as governing the nature of the obligations that spring from it and the incidents which arise in the course of its development.—Where a purchaser of real estate in New York executes guarantee bonds there, in favour of a mortgagee, in consideration of the latter's forbearance to foreclose for a period, after which he does foreclose, but does not realise enough to pay his debt, and the law of New York provides that, under such circumstances, no other action shall be commenced or maintained by the mortgagee to recover any part of the mortgage debt without leave of the Court in which the foreclosure proceedings were had, no action will lie on the bonds in the Superior Court here without such leave first obtained, as a condition precedent.—The law in question is not one of forms of remedies and modes of proceedings, but one which affects the nature of the obligation and the right to enforce it at all. *German Savings Bank* v. *Tétrault*, 27 Que. S. C. 447.

PRIVATE PROSECUTOR.

See CRIMINAL LAW.

PRIVATE WAY.

See WAY.

PRIVILEGE.

See ARREST — CONSTITUTIONAL LAW — COURTS — CRIMINAL LAW — DEFAMATION — DISCOVERY—LIEN—MECHANICS' LIENS — MINES AND MINERALS—SOLICITOR—WILL.

PRIVY COUNCIL.

See APPEAL — CANADA TEMPERANCE ACT— PRACTICE.

PRIVY COUNCIL — JUDICIAL COMMITTEE.

Appeal — *Right of—From judgment on petition of right.*]—An appeal lies to Her Majesty in Council from a decision of the Court of Queen's Bench (Quebec) on a petition of right. *Regina* v. *Demers*, [1900] A. C. 103.

PRIVY COUNCIL. RAILWAY COMMITTEE OF.

See RAILWAYS AND RAILWAY COMPANIES.

PRIZE-FIGHTING.

See CRIMINAL LAW.

PROBATE.

See EVIDENCE — EXECUTORS AND ADMINISTRATORS—WILL—WRIT OF SUMMONS.

PROBATE COURT.

See COSTS — COURTS — FRAUDULENT CONVEYANCE—WILL.

PROBATE COURT, N.B.

See INFANT.

PROBATE COURT, N.S.

See DISTRIBUTION OF ESTATES.

PROBATE DUTY.

See WILL.

PROBATE FEES.

See WILL.

PROCEDURE.

See CRIMINAL LAW.

PROCES-VERBAL.

See MUNICIPAL CORPORATIONS — OPPOSITION — REVENDICATION — WAY.

PROCESS.

1. STATEMENT OF CLAIM.

Application to extend time for service — *Statute of Limitations — Rules 176, 203.*]—Unless there are extraordinary circumstances, an application to extend the time for service of the statement of claim should be made before the lapse of the six months allowed for service by Rule 176 of the King's Bench Act, especially as the plaintiff can obtain substantial service or some other remedy under Rule 203, and in all cases an honest attempt to serve the defendant should be shewn.—Such an attempt is not shewn where the affidavit of the solicitor merely states that since the issue of the statement of claim he has been constantly endeavouring to "locate" the defendant, but without success, until recently, when it was discovered that he resided in Saskatchewan. — In such circumstances, leave to serve the statement of claim ought not to be given, if the effect be to revive a cause of action barred by the Statute of Limitations at the time the application is made. — *Doyle* v. *Kaufman*, 3 Q. B. D. 340, followed. *Watson Manufacturing Co.* v. *Bowser*, 18 Man. L. R. 425, 10 W. L. R. 92.

2. WRIT OF SUMMONS.

See WRIT OF SUMMONS.

a. Amending.

Foreign partnership suing in firm name — *Irregularity — Waiver by appearance.*]—The plaintiffs, a foreign firm, issued the writ of summons in their firm name. The local Master on an application to set aside the writ gave plaintiffs leave to amend by setting out the names of the several partners. On appeal, *held*, there was only an irregularity which was waived by defendants appearing and obtaining an order for security for costs. Appeal dismissed. *Kasindorf* v. *Hudson*, 11 W. L. R. 143.

Partnership.]—Plaintiff sued defendants in partnership name. Defendants entered appearance in their individual names. Local Judge changed names of defendants from partnership to individual and gave plaintiff liberty to sign judgment against both defendants for $1,197.39 unless defendants should pay that sum into Court. Defendants appealed from that order:—*Held*, that the defendant Fred. S. Lorne invited amendment by appearing in his own name. He having appeared when not named did so because he was a partner. *White* v. *Lorne* (1909), 14 O. W. R. 821, 1 O. W. N. 154.

b. Service out of Jurisdiction.

Cause of action — *Contract—Breach in Ontario.*]—Where the cause of action is alleged to be a breach within Ontario that gives jurisdiction to Ontario Courts, all a plaintiff is called upon to shew is a *prima facie* case of something triable in Ontario. Where defendants were a British corporation, a writ of service out of the jurisdiction should have been served and not a notice of a writ. *Lloyd* v. *White Star* (1909), 14 O. W. R. 649.

Con. Rule 162 (e)—*Action for breach of trust in Ontario—Both parties resident in Quebec—Proper forum for litigation.*]—Plaintiff brought action for breach of trust in Ontario. Both parties were residents of province of Quebec. Plaintiff obtained an order under Con. Rule 162 (e), giving leave to serve the writ of summons and statement of claim upon defendant in province of Quebec.—Master in Chambers set aside above order and service effected pursuant thereto, holding that there was no authority permitting a foreign plaintiff to prosecute an action in Ontario against an unwilling foreign defendant.—Boyd, C., reversed order of Master in Chambers and restored the writ, holding that the particular breach of trust began and ended in Ontario, and might fairly be regarded as a breach of contract to be performed within Ontario for which damages were sought. That Con. Rule 162 (e) covered the situation and it was a transaction which might well be investigated in Ontario Courts.—Teetzel, J., granted leave to appeal to Divisional Court. *Russell* v. *Greenshields* (1911), 18 O. W. R. 264, 2 O. W. N. 565, 718, 802.

Divisional Court affirmed Boyd, C. (1911), 19 O. W. R. 416, 2 O. W. N. 1201.

Conditional appearance — *Leave to enter refused—Discretion of Master—Defendant residing out of jurisdiction—Locus contracti—Con. Rules 162, 173.*]—Plaintiff sued defendant Wallberg and a company jointly. Wallberg resided in Montreal and wished to dispute the jurisdiction of the Ontario Courts. He did not move to set aside the service upon him or the order for the issue of a concurrent writ, but he moved for leave to enter a conditional appearance:—*Held*, that if he was jointly liable, then he was subject to the jurisdiction and if he was not liable he need not appear, if he had no assets in Ontario. *Comber* v. *Leyland*, [1898] A. C. 527, followed. Divisional Court *held*, that Con. Rule 173 providing that a conditional appearance may be entered by leave, imports a discretionary power to grant leave, and

there was no sufficient ground for reversing above order. Appeal dismissed with costs. *Standard Construction Co.* v. *Wallberg* (1910), 15 O. W. R. 840, 20 O. L. R. 646, 1 O. W. N. 527.

Conditional appearance—*Place of contract — Where payment to be made—Con. Rule 162 (e), (h).*] — Defendant moved, under Con. Rule 162, before the Master in Chambers, to set aside an order of a registrar sitting for the Master in Chambers, allowing plaintiff to serve a writ of summons upon defendant in Montreal. The Master *held*, that the material upon which the order of the registrar, which gave leave to serve the writ out of Ontario, was made, was insufficient, but as there was now before him material which would have been sufficient in the first instance to have warranted the making of the order, the motion should be dismissed, but defendant to have leave to enter a conditional appearance. *Great Australian* v. *Martin* (1877), 5 Ch. D. 1, and *Canadian Radiator Co.* v. *Cuthbertson* (1905), 9 O. L. R. 126, followed. Sir Wm. Meredith, C.J.C.P., dismissed defendant's appeal with costs in the cause. *Kemerer* v. *Watterson* (1910), 15 O. W. R. 539, 20 O. L. R. 451, 1 O. W. N. 521.

Construction of contract — *Place of payment—Parol evidence — Admissibility —Con. Rule 162—Conditional appearance.*] —The plaintiff, resident and carrying on business in Toronto, completed, by letter posted there, a contract with the defendant, who resided in Scotland, under which he was entitled to a certain commission on goods sold in Toronto:—*Held*, that, on the legal construction of the contract, the place of payment was Toronto, and parol evidence was not admissible to shew the contrary, as by proving that the plaintiff had always drawn on the defendant for his commission, and that such drafts had been paid in Scotland; and therefore an order allowing service of a writ of summons out of Ontario was rightly made under Con. Rule 162; but the defendants should be allowed to enter a conditional appearance. *Blackley* v. *Elite Costume Co.* (1905), 9 O. L. R. 382, followed. *Nixon* v. *Jamieson* (1909), 18 O. L. R. 625, 13 O. W. R. 634, 911.

County Court Rules—*Order VII., Rule 18 (c)—Service of summons — Contract — Place of performance — Calls on shares — No place of payment fixed by resolution of directors — Delegation of powers — Ultra vires — Order for service set aside.*]—The plaintiffs, a British Columbia company, sued the defendant in a County Court for the amount called upon certain shares in the company subscribed for by the defendant. The defendant signed the application for the shares in Ontario, but the plaintiffs alleged that they accepted the application and allotted the defendant the shares at a place in British Columbia, and gave him due notice of the allotment. An order was made for service of the County Court summons upon the defendant in Ontario, and the defendant moved to set aside the order. Rule 18 (c) of Order VII. of the County Court Rules provides that service out of the province of a summons may be allowed by the Court whenever the action is founded on any breach within the territorial limits of the Court of any contract wherever made, which, according to the terms thereof, ought to be performed within British Columbia: — *Held*, that, in order to justify invoking Rule 18 (c) the plaintiffs had to establish that payment of the calls must be made within British Columbia, and within British Columbia alone.—No resolution had been passed by the company's directors naming a place for payment within the jurisdiction.—*Held*, that the directors could not delegate their powers in that behalf; that no place had been defined where payment for calls on these shares was to be made; and therefore the order should be set aside. *Stemwinder Mining Co.* v. *Hurdman* (1910), 14 W. L. R. 318.

Defendants residing out of jurisdiction — *"Assets" in jurisdiction — Debt due to defendants by debtors residing in jurisdiction—Situs of debt—Alberta Judicature Ordinance, s. 18.*]—Plaintiff sued defendants for wrongful dismissal, a contract having been made between the parties in Ontario, where defendants' head office is, plaintiff now residing in Alberta. On the same day he issued a garnishee summons against a company in Alberta, owing defendants, and this company paid its debt to defendants into Court:—*Held*, that a debt has in reality no situs, but a conventional situs has been ascribed to it. "Assets" in above Ordinance must be confined in its meaning to that class of assets which, from their nature and real locality, can be assigned, and will not include assets which have a mere theoretical or conventional locality. Writ and garnishee summons set aside. *Love* v. *Bell*, 10 W. L. R. 657.

Order permitting service — *Manitoba Rule 202 — Assets in Manitoba — Debt due to defendants—Effect on debt of appointment of receiver by foreign Court—International comity.*]—Defendants, an Illinois corporation, were indebted to plaintiffs in Winnipeg, and D. in Winnipeg was indebted to defendants in a sum over $200. Prior to issue of statement of claim herein, a receiver of defendants' property had been appointed in Chicago and all persons were restrained from interfering with defendants' assets:—*Held*, that plaintiffs may serve a statement of claim out of the jurisdiction, there being the requisite assets within the jurisdiction. A motion for leave to serve this statement of claim is interlocutory and affidavits of belief sufficient. *Bank of Nova Scotia* v. *Booth*, 10 W. L. R. 313.

See 13 O. W. R. 209, 294; 10 W. L. R. 94.

Rule 162 (e), (g)—*Railway — Carriage of goods — Contract — Connecting lines — Partnership.*] — Plaintiff shipped goods from Stratford, Ont., to Ogden, Utah, the Grand Trunk Railway Co. agreeing to carry them over amongst other railways, a certain line which the Grand Trunk and the defendants the T. Company operated in partnership:—*Held*, in an action for damages for loss of the goods, that there appeared to be no cause of action against the T. Co., nor was the contract broken, nor to be performed in Ontario. Service of writ

of summons and statement of claim set aside. *Clegg* v. *Grand Trunk*, 13 O. W. R. 570.

Service ex juris — *Order XI., r. 1 (b)—Timber licenses—Interest in lands.*]—An interest in a special timber license issued under the Land Act of B. C., is an interest in lands, to enforce which a writ may be issued for service *ex juris* under the provisions of Order XI., r. 1 (*b*). *Vaughan-Rys*, v. *Clary* (1910), 15 B. C. R. 9.

Service on one defendant — *Proper party to action—Order for service—Affidavit to lead — Omission to verify statement of claim—Leave to file new affidavit—Summons to set aside order—Omission to specify objection.*]—Upon an application by the defendant M. to set aside an order authorising service upon him out of the jurisdiction of the Alberta Court of the writ of summons and statement of claim and to set aside the service effected thereunder, the action being for a declaration of the plaintiff's right to a one-sixth interest in the charter rights of three incorporated companies, also made defendants, and it being alleged in the statement of claim that the defendant M. had become entitled to $5,000 of the stock of one of the companies:—*Held*, having regard to this allegation, that M. was a necessary and proper party to the action; and it was not necessary, upon the present application, to decide whether the other claim made against M., for damages for what he did as the plaintiff's solicitor, could properly be tried along with the other claims in the action.—The order sought to be set aside was based upon an affidavit made by the plaintiff's solicitor in Alberta, in which he swore, *inter alia*, that he believed that the plaintiff had a good cause of action against the defendants for the relief asked for in the statement of claim:—*Held*, that the order should have been based upon the affidavit of some one acquainted with the facts swearing to the truth of the allegations made in the statement of claim and making out a *primâ facie* case; and the plaintiff was allowed an opportunity of filing a proper affidavit, in default of which the order was to be set aside.—This ground of application was not set forth in the defendant M.'s summons.—*Held*, in view of the disposition made of the motion, that that irregularity—if it was one—should be overlooked. *Hawes* v. *Clarke* (1910), 15 W. L. R. 516.

Service without order under Con. Rule 162—A nullity—Service and proceeding under set aside—Costs fixed—Plaintiff to have 10 days to proceed in regular way. *Grant* v. *Kerr, Marshall & Crowe* (1911), 18 O. W. R. 398, 2 O. W. N. 770.

Statement of claim — *Rule 201 (e)—Tort—Chattel mortgage — Fraudulent preference.*]—The mere taking of a chattel mortgage, without taking possession of the mortgaged goods, although it may constitute a fraudulent preference under the Assignments Act, cannot be said to be a tort within the meaning of paragraph (e) of Rule 201 of the King's Bench Act, R. S. M. 1902 c. 40; and there is no jurisdiction to serve a statement of claim out of the jurisdiction in an action against a non-resident to set aside such a chattel mortgage, although given to him by a resident debtor on goods within the jurisdiction. — *Emperor of Russia* v. *Proskouriakoff*, 18 Man. L. R. 56, 8 W. L. R. 10, 461, followed. *Clarkson* v. *Dupré*, 16 P. R. 521, distinguished. *Anchor Elevator Co.* v. *Heney*, 8 W. L. R. 735, 18 Man. L. R. 96.

Statement of claim — Substituted service—Foreigners — Temporary residence.—See *Emperor of Russia* v. *Proskouriakoff*, 8 W. L. R. 10, 461, 18 Man. L. R. 56.

Statement of defence — *Time for delivery—Ex p. order of local Judge varied by Master in Chambers—Power of Master to vary—Con. Rule 358.*]—The Master in Chambers has power to vary an order of a local Judge, by striking out so much thereof as limited the time for delivery of statement of defence to 15 days from service of writ, and to extend the time for said delivery for 10 days from date of the Master's order and to direct costs of application to the Master to be costs in the cause.—*Armstrong* v. *Proctor* (1909), 14 O. W. R. 765, at p. 767, and *Williams* v. *Harrison*, 2 O. W. R. 1061, 1118, followed. *McCammond* v. *Gavenlock* (1910), 16 O. W. R. 178.

Time for return too short — *Nullity —Certificate of service — Distance of place of service from court-house — Exception to form — Affidavit — Summary matter—Time for presentation.*] — The service of process in an action, when the delay is short and insufficient, is an absolute nullity, and the Court cannot exercise its discretion and order a new service. *Larue* v. *Poulin*, 9 Que. P. R. 157, followed.—2. When the certificate of service of the writ does not shew or certify what distance exists between the court-house and the place of service, a mere denial of the sufficiency of the delays is required in the exception to the form, no affidavit being necessary.—3. In a summary matter, if the exception to the form is filed the day following the return of the action, the presentation of the exception may be made within the same delay as if it had been filed only the second day following the return of the action. *Demers* v. *Forcier*, 10 Que. P. R. 211.

Writ dated on Sunday — *Practice.*]—A writ of summons dated on Sunday is void, and a judgment and subsequent proceedings founded thereon will be set aside, and the date of summons is not amendable. *McKinnon* v. *Proud* (1874), 1 P. E. I. R. 474.

Writ of summons need not be issued before applying for interlocutory injunction. *Rheaume* v. *Stuart* (1910), 11 Que. P. R. 434.

c. Service within Jurisdiction.

Action for physician's fees—*Service of account.*]—In an action by a physician for the value of professional services:—*Held*, that the default of serving a detailed account upon the defendant is not a ground for an exception to the form, and can have no other effect than to delay the judgment or proceedings until the account is served. *Perrigo* v. *Arcand*, 3 Que. P. R. 350.

Action for price of goods—*Service of account.*]—In an action for goods sold and

board furnished by an innkeeper, where an account of the plaintiff's claim has been filed with the report of the action, there is no ground for a motion to suspend the proceedings until a copy of the account has been served on the defendant. *Chateau Frontenac Co.* v. *Lionais*, 3 Que. P. R. 352.

Advocate — *Election of domicil — Ceasing to occupy.*]—When an advocate has his chosen place of domicil within a radius of a mile from the Court house, all services on him should be made at this chosen domicil, even if he has ceased to occupy it, and service can not be made on the clerk of the Court unless this domicil has been found closed. *Hogue* v. *Darcluy*, 7 Que. P. R. 129.

Consent of next friend — *Filing — Proceedings avoided by omission.*]—The English Rule requiring that, where the consent of the next friend of the plaintiff is necessary, it must be filed before the issue of the writ of summons is in force in the Territories, and default is not cured by filing a consent filed subsequently to the issue, but avoids all the proceedings in the action. *Short* v. *Spence* (1905), 6 Terr. L. R. 267.

Delay in service—Certificate of *lis pendens* registered—Motion for order renewing writ—Oversight in not serving writ—Knowledge of writ by defendants—Order granted—Writ to be served at once—Statement of claim to be delivered within 2 days after appearance—Trial expedited—Costs to defendants. *Muir* v. *Guinane* (1905), 6 O. W. R. 64, 10 O. L. R. 367, followed. *Fair* v. *Tierney* (1911), 18 O. W. R. 639, 2 O. W. N. 798.

General partnership—*Exception to the form—C. P. 139.*]—Service effected upon a general partnership by leaving a copy of writ of summons with one partner elsewhere than at the place of the parinership business, is irregular, and exception to form on these grounds will be maintained as to costs.—But, upon motion plaintiff will be permitted to serve another copy of the writ of summons and of the declaration at the place of business of the parinership within 3 days. *Vigroux* v. *Pinsonneault* (1910), 12 Que. P. R. 44.

Insufficient delay on a writ is a cause of nullity which cannot be remedied except by another service, either of the same writ or a new one. Under such circumstances, the defendant is neither obliged to allege or prove prejudice. *Farive* v. *Poulin*, 9 Q. P. R. 157, followed. *Erdick* v. *Barry* (1910), 12 Que. P. R. 178.

Confirmed in review.

Interrogatories — *Personal service — Domicil—Place of business.*]—A motion that interrogatories *sur faits et articles* shall be taken as answered against him, in pursuance of Art. 364, C. P., will not be granted against a defendant in default, unless such interrogatories have been served upon him personally or at his domicil (Art. 361, C. P.), if it is not established that he is absent or in hiding—2. Service effected at his place of business is only valid when such defendant has no regular domicil or ordinary residence, as that exists for the service of process in an action under Art. 128, C. P. *Myers* v. *Mercier*, 5 Que. P. R. 6.

Married woman.]—In an action taken against a married woman separate as to property, if a copy of the writ has not been served upon her husband, leave will be given plaintiff so to do upon paying costs of exception to form. *Vacuzzo* v. *Charpentier* (1910), 12 Que. P. R. 38.

Non-appearance of a fire insurance Co. to a garnishee summons, is not such an admission of liability as will convert the claim into a debt. *Hartt* v. *Edmonton Laundry Co. & Colonial Assurance Co.* (1909), 2 Alta. L. R. 130.

Petition — *Husband and wife—Substituted service.*] — If a defendant is absent from his domicil, habitually during the hours in which the service of process may be regularly effected upon him, and leaves a writing upon his door notifying those seeking him to apply at the house of one of his neighbours, permission will be granted to serve upon him a petition *pour ester la justice en séparation*, by serving the neighbour indicated by the writing. *Mead* v. *Fyen*, 4 Que. P. R. 406.

Postponement of return of writ pending settlement of action—*Imbault* v. *Crevier* (1911), 39 Que. S. C. 509.

Practice — *Time—Saturday afternoon.*] —Service of papers in an action on the solicitor of a party after one o'clock on Saturday afternoon is bad. *Couture* v. *Bélanger*, 27 Que. S. C. 77.

Service under Con. Rules 223 and 224 — *Limitation of service — Notice — Presumption — Adverse party — Conditional appearance—Denial of partnership—Onus — Examination — Requirements—Costs.*]—Appeal from a decision of M.-in-C., 19 O. W. R. 148, 2 O. W. N. 1120, dismissing an application by plaintiff to compel defendant Matthews to re-attend at his own expense and submit to examination in reference to matters in question—other than merely the question of defendant's being a partner in the firm of R. G. Dun & Co. Appeal dismissed by Britton, J., with costs in cause to plaintiff. *Telfer* v. *Dun* (1911), 19 O. W. R. 208, 2 O. W. N. 1146.

Substitutional service should not be ordered, when it is said that defendant is evading service, unless the writ has been placed in the hands of the sheriff to be served. *Coville* v. *Small* (1910), 1 O. W. N. 857.

Time — *Summary procedure — Hour of service—Exception.*]—An exception to the form, served on the second day after the return of the proceeding excepted to, in a summary matter, but after five o'clock in the afternoon, will not be received. *Préfontaine* v. *Wiseman*, 7 Que. P. R. 135.

d. Special Endorsement.

Interest on an account stated is not a proper subject of special endorsement of a writ under Ont. Rule 138, inasmuch as

an account stated does not of itself entitle a creditor to interest. *George* v. *Green* (1907), 8 O. W. R. 247, 787, 13 O. L. R. 189, 10 O. W. R. 292, 14 O. L. R. 578, affirmed, 42 S. C. R. 219.

3. Miscellaneous Cases.

Petition by liquidator of an insurance company to obtain deposit in hands of prothonotary — *Rights of third party claiming to have made deposit with his own money—C. P. 117.*]—The rule is that legal proceedings are instituted by means of a writ of summons in the name of the Sovereign, calling upon defendant to appear, unless some other means of summons is ordered by the Court.—The liquidator of an insurance company who wishes to withdraw a deposit placed in the hands of the prothonotary of the Superior Court, and which is claimed by a third party as being his own money, must proceed by writ of summons and not by petition. *Dostaler* v. *Canada Mutual Fire Ins. Co.* (1911), 17 R. de J. 257.

Service of declaration in an attachment for rent at the office of the Court the day after the return of the writ is too late; such declaration should be filed in the office of the Court at least one clear day before the return of the writ, in order that the defendant may know the reasons prompting the action, and to enable him to make a tender or to plead to the action, as the case may be. *Erdick* v. *Barry* (1910), 12 Que. P. R. 178.

Confirmed in Review.

See Writ of Summons.

PROCLAMATION.

See Immigration — Municipal Corporations—Municipal Elections.

PROCURATION.

Action in disavowal — *Form* — *Practice.*]—The procuration or power of attorney to be furnished by a plaintiff in disavowal of a *saisie-revendication* need not be in authentic form. *Leclerc* v. *Bernard*, 8 Que. P. R. 332.

Death of one of two attorneys named in power — *Security for costs* — *Costs of motion.*]—Where a power of attorney to prosecute an action has been given to a firm of attorneys generally, and one of them dies before the institution thereof, the surviving member of the firm may take such action in his own name as attorney for the plaintiff. 2. Security for costs, as well as a power of attorney, having been asked by the same motion, and such security having been ordered, the costs will follow the fate of the case. *Kitts* v. *Gosselin*, 25 Que. S. C. 22, 6 Que. P. R. 154.

Demand — *Costs—Reservation of—Payment of judgment* — *Absent plaintiff.*] — The costs of a motion to compel production of a procuration may be reserved as well as those of a demand for security for costs. The plaintiff, before furnishing the procuration, as before furnishing security for costs, is within his rights in waiting until a demand for it is made, and is not in default until then. *Block* v. *Carrier*, 28 Que. S. C. 49, followed.—When the plaintiff is absent, a defendant who delays until after judgment to pay, has the right to demand a procuration from the person to whom he makes the payment. *Dill* v. *Cardinal*, 8 Que. P. R. 167.

Filing by plaintiff without demand —*Setting aside.*]—A defendant has no right to demand the setting aside of a procuration voluntarily filed by the plaintiff, and without demand by the defendant. *Welch* v. *McGuire*, 9 Que. P. R. 211.

Foreign company — *Authority of officers signing* — *Authentication.*]—A procuration furnished by a foreign company ought to be the true deed of the company, authorised by its board of directors, and ought to shew *prima facie* that the officer who signs it is authorised to do so; and all signatures thereto ought to be authenticated by an officer competent under Art. 1220, C. C. *Trusts and Guarantee Co.* v. *Bélanger*, 7 Que. P. R. 301.

Foreign plaintiff — *Advocate* — *Other person.*]—The procuration which a foreign plaintiff must give, need not necessarily be given to an advocate, and it is sufficient if it is given to some person resident at the place where the action is brought. *Spencer* v. *Strathcona Rubber Co.*, 5 Que. P. R. 385.

Time for demanding — *Security for costs.*]—If the defendant does not demand from the plaintiff, a foreigner, a procuration at the same time as security for costs, he cannot do so after security has been given. *National Life Assce. Co. of Canada* v. *Malone*, 7 Que. P. R. 283.

See Costs — Husband and Wife—Partnership.

PRODUCTION OF DOCUMENTS.

See Discovery.

PROFESSIONAL FEES.

See Patent Solicitor.

PROFESSIONAL MISCONDUCT.

See Pleading.

PROFIT A PRENDRE.

See Contract — Easement—License.

PROHIBITION.

1. County Courts.

Amount in controversy—*Mining claim —Transfer of action.*]—The plaintiff was a miner in the employment of the defendants, and brought an action in a County Court (mining jurisdiction) for $2,190 damages for personal injuries. The defendants moved for prohibition, on the ground that the amount sued for was beyond the jurisdiction of the County Courts;—*Held*, that the action was properly brought in the County Court, under s. 117, s.-s. 2, of the Mineral Act, R. S. B. C. 1897 c. 135. An order was made transferring the action to the Supreme Court. *Beamish* v. *Whitewater Mines (Limited)*, 20 C. L. T. 290, 7 B. C. R. 261.

Judgment — *Delivery of — Laches — Discretion.*]—The defendant resided in Ontario, and was sued as administrator. The action was brought in the County Court of Selkirk, and tried on the 27th August, 1898; judgment was reserved and rendered on the 11th January, 1899. The defendant had no property in Manitoba, and nothing was done to enforce the judgment there. On the 25th April an action was brought against the defendant in Ontario, and judgment rendered in favour of the plaintiff on the 17th May. Notice of application for prohibition was given to the plaintiff on the 20th May. By s. 130 of the County Courts Act, R. S. M. c. 33, as amended by 56 V. c. 6, s. 1, the County Court Judge has to announce his decision in a case within 60 days from the hearing;—*Held*, that the defendant had not been prejudiced by the non-compliance with this provision; such provision is a mere matter of procedure; and the delivery of judgment after the prescribed time is an irregularity only; the proper remedy would be to appeal against the judgment. The plaintiff, through her solicitor, was made aware of the judgment as soon as it was delivered; she might have appealed against it, but did not, and delayed for more than four months after judgment was rendered before making the application for prohibition. This was not a case in which the discretion of the Court should be exercised in favour of prohibition. *Doidge* v. *Mimms*, 19 C. L. T. 291, 12 Man. L. R. 618.

Order to County Court Judge, clerk of the Court and informant — *From taking further proceedings — Ground — Appeal not heard within thirty days — Costs.*]—Defendant, an apple merchant, was fined $10 and costs on each of three cases of violation of the Inspection and Sales Act. He appealed to the County Court Judge and the convictions were confirmed. Costs were taxed at $161.90 by the clerk of the County Court. Defendant then applied for an order prohibiting the County Court officials from taking further proceeding in said cases.—Sutherland, J., *held*, that the order should be refused, and granted an enlargement for ten days to enable the County Judge to fix the costs. *Re R.* v. *Hamlink* (1910), 17 O. W. R. 275, 2 O. W. N. 186.

Surrogate Judge — Will — Construction of by Surrogate Judge — Motion for prohibition — Grounds bias owing to affinity —Devisee married to niece of Judge—Sole tribunal — Necessity of Act — Prohibition dismissed with costs. *Re Murphy* (1910), 8 E. L. R. 586.

2. Division Courts.

Judgment — *Setting aside — Fraud.*]—A Judge in an action in a Division Court, apart from the jurisdiction conferred by s. 152 of the Division Courts Act to grant a new trial within the fourteen days thereby prescribed, has not any inherent jurisdiction to set aside a judgment by reason of its having been procured by fraud, and to order a new trial. *In re Nilick* v. *Marks*, 20 C. L. T. 261, 278, 31 O. R. 677.

Judgment debtor — *Committal—Means of payment.*]—A County Court Judge has jurisdiction under R. S. O. c. 60, s. 247, as amended by 61 V. c. 15, s. 4, in an action in a Division Court, after the examination of, and an order for payment by, a judgment debtor who is a Government officer, to commit him for default in payment, although he has no other source of income than his official salary. The question for the Judge was one of fact, viz., whether the debtor had means to pay, and his decision could not be reviewed in prohibition.—*Semble*, that the order complained of was not so much by way of execution, whether qualified or otherwise, as it was of a punitive character, according to *Stonor* v. *Fowle*, 13 App. Cas. 20. *In re Hyde* v. *Caven*, 19 C. L. T. 359, 31 O. R. 189.

Wager — *Amendment.*]—The particulars annexed to a summons issued out of a Division Court were: "To amount of a wager won by the plaintiff, $20." The defendant disputed the jurisdiction. By s. 71 of the Division Courts Act, R. S. O. c. 60, the Division Courts shall not have jurisdiction in (1) actions for any gambling debt. It appeared that a bet of $10 was made by the plaintiff with the defendant on the result of an election, and the defendant, by agreement, became the holder of the plaintiff's stake and his own. The plaintiff claimed both stakes as the result of the election, but the defendant refused to pay. At the trial the plaintiff obtained leave to amend the particulars so as to claim a return of his own $10 as money paid to the defendant for plaintiff's use. The Judge, after hearing all the evidence, found that there had not been a wager or bet, and gave judgment for the plaintiff for $10:—*Held*, that there was power to amend, and this Court could not interfere by prohibition. *In re Sebert* v. *Hodgson*, 20 C. L. T. 308, 32 O. R. 157.

3. Magistrates.

District magistrate — *Adjournment.*]—A district magistrate has, as has every

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

Grounds for prohibition — *Criminal law — Lottery.*]—The Superior Court will not interfere by writ of prohibition, to prevent a magistrate from hearing and adjudging a complaint, in a criminal matter within his jurisdiction. 2. Reasons which merely shew that the petitioner for a writ of prohibition may have a good ground of defence to the charge made against him in the proceedings before the magistrate hearing such charge, are insufficient to justify the issue of a writ of prohibition. 3. Letters patent issued by the Lieutenant-Governor-in-Council cannot legalise the sale of lottery tickets for any purpose other than those specified in Act. 205 (c) of the Criminal Code. *Beaudry* v. *Lafontaine*, 17 Que. S. C. 396.

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4. Other Tribunals.

Application for — Jurisdiction of County Court Judge—Affidavits not inconsistent with tenancy—Question of belief of fact of tenancy is for Judge at trial and cannot be questioned — "Landlord" within meaning of Overholding Tenants Act, R. S. O. (1897), c. 171, s. 2—Matter settled—Application to teach County Court Judge a lesson dismissed with costs. *Pepall* v. *Broom* (1911), 19 O. W. R. 512, 2 O. W. N. 1275.

See 19 O. W. R. 262, 2 O. W. N. 1104.

Bar council of province — *Advocate —Discipline — Jurisdiction — Procedure.*]—In pursuance of statutory powers, the Bar of Montreal suspended a practising advocate after holding an enquiry into charges against him, which, however, had been withdrawn by the private prosecutor before the council had considered the matter. It did not appear that witnesses had been examined upon oath, during the enquiry, and no notes in writing of the evidence of witnesses adduced had been taken, the effect of such absence of written notes being that the appellant had been deprived of an opportunity of effectively prosecuting an appeal to the general council of the Bar of the Province of Quebec: — *Held*, affirming the judgment appealed from, 8 Que. Q. B. 26, that the local council of the Bar of Montreal had jurisdiction to proceed with the enquiry in the interest of the profession, notwithstanding the withdrawal of the charge by the private prosecutor; that a complaint in any form sufficient to disclose charges against an advocate of improperly carrying on trade and commerce and unduly retaining the money of a client, contrary to the by-laws of the local section of the Bar, is a matter over which the council of the Bar has complete jurisdiction; and further, that a writ of prohibition does not lie to prevent the execution of a sentence of suspension pronounced by the council of a local section of the Bar of the Province of Quebec against a member of that section, where the corporation in the exercise of its disciplinary powers had acted within the jurisdiction given to it by statute; and that the omission to preserve a complete record of the proceedings upon the enquiry of the council in the matter or to take written notes of the evidence of witnesses adduced constituted mere irregularities in procedure which were insufficient to justify a writ of prohibition. *Hanan* v. *The Bar of Montreal*, 19 C. L. T. 377, 30 S. C. R. 1.

Board of examiners of association — *Members of board — Statute — Repeal.*]—When any provisions of a statute are repealed and others substituted therefor, the provisions repealed remain in operation until the provisions substituted become executory under the repealing statute (R. S. Q., s. 8). And unless the repealing statute otherwise provides, all acts, proceedings, or things done or begun, and all rights acquired, in virtue of the provisions of any statute afterwards repealed, may be continued, completed, and exercised under such provisions, notwithstanding such repeal, by observing, in so far as applicable, the procedure set forth in the new law (R. S. Q., s. 11). The Act, 62 V. (Q.) c. 36, amending the law respecting dentists, did not otherwise provide, and therefore the board of examiners of the association of dentists, as constituted under the repealed statute, did not become dissolved and *functi officio* by reason of the enactment of 62 V. c. 36, s. 1, and 62 V. c. 36 did not repeal existing provisions as to the prosecution of offenders. 2. Even if the board of examiners became *functi officio* by reason of 62 V. c. 36, s. 1, a writ of prohibition addressed either to individuals or to a corporation alleged to no longer possess legal existence, would not be the proper remedy. Moreover, a writ of prohibition only lies against an inferior tribunal and not against the members composing such tribunal. *Versailles* v. *Ibbotson*, 17 Que. S. C. 195.

Circuit Court, Quebec — *Judge.*] — The Circuit Court, even when presided over by a Judge of the Superior Court, is subject to prohibition. *Robillard* v. *Blanchet*, 19 Que. S. C. 383.

Circuit Court, Quebec — *Powers of Superior Court — Action against liquidator — Winding-up Act — Motion after judgment.*]—The Circuit Court has no jurisdiction to entertain an action against the liquidator of a company in liquidation under the Dominion Winding-up Act. 2. The Superior Court, by virtue of the control which Art. 50, C. P., gives it over all Courts (except the King's Bench) has jurisdiction to grant a writ of prohibition to a Circuit Court which exceeds its jurisdiction. 3. Prohibition may be directed to an inferior tribunal even after judgment has been rendered by such tribunal. *Robillard* v. *Blanchet*, 3 Que. P. R. 532.

Commissioner under Collection Act — *Examination of debtor — Disqualification by reason of interest — Solicitor — Commissioner not a "Court."*]—The plaintiff, who had recovered a judgment against the defendant in the Supreme Court, initiated proceedings under the Collection Act, R. S. N. S. c. 182, for the examination of the defendant before D., a commissioner. The defendant's solicitor appeared before D., and objected to his proceeding with the examination, on the ground that, as solicitor for another credi-

tor of the defendant, he had such an interest in the result of the examination as to disqualify him from acting. Consequently a writ of prohibition was issued from the Supreme Court to restrain D. from acting, or proceeding with the examination. On appeal from the order allowing the writ:—*Held*, that D. was disqualified.—*Held*, nevertheless, that, as a commissioner acting under the provisions of the Collection Act is not a distinct court, the writ was improperly allowed, and, that, for this reason, the appeal must prevail, but without costs. *McKay* v. *Campbell*, 36 N. S. R. 522.

Court of Commissioners — *Territorial jurisdiction — Declinatory exception—Judgment — Desistment.*]—Article 170 C. P., is not limitative, and applies to all cases analogous to those expressly mentioned in the Article. 2. In this case a writ of prohibition having been issued to quash a judgment of the Court of Commissioners of a district other than that in which the writ of prohibition was issued, a declinatory exception filed against the writ of prohibition, accompanied by a desistment from the judgment sought to be quashed, was maintained, and the action dismissed. Judgment in 21 Que. S. C. 437 reversed. *Gaudet* v. *Garneau*, 12 Que. K. B. 145.

Court of Revision — *Prohibition after sentence — Jurisdiction.*] — A municipal court of revision, after the assessment roll has been completed by the assessor, and checked over by the assessment committee, passed, in consequence of a successful appeal to the court by the promovents, a general resolution reducing the entire assessment by 20 per cent.:—*Held*, with hesitation, that prohibition lay. The Court should not be chary at the present day in exercising the power of prohibition. The proceedings before the court of revision were not terminated, inasmuch as its decision necessitated the amending of the roll, and this duty imposed upon the clerk would be the act of the Court by the instrumentality of its clerk. In any case prohibition will lie after sentence, when it appears on the face of the proceedings that the matters are not within the jurisdiction of the tribunal. *Hickson* v. *Wilson*, 2 Terr. L. R. 429.

Division Court — *Action on foreign judgment — Promissory note — Recovery on — Cause of action — Increased jurisdiction—Ascertainment of amount.*]—A party plaintiff suing in this province on a foreign judgment may sue on the foreign judgment or on the original cause of action, or may combine them both in the same action, and such a judgment may be enforced in this jurisdiction as importing a legal obligation to pay the sum recovered by means of an action of debt as on a simple contract. A judgment debt represents a simple contract debt only, and one not ascertained by the signature of the defendant, even when recovered on a promissory note signed by the defendant; and prohibition was granted to restrain proceeding with a plaint in a Division Court on a Manitoba judgment for $232.37 recovered on such a note, where the plaintiff abandoned $32.37 and sought to recover judgment for $200. *In re McMillan* v. *Fortier*, 21 C. L. T. 501, 2 O. L. R. 231.

Division Court — *Order for committal — Previous order for payment—Affidavit.*]—The plaintiff recovered judgment against the defendant in a Division Court action for a debt contracted before 61 V. c. 15 (O.), and the defendant was at the hearing ordered to pay the amount of the judgment forthwith:—*Held*, that the Court had jurisdiction under s.-s. 5 of s. 247 of the Division Courts Act, R. S. O. 1897 c. 60, upon examination of the defendant on an after-judgment summons, to make an order for her committal without a previous order for payment based upon such an examination and default thereunder. Where it appears that the judgment debtor has been examined before the Judge, his order for committal must, on a motion for prohibition, be treated as a complete adjudication, as to that which must be made to appear to warrant the making of an order under s.-s. 5 of s. 247.—*Semble*, that if the affidavit of the plaintiff required by s. 243 to be filed before the issue of the summons were not filed, it would not be open to the defendant, after appearing in obedience to the summons, to raise an objection to the jurisdiction on that ground; and, the defect not appearing on the face of the proceedings, prohibition would not be granted. *In re Hawkins* v. *Batsold*, 21 C. L. T. 397, 22 C. L. T. 14, 2 O. L. R. 704.

Division Court — *Transfer of action.*] —Where an order was made by a Division Court Judge for the transfer of an action to a Division Court in another county, the order being made under the powers conferred by s. 90 of the Division Courts Act, R. S. O. 1897 c. 60, whereas, under the circumstances, it should have been made under s. 91, an order was made prohibiting the Division Court to which the transfer had been made from acting under the order of transfer; but such order of prohibition was to be without prejudice to the right to apply for an order under s. 91. *In re Frost* v. *McMillen*, 21 C. L. T. 532, 2 O. L. R. 303.

Enforcement of Judgment — *Declinatory exception — Deposit of desistment.*] — When a defendant pleads by way of declinatory exception and simply demands the dismissal of the action, he must deposit with his exception the amount claimed if it is a sum of money, or a desistment regularly signed and authenticated if the suit, as in this case, is for a writ of prohibition against a judgment. *Garneau* v. *Gaudet*, 21 Que. S. C. 437.

Judge of Sessions of Peace — *Conviction — Right of appeal.*] — The writ of prohibition is an extraordinary remedy, strictly confined to cases where none other exists, and will not be granted against the enforcement of a conviction by a Judge of the Sessions of the Peace, after sentence, when the party aggrieved can seek relief by means of appeal. *Bastien* v. *Amyot*, 13 Que. K. B. 22.

Justice of the Peace — *Qualification—De facto justice — Grounds for application—Taking before justice.*]—The grounds alleged upon application for a writ of prohibition based upon excess of jurisdiction in the inferior Court, must have been raised before that Court. 2. A justice of the peace who

exercises his functions in good faith is competent to act *de facto*, although he has not complied with all the formalities relating to his qualification. *Hogle* v. *Rockwell*, 20 Que. S. C. 309.

License Commissioners — *Deposit — Absence of — Preliminary exception—Jurisdiction of commissioners — Grant of license —Discretion — Matters within jurisdiction.*] —The absence of the deposit required by law, before application for a writ of *certiorari* or prohibition, should be pleaded by preliminary exception. 2. License commissioners, although not among the inferior courts mentioned in Arts. 50, 63, 64, and 65, C. P., have duties of a judicial character which, on proper occasion, subject them to the superintending authority of the Superior Court, and the proper remedy is a writ of prohibition. 3. The only proof required, or admissible, on a writ of prohibition against the license commissioners is such as would go to establish want or excess of jurisdiction. 4. When Art. 856, R. S. Q., may be invoked, the license commissioners can no longer grant a license as a matter of discretion, but their judgment is none the less final as to whether majority oppositions, or two previous oppositions, really exist. 5. The refusal of the commissioners to re-open the *enquête* after both parties had formally declared their respective *enquêtes* closed, is not sufficient to support a writ of prohibition. 6. The refusal of the commissioners to count on the opposition signatures of duly qualified electors, for the reason that the same persons had also signed in support of the application, was a decision on an issue within their jurisdiction, and was, moreover, a proper decision. Judgment in 19 Que. S. C. 270 affirmed. *Kearney* v. *Desnoyers*, 10 Que. K. B. 436.

Magistrate — Criminal prosecution — Motion — Forum — Jurisdiction of magistrate — Submission. *Re Hodge and Kerr*, 7 O. W. R. 131.

Magistrate — *Disqualified by reason of bias — Jurisdiction.*]—Order *nisi* for writ of prohibition, discharged. It does not necessarily follow because P., a police magistrate, who has committed S. for trial on a charge of misappropriating public moneys, that S., a justice of the peace, before whom P. has been charged with assault on D., is biased so that he cannot act judicially as such justice. *Ex parte Peck, In re Stuart*, 6 E. L. R. 274.

Police magistrate — *Conspiracy—Particulars — Preliminary investigation—Scope of enquiry — Jurisdiction.*] — Prohibition will not lie unless there is a lack of jurisdiction in the judicial officer or Court dealing with the proceedings sought to be prohibited. — The defendant, having been arrested and brought before a police magistrate charged with conspiracy under s. 394 of the Criminal Code, objected to the sufficiency of the charge and asked for particulars of the deceit, etc., charged, with dates and names. The magistrate overruled the objection and refused the particulars, on the ground that the proceeding before him was an investigation, whereupon the defendant applied for prohibition, which was refused. *Rex* v. *Phillips*, 11 O. L. R. 478, 7 O. W. R. 418.

Powers conferred on the board *sitting under the Combines Investigation Act*, are of a quasi-judicial nature; such board constitutes an inferior tribunal and is subject to a writ of prohibition when it exceeds its powers. *United Shoe Machinery Co.* v. *Laurendeau* (1911), 12 Que. P. R. 319.

Recorder's Court — *Unauthorised suit.*] —Where the collector of provincial revenue disavowed and declared that he had not authorised issue by the clerk of the Recorder's Court of Montreal of a summons to recover a penalty for selling intoxicating drink on a Sunday, there is ground for a prohibition to prevent the Recorder's Court from further proceedings upon the summons. *Boisseau* v. *Wiseman*, 2 Que. P. R. 503.

Statutory board — *Jurisdiction — Summary application — Declaration in prohibition — Parliamentary elections — Voters' lists.*]—A person claiming to be entitled to be registered as an elector in a certain division, and to have had his name on the last revised list of electors for the revision, applied for a prohibition to restrain the Board of Manhood Suffrage Registrars, as constituted under the Manhood Suffrage Registration Act, 63 & 64 V. c. 25 (M.), from proceeding to prepare the lists of voters for that constituency under the provisions of the Act, which they were about to do for the purpose of a bye-election then pending. On the motion coming on for hearing, it was contended that the board had no power to go on with their proceedings because, under s. 70 of the Manitoba Voters' List Act, 63 & 64 V. c. 62, the former revised lists were to be used until new lists had been prepared and revised throughout the province, and further, that, even if that was done, the board were not to prepare the whole list, but only lists supplemental to the lists prepared under the Voters' Lists Act. It was contended on behalf of the board that there was no power in the Court to interfere with a board of that kind by prohibition:—*Held*, (1) that a Judge should not undertake to decide difficult questions of that kind on a summary application such as was made, but that the parties should be left to declare in prohibition, which might still be done under the Queen's Bench Act. (2) Although the board was about to prepare and revise lists of electors under the Act, it could not be assumed that they would decide or attempt to decide what lists the returning officer should use at the coming election, or would determine or attempt to determine whether the vote of the applicant should be received or not in the event of his name not being put on the list they were about to prepare; and therefore the applicant could not say that the board intended to take away any of his rights; and there was no necessity for an immediate prohibition. *In re South Winnipeg Board of Manhood Suffrage Registrars*, 21 C. L. T. 167, 13 Man. L. R. 345.

Writ of prohibition is available, for the purpose of preventing an inferior Court from taking cognizance of a case, from the

moment suit is taken and previous to the delivering of the judgment. But such relief is not available once judgment has been given unless the excess of jurisdiction is apparent upon the face of the proceedings. *Desormeaux* v. *St. Therese* (1909), 19 Que. K. B. 481.

See ATTACHMENT OF DEBTS — CONSTITUTIONAL LAW — COURTS — CRIMINAL LAW — JUSTICE OF THE PEACE — MUNICIPAL CORPORATIONS—STATUTES.

PROHIBITION ACT.

See CANADA TEMPERANCE ACT.

PROHIBITION ACT OF PRINCE EDWARD ISLAND.

Offence — Description of — Search warrant — Grounds of suspicion to be submitted to magistrate before issue of — Delivery of warrant to policeman — Execution of warrant by prosecutor. *Fanning* v. *Gough*, 4 E. L. R. 483.

See APPEAL — CONSTITUTIONAL LAW — CRIMINAL LAW.

PROMISSORY NOTES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES—BILLS AND NOTES.

PROMOTERS.

See COMPANY — CONTRACT — FRAUD AND MISREPRESENTATION — SALE OF GOODS —VENDOR AND PURCHASER.

PROPERTY PASSING.

See SALE OF GOODS.

PROPERTY QUALIFICATION.

See MUNICIPAL ELECTIONS.

PROPRIETARY MEDICINES.

See INTOXICATING LIQUORS—TRESPASS.

PROSECUTION.

See MANDAMUS.

PROSPECTUS.

See COMPANY.

PROSTITUTION.

See LANDLORD AND TENANT—VENDOR AND PURCHASER.

PROTECTION OF FORESTS.

See FIRE.

PROTESTANT SEPARATE SCHOOLS.

See SCHOOLS.

PROTHONOTARY.

See APPEAL—BANKRUPTCY AND INSOLVENCY — COURTS — DISCONTINUANCE OF ACTION—DESISTMENT — DISTRIBUTION OF ESTATES—FAMILY COUNCIL — INTERVENTION.

PROVIDENT SOCIETY.

See MASTER AND SERVANT.

PROVINCES.

See CONSTITUTIONAL LAW—INTEREST.

PROVINCIAL COURTS.

See CONSTITUTIONAL LAW.

PROVINCIAL LANDS.

See CONSTITUTIONAL LAW.

PROVINCIAL LEGISLATURE.

See CONSTITUTIONAL LAW—CROWN.

PROVINCIAL SECRETARY.

See CONSTITUTIONAL LAW—CROWN.

PROVINCIAL TREASURER.

See COMPANY—INSURANCE.

PROVISIONAL DIRECTORS.

See COMPANY.

PROXIES.

See COMPANY.

PROXIMATE CAUSE.

See MASTER AND SERVANT.

PUBLIC ACT.

See STATUTES.

PUBLIC BATH.

See MUNICIPAL CORPORATIONS.

PUBLIC DOMAIN.

See CROWN — FISHERIES — WATER AND WATERCOURSES.

PUBLIC HEALTH.

Board of Health — *Order issued by officer—Municipal by-law — Jurisdiction — Uncertainty — Conviction.*] — Annexed to an information for an offence against a health by-law, was an order issued by an officer of the Board of Health, and not by the Committee of Health itself, which alone has jurisdiction by the terms of s. 29 of by-law 105 of the city of Montreal concerning health:—*Held*, that the order was illegal and void for want of jurisdiction, and also because it was vague and uncertain and did not indicate or describe what works or repairs the Board of Health deemed necessary, and a conviction based thereon was quashed. *Riopel* v. *City of Montreal*, 7 Q. P. R. 342.

Compulsory vaccination — *Statutory regulations — Exception — Conviction.*]— The health district of the city and county of St. John is not within regulation 2 of the regulations made under s. 38 of the Public Health Act, 1898, which provides for compulsory vaccination when "it shall be found by the local board of health of any health district that a case of smallpox exists in case such district be a city or town," and a conviction for refusing to attend at the office of the local board of health of the district of the city and county of St. John and to be vaccinated, contrary to the statute and regulations, is bad. *Rex* v. *Ritchie, Ex p. Jack*, 35 N. B. R. 581.

Contagious disease — *Detention of persons exposed to infection.*]—Section 75 of the Health Act provides, that when smallpox, scarlet fever, diphtheria, cholera, or any other contagious or infectious disease dangerous to the public health, is found to exist in a municipality, the health officers shall use all possible care to prevent the spreading of the infection or contagion:—*Held*, that health officers were justified under this section in detaining a person who had been exposed to infection from a person suspected of having smallpox, but who in reality had measles. *Mills* v. *Vancouver*, 10 B. C. R. 99.

Contagious disease — Prevention of spread — Local board of health—Converting hotel into hospital — Illegality — Malice — Reasonable and probable cause—Members of board—Corporation—Violation of statute—Conversion of goods—Confinement of person in hospital. *Ward* v. *Loethian*, *Green* v. *Marr*, 3 O. W. R. 362, 4 O. W. R. 502.

Contagious disease — Services of physician — Remuneration — Action to recover— Board of health — Medical health officer — Liability — Mandamus — Costs. *Bibby* v. *Davis*, 1 O. W. R. 189.

Contagious diseases hospital — *Acquisition of site — Municipal corporation — By-law—Resolution—Delegation of powers— Local board of health—Public Health Act —Prohibition as to locality of hospital — Public benefit — "Inhabited dwelling"—Consent of owner—Injunction—Status of plaintiff—Special damage.*]—The council of a city corporation passed a by-law, pursuant to 62 V. c. 32, providing for establishing, erecting, and furnishing a contagious diseases hospital, and for borrowing $72,000 for these purposes. Subsequently the council passed a resolution authorising the local board of health to purchase a property in the residential part of the city and proceed to erect a contagious diseases hospital thereon, "at an amount not to exceed $31,000 approximately," "providing the same, in the opinion of the city solicitor, can be done without incurring a law suit":—*Held*, that the resolution was not illegal; it was not necessary for the corporation to proceed by by-law at this stage; the resolution did not delegate to the local board the authority to acquire property for the municipality, but only the power to negotiate for the purchase, after which the council could pass the necessary by-law for the purpose of acquiring title. 2. It is provided by s. 28 of the Public Health Act that "no land or building to be used for the purposes of this Act shall be nearer than 150 yards to an inhabited dwelling:"—*Held*, that this limitation applies to land to be acquired for any of the purposes of the Act as found in the Revised Statutes of 1887 and 1897. 3. *Held*, also, that s. 28 is a provision enacted in the public interest and for the benefit of the public generally, and therefore where there is only one inhabited dwelling within the prescribed radius, the consent of the owner and occupier of that dwelling to the erection of a hospital within such radius is not a legal answer to an action (by one who can shew special damage) to restrain the corporation from erecting such hospital. 4. To maintain the action the plaintiff must himself be within the 150 yard radius or must shew some special pecuniary or proprietary damage or some special legal injury. *Reed* v. *Ottawa*, 21 C. L. T. 470.

Hospital for consumptives — *Conviction—Statute—Grouping of sections.*]—Section 72 of the Public Health Act, R. S. O. c. 248, which prohibits, under a penalty, the establishment, without the consent of the municipality, of "any offensive trade, that is to say, the trade of blood boiling, or bone boiling, or" (setting out a number of similar trades), "or any other noxious or offensive trade, business, or manufacture, or such as may become offensive," etc., does not apply to a house or hospital for consumptive pa-

tients, for not only is it excluded under the doctrine of *ejusdem generis*, but also by virtue of the legislative grouping of the sections of the Act, s. 72 being under the subdivision dealing with nuisances, while infectious diseases and hospitals are dealt with in a distinct sub-division, commencing with s. 81. A conviction, therefore, for carrying on such house or hospital contrary to s. 72, was quashed. *Regina* v. *Playter*, 21 C. L. T. 285, 1 O. L. R. 360.

Infectious disease — *Employment of physician and nurse — Payment — Liability of municipality — Powers of health officer or inspector.*]—Section 67 of the Public Health Act, R. S. M. 1902 *c.* 138, which enables the health officer to act by removing a person afflicted with any infectious or contagious disease to a separate house or by otherwise isolating him, "and by providing nurses and other assistance and necessities for him at his own cost and charge or the cost and charge of his parents or other person or persons liable for his support if able to pay for the same, otherwise at the cost and charge of the municipality," should be read and construed together with ss. 95, 101, and 102 of the Act, and by the true interpretation of all these provisions, persons performing services as nurses or furnishing necessities at the request of a health officer for a smallpox patient are entitled to be paid at once by the municipality, without proving that the parents or other persons are unable to pay for the same. Under s. 32 of the Act, an inspector appointed by the government has the same powers as a health officer, and may exercise such powers without having first suspended or superseded the local health officer. Although the Act does not distinctly provide for the employment of a physician, yet a person who is a physician, and is employed to act both as doctor and nurse for a smallpox patient, may recover at least for his services as nurse, and $15 per day was not considered excessive for the services of so skilled a nurse as a physician should be, considering also the special risk he ran:—*Quære*, whether the employment of a physician is not authorised by the words "providing other assistance and necessities" in s. 67. *Cameron* v. *Dauphin*, 24 C. L. T. 99, 14 Man. L. R. 573.

Infectious disease — *Property destroyed to prevent spread—Compensation—Municipal corporation.*]—The Public Health Act, R. S. N. S. *c.* 102, s. 32, provides that "all necessary expenses incurred by a local board in suppressing any infectious or contagious disease, shall be a charge against the municipality." In an action to recover the value of personal property destroyed, as alleged, by direction of the board of health, during an epidemic of smallpox, for the purpose of preventing the spread of the disease:—*Held*, that, in the absence of proof of proper authority for the destruction of the property, neither the board nor the municipality could be held liable. *Per* Weatherbe, J., that, assuming the property to have been destroyed by order of the board, there was no provision in the Act to render the municipality liable to make compensation for the destruction of infected property dangerous to the public health. Townshend, J., dissented. *Pelipas* v. *Pictou*, 36 N. S. R. 460.

Infectious disease — *Quarantine—Expenses — Liability of municipality.*] — One whose house is placed in quarantine by virtue of by-laws of the board of health of the province of Quebec, is obliged to pay only the ordinary expenses attending the infectious disease; and the extraordinary expenses imposed by law to prevent the spread of the disease, such as those of caretaking and those of a like nature are to be paid by the municipality. *Corp. of South Whitton* v. *Giroux*, 24 Que. S. C. 361.

Local Board of Health—*Expropriation of land for hospital—Public park.*]—Upon a motion to restrain a municipal corporation from using land acquired by the plaintiffs under the Public Parks Act for a park for the purpose of erecting thereon a contagious diseases hospital:—*Held*, that the actual or virtual expropriation of the land for the use of a hospital in perpetuity, or during the existence of the substantial building contracted for by the defendants, was not within the powers conferred by the Public Health Act on the local board of health; and that this infirmity was not overcome by the sanction of the Provincial Board of Health, or of an order in council. *Ottawa Board of Park Management* v. *Ottawa*, 21 C. L. T. 378.

Matter dangerous to public health — *Notice to remove—Conviction for disobeying—Misdescription of premises—Waiver—Jurisdiction.*] — A conviction under the Public Health Act, C. S. N. B. 1903 *c.* 33, for failing to remove material dangerous to the public health from premises indicated in a notice given by a health officer under s. 36 of the Act, *held* bad, where the notice to remove described, not the premises of the defendant on which the material complained of was deposited, but other premises; and further *held*, that the objection was not waived or the conviction cured by the defendant not being misled by the wrong description and not raising any objection on that ground, but appearing and defending on other grounds. *Rex* v. *Kay, Ex p. Allen*, 38 N. B. R. 536.

Noxious or offensive trade—*Conviction —Motion to quash refused—Public Health Act—R. S. O. (1897), c. 248, s. 72—Construction of.*] — Teetzel, J., *held*, that the trade, business and manufacture of heating and preparing asphalt and other material fell within the *ejusdem generis* rule of Public Health Act, R. S. O. (1897), *c.* 248, s. 72, viz., "refining of coal oil" and "manufacturing of gas" and refused to quash defendants' conviction for having unlawfully established and carried on the above trade without the consent of the municipal council. *R.* v. *Barber Asphalt Paving Co.* (1911), 18 O. W. R. 778, 2 O. W. N. 819, 23 O. L. R. 372.

Prosecution — *Ratepayer—Disinfection —Public Health Act.*]—A prosecution for the infringement of by-laws of the board of health can be brought by any ratepayer, without any authorisation. 2. A private dis-

infection of infected premises by the proprietor is not sufficient reason, under the Public Health Act, for refusing to allow the executive officer to disinfect. *Bousquet* v. *Gagnon*, 23 Que. S. C. 35.

Vaccination — *Municipal By-law—Unreasonableness.*]—A by-law holding the manager or head of a business establishment liable, under pain of fine or imprisonment, for allowing an employee to frequent any manufacturing or business establishment, without furnishing a certificate shewing that he has been vaccinated, is not reasonable but oppressive, and is therefore illegal. *Montreal* v. *Garon*, 23 Que. S. C. 363.

See CONSTITUTIONAL LAW — COURTS — MUNICIPAL CORPORATION—PENALTY.

PUBLIC HIGHWAY.

See WAY.

PUBLIC INQUIRIES ACT.

See CLUB.

PUBLIC INSTRUCTION ACT.

See COSTS—SCHOOLS.

PUBLIC LANDS ACT.

See DOWER.

PUBLIC LIBRARY.

See MUNICIPAL CORPORATIONS.

PUBLIC MORALS.

Action involving indecent matter—*Striking out objectionable causes of action—Judgment—Form of—Dismissal of action—Res judicata—Costs.*]—On the trial of an action containing three different causes of action, one of which was an action for moneys had and received, another for damages for assault and false imprisonment, and a third for damages for procuring the plaintiff to enter a house of prostitution, the Judge, after reading the plaintiff's examination for discovery, came to the conclusion that the evidence disclosed an illegal contract under which the defendants were to receive a part of the moneys obtained by the plaintiff while engaged in prostitution, and that the action involved the taking of an account in respect thereof, and was of an indecent character and unfit to be dealt with, and he dismissed it out of the Court of his own motion; the formal judgment stating that "this Court doth of its own motion and without adjudicating as between the plaintiff and defendants on the matters in dispute between them, order that this action be dismissed out of this Court, with costs:"—*Held*, that the order dismissing the action would have precluded the plaintiff from again suing in respect of any of the causes of action included in the statement of claim, and that the plaintiff should have been allowed to prove her case in respect to those causes of action against which there was no objection; and that the respondent who supported the judgment on appeal must pay the costs of the appeal. *Guilbault* v. *Brothier*, 24 C. L. T. 342, 10 B. C. R. 449.

See CRIMINAL LAW.

PUBLIC OFFICER.

See ATTACHMENT OF DEBTS—COSTS—CROWN —MANDAMUS—NOTICE OF ACTION.

PUBLIC PARK.

See MUNICIPAL CORPORATIONS—NEGLIGENCE —PUBLIC HEALTH—WILL.

PUBLIC POLICY.

See COMPANY — CONSTITUTIONAL LAW — CONTRACT—COVENANT—CRIMINAL LAW —HUSBAND AND WIFE — INFANT — —MASTER AND SERVANT—WILL.

PUBLIC SCHOOLS.

See SCHOOLS.

PUBLIC SLANDER.

See CRIMINAL LAW.

PUBLIC USER.

See PARTICULARS—PATENT FOR INVENTION.

PUBLIC WORKS.

See CROWN—LIQUOR LICENSES.

PUBLICATION.

See DEFAMATION.

PUIS DARREIN CONTINUANCE.

See PLEADING.

PUNCTUATION.

See WILL.

PURCHASER.

See VENDOR AND PURCHASER.

PURSUING BUSINESS ON SUNDAY.

See CRIMINAL LAW.

QUALIFICATION.

See MUNICIPAL ELECTIONS—SCHOOLS.

QUALIFICATION OF TEACHERS.

See SCHOOLS.

QUANTUM MERUIT.

See ARCHITECTS—CONTRACT — MASTER AND SERVANT—MUNICIPAL CORPORATIONS — PHYSICIANS AND SURGEONS—PRINCIPAL AND AGENT — SOLICITOR.

QUARANTINE.

See MUNICIPAL CORPORATIONS — PUBLIC HEALTH ACT.

QUASHING BY-LAWS.

See MUNICIPAL CORPORATIONS.

QUEBEC CIVIL CODE.

See STATUTES.

QUEBEC ELECTION ACT.

See PARLIAMENTARY ELECTIONS.

QUEBEC LAW.

See HUSBAND AND WIFE — INSURANCE — MASTER AND SERVANT—REGISTRY LAWS —VENDOR AND PURCHASER.

QUEEN'S BENCH, MAN.

See APPEAL.

QUEEN'S BENCH, QUEBEC.

See APPEAL.

QUI TAM ACTION.

See CONSTITUTIONAL LAW — COSTS — PENALTY.

QUIETING TITLES ACT.

"**Collector**" mentioned in s. 32 of R. S. B. C. c. 32 is a *persona designata*. *Re Brennan*, 9 W. L. R. 500 (1910), 14 W. L. R. 633.

Petition under mortgage dated 1877 against title — *Presumption that mortgagee died intestate and without heirs —Rights of Crown—Statute of Limitations.*] —Petitioner asked for a declaration of his title under The Quieting Titles Act. In his report the Local Master mentioned a mortgage upon said land given by James Raycraft, the grantor of Thos. Raycraft, the petitioner, in Feb., 1877, by one John Irwin, for $900. As John Irwin, the mortgagee, had not been heard of since 1878, the Master's attention was called to the fact that there might be an *escheat* to the Crown of the money in the mortgage mentioned, or the mortgaged land. Thereupon the Crown was notified, but though called upon to do so, did not attempt to prove any claim, but asked that the certificate of title be subject to the rights of the Crown to the land: —*Held*, (1) That the statute as to quieting titles had placed the Crown in that position that the claim must be proved, or it could be barred. (2) That there was another objection to the Crown's claim. They granted a patent to James Rayecraft on 25th Oct., 1880, and that grant cut out the mortgage as between Thomas Raycraft, who was a purchaser for value, and the Crown. (3) That Thomas Rayecraft is entitled to the certificate as asked, and that the appeals should be dismissed, with costs. *Re Raycraft* (1910), 15 O. W. R. 438, 20 O. L. R. 437, 1 O. W. N. 569.

QUIT CLAIM.

See DEED.

QUIT RENTS.

See RENTES CONSTITUÉES.

QUO WARRANTO.

See AFFIDAVIT — COMPANY — CROWN — MUNICIPAL CORPORATIONS — MUNICIPAL ELECTIONS — SCHOOLS.

RACE COURSE.

See NEGLIGENCE.

RAILWAY.

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1. Animals Killed on Track.

Absence of fence — Liability — Railway Act 1903, s. 199, s.-s. 3 — Lands "not improved or settled, and inclosed." *Schellenberg* v. *Canadian Pacific Rw. Co.* (Man.), 3 W. L. R. 457.

Action for loss — *Railway Act—Pleading — Negligence.*]—In an action against a railway company for damages for the loss of horses killed by a train upon the tracks it is not necessary, having regard to the provisions of the Dominion Railway Act, 3 Edw. VII. c. 58, ss. 237, 242, that the plaintiff should allege fault or negligence on the part of the defendants. *Rocheleau* v. *Grand Trunk Rw. Co.*, 9 Que. P. R. 402.

Animal crossing track — Highway—Neglect to give warning — Contributory negligence — Findings of Judge — Appeal to Divisional Court. *Smith* v. *Niagara, St. Catharines, and Toronto Rw. Co.*, 4 O. W. R. 526.

Animals at large through negligence of owner — *Obligation to fence — Railway Act, 1903, ss. 199, 237, 294.*]—When it is proved that animals killed by a train of a railway company had been allowed to go at large on a public road through the negligence or wilful act or omission of the owner or his agent, and, in consequence thereof, got upon the right of way through a defect in the railway fence, s.-s. 4 of s. 237 of the Railway Act, 1903 (s. 294 of c. 37 of R. S. C. 1906) protects the company from any claim for damages, although the company had failed to observe the requirement of s. 199 (now 254) by neglecting to keep the fence along the right of way in proper repair.—*Murray* v. *Canadian Pacific Rw. Co.*, 7 W. L. R. 50, *Becker* v. *Canadian Pacific Rw. Co.*, 7 Can. Ry. Cas. 29, 5 W. L. R. 569, and *Bourassa* v. *Canadian Pacific Rw. Co.*, 7 Can. Ry. Cas. 41, 30 Que. S. C. 385, followed.—2. Section 237 deals completely with the question of animals at large getting upon the railway track and being killed or injured, and, therefore, s. 294 (now 427), being only of general application, cannot be interpreted so as to make the company liable in a case in which, by s. 237, they are expressly relieved from liability: Howell, C.J.A., dissenting. *Clayton* v. *Canadian Northern Rw. Co.*, 7 W. L. R. 721, 17 Man. L. R. 426.

Cattle at large — *Competent person — Infant—Findings of jury—R. S. C. 1906 c. 37, s. 294.*]—Section 294 of the Railway Act, R. S. C. 1906 c. 37, enacts that "no horses . . . or other cattle shall be permitted to be at large upon any highway within half a mile of (its) intersection with any railway at rail level, unless . . . in charge of some competent person . . . to prevent their loitering . . . on such highway . . . or straying upon the railway." "(3) If the horses . . . of any person which are at large contrary to . . . this section are killed . . . by any train at such point of intersection . . . he shall not have any right of action against any company in respect of the same being killed or injured." The plaintiff, a farmer, sent a lad about ten years old to take fourteen cows along a public highway and across the defendants' line of railway. A train of the defendants ran over and killed four of the cows, and the jury found negligence on the part of the defendants, and also that the boy was a "competent person" within the meaning of the above section:—*Held*, that the plaintiff was entitled to judgment. *Sexton* v. *Grand Trunk Rw. Co.*, 18 O. L. R. 202, 13 O. W. R. 506, 9 Can. Ry. Cas. 119.

Cattle at large — *Intersection of railway and highway — Negligence—Liability — Railway Act.*]—On the proper construction of s. 237, s.-s. 4, of the Railway Act, 1903, 3 Edw. VII. c. 58 (D.), while it is unlawful for the owner of cattle to permit them to be at large within half a mile of the intersection of a highway with a railway, and while if killed at the intersection, the railway company are exempt from liability—if by reason of the failure of the company to comply with the statutory requirements as to fencing, construction of cattle guards, etc., the cattle reach the line of railway and are killed or injured at a point on the railway other than the intersection, the company are liable, unless they can establish affirmatively that the owner was guilty of negligence. The mere fact that the cattle were at large, or the fact that they were not in charge of a competent person, does not prevent the plaintiff's recovery. *Arthur* v. *Central Ontario Rw. Co.*, 11 O. L. R. 525, 7 O. W. R. 527.

Cattle escaping on tracks — *Killed by falling from bridge—Railway Act, s. 437*

(2).]—A heifer escaped on to defendants' tracks, through a defective fence, and while being pursued she fell through a bridge and being severely injured she had to be killed. Plaintiff brought action to recover damages: —*Held*, that as the heifer was not killed by defendants' train, the defendants were not liable under s. 427 (2) of the Railway Act. Action dismissed. *Young* v. *Erie & Huron Ry. Co.* 27 O. R. 539, followed. *Douglas* v. *Grand Trunk Ry. Co.* (1908), 9 Can. Ry. Cas. 27.

Defect in fence — Knowledge—Escape of animals from adjoining land—Railway Act, 1903, s. 257, s.-s. 4. *Carruthers* v. *Can. Pac. Ry. Co.* (Man.), 3 W. L. R. 455, 4 W. L. R. 441.

Defective fence — *Swing-gate — Becoming unfastened—Fault of railway—Findings of jury—Railway Act, ss. 254, 295.*]— Plaintiffs brought action to recover $525 damages for loss of three horses killed by defendants' train, where it crossed plaintiff's farm. Evidence was received as to plaintiff's horses getting on defendants' tracks by reason of a defective gate which it was the defendants' duty to maintain. The jury found in plaintiff's favour, and Boyd, C., entered judgment accordingly. — Divisional Court affirmed above judgment on the ground that defendants had not discharged their statutory obligation to maintain the gate with proper hinges and fastenings, as required by Railway Act, s. 254, and there being no evidence of contributory negligence as provided for by s. 295. *Dobson* v. *Can. Pac. Ry. Co.* (1910), 16 O. W. R. 657, 1 O. W. N. 1063.

Dominion Railway Act, s. 294, s.-ss. 4 and 5—*Application where company not obliged to fence—Animals, how at large—Negligence — Wilful act or omission—Evidence.*]—The plaintiff sought to recover damages for three horses killed on the defendants' track. It was admitted that at the place where the animals reached the railway the defendants were under no liability to fence, under s.-s. 4 of s. 254 of the Dominion Railway Act; and, in fact, they had not fenced. The plaintiff contended that he was entitled to recover under s.-ss. 4 and 5 of s. 294:— *Held*, that the application of s.-ss. 4 and 5 of s. 294 is not restricted to cases where the railway company are under a liability to fence; and that under these sub-sections, the railway company can escape liability only by shewing that the animals got at large through the negligence or wilful act or omission of the owner.—History of the legislation and review of the authorities.—And *held*, upon the evidence, that the animals, in the circumstances set out below, were not at large through the negligence or wilful act or omission of the plaintiff. *Parks* v. *Can. Nor. Ry. Co.* (1910), 15 W. L. R. 445, Man. L. R.

Dominion Railway Act, 1888—"*Not wrongfully on the railway*"—*Adjoining owners—Obligation to fence—Farm crossing.*]— The plaintiff's mare and colt strayed from his yard on to the public road, and reached the track of the defendants, presumably at a place called Morton's crossing. The mare was overtaken by a train and killed as she was running towards the crossing. This was a farmer's crossing, which, under the statute, should have a gate on each side. There was no gate or fence on the west side of the crossing by which the animal was presumed to have reached the track from the public road, but there was a cattle-guard (over which the animals crossed) put there by agreement with Morton. The plaintiff was not an adjoining owner:—*Held*, on appeal (Martin, J., dissenting), that Morton's crossing being a farm and not a public crossing, the statute required that it be either fenced off or provided with gates on both sides; and that the placing of the cattle-guard did not relieve the defendants from their obligation to provide a fence or gate on the west side of the crossing. *Coen* v. *New Westminster Southern Ry. Co.*, 5 W. L. R. 214, 12 B. C. R. 419.

Dominion Railway Act, 1903, s. 199, s.-ss. 3 — *Absence of fence — Lands "not improved or settled, and inclosed."*]—Under s.-s. 3 of s. 199 of the Railway Act, 1903 (D.), a railway company are not required to fence off lands on either side of the right of way, unless they are inclosed, as the plain meaning of the words "not improved or settled, and inclosed" is the same as if they were "not improved and inclosed, or not settled and inclosed." *Dreger* v. *Can. North. Ry. Co.*, 15 Man. L. R. 386, not followed. *Schellenberg* v. *Can. Pac. Ry. Co.*, 3 W. L. R. 457, 16 Man. L. R. 154.

Dominion Railway Act, 1903, s. 237 —*Animals "at large" through negligence of owner—Highway—"Otherwise" upon.*]— The plaintiff left a number of horses in a pasture partly enclosed, being fenced on two sides, bounded by a shallow creek on the third side, and unenclosed on the fourth. He had been using this pasture for the purpose of keeping his horses over night for some years, and up to the time in question none had ever strayed out. On this occasion, the horses, being left for some days unattended to on account of a severe storm, left the pasture, there being no evidence as to how they escaped, and strayed on to the railway of the defendants, where two of them were killed by a train, and one so seriously injured that it had to be destroyed. In an action for damages for the loss of these animals:— *Held*, that the plaintiff did not take reasonable precautions safely to keep the horses in question and prevent them from getting at large, and could not, therefore, under the provisions of s.-s. 4 of s. 237 of the Railway Act of 1903, recover the value of those killed, there being no evidence of negligence on the part of the defendants.—2. That s.-s. 4 of s. 237, which reads, "when any cattle or other animals at large upon the highway or otherwise, get upon the property of the company and are killed or injured by a train the owner . . . shall be entitled to recover," means any cattle or animals at large upon the highway or upon other places than the highway. *Murray* v. *Can. Pac. Ry. Co.*, 1 Sask. L. R. 283, 7 W. L. R. 50.

Dominion Railway Act, 1903, s. 224 —Destruction of horses by engine at crossing—Negligence—Contributory negligence — Conflicting evidence as to blowing whistle— Failure to ring bell—Neglect of persons in charge of horses to look out for train —

Occurrence within city limits — Exception in statute—Failure of evidence to negative. *Pedlar* v. *Can. North. Rw. Co.* (Man.), 6 W. L. R. 201.

Dominion Railway Act, 1903, ss. 199, 237 — *Negligence — Animals at large — Construction of statute—"At large upon the highway or otherwise"—Fencing of railway—Trespass from lands not belonging to owner.*]—C.'s horses strayed from his enclosed pastur situated beside a highway which ran parallel to the company's railway, entered a neighbour's field adjacent thereto, passed thence upon the track through an opening in the fence, which had not been provided with a gate by the company, and were killed by a train. There was no person in charge of the animals, nor was there evidence that they got at large through any negligence or wilful act attributable to C.:—*Held*, affirming the judgment appealed from, *Carruthers* v. *Can. Pac. Rw. Co.*, 16 Man. L. R. 323, 4 W. L. R. 441, that under the provisions of s.-s. 4 of s. 237 of the Railway Act, 1903, the company were liable to damages for the loss sustained, notwithstanding that the animals had got upon the track while at large in a place other than a highway intersected by the railway. *Can. Pac. Rw. Co.* v. *Carruthers*, 27 C. L. T. 663, 39 S. C. R. 251.

Dominion Railway Act, 1903, ss. 199, 237 — Negligence — Duty to fence—Lease by railway company of land adjoining railway—Escape of horses therefrom—Covenant of lessee to erect and maintain fences—Owner of animals using lands under license from assignee of lessee — Escape of animals due to negligence of owner. *Beck* v. *Can. Pac. Rw. Co.*, 10 O. W. R. 644.

Dominion Railway Act, 1903, ss. 199, 237 — Obligation to fence—Locality —Interpretation — Onus. *Cortese* v. *Can. Pac. Rw. Co.* (B.C.), 6 W. L. R. 49.

Dominion Railway Act, 1903, s. 237 —Animals "at large" through negligence of owner—Evidence—"Otherwise." *Murray* v. *Can. Pac. Rw. Co.* (Sask.), 7 W. L. R. 50.

Dominion Railway Act, 1903, s. 237 (4) — *Exception — Negligence — Contributory negligence.*]—Under cl. 4 of s. 237 of the Dominion Railway Act (3 Edw. VII. c. 58), which provides that railway companies shall be liable for the loss of cattle killed on their roads, except when it is proved that such cattle "got at large through the negligence or wilful act or omission of the owner or his agent," no liability whatever is incurred by the company for contributory negligence or otherwise, when the case falls within the exception. *Bourassa* v. *Can. Pac. Rw. Co.*, 30 Que. S. C. 385.

Dominion Railway Act, 1903, s. 237, s.-s. 4 — *Escape from adjoining enclosure —Defective gate—Negligence—Special agreement—Liability — Tenant — Contributory negligence.*] — Section 237, s.-s. 4, of the Dominion Railway Act, 1903, 3 Edw. VII. c. 58, enacts that "when any cattle or other animals at large upon the highway or otherwise, get upon the property of the company and are killed or injured by a train, the owner of such animals so killed or injured shall be entitled to recover the amount of such loss or injury against the company . . . unless the company . . . establishes that such animals got at large through the negligence . . . of the owner or his agent . . . ":—*Held*, that, on the proper construction, the reference in the above section is not to animals getting upon the railway from an adjoining enclosure, but only to animals at large upon the highway or otherwise at large; and that it can have no reference to animals escaped from an adjoining field where, apart from any defect in railway fencing, they were properly enclosed.—The action was brought for the loss of cattle of the plaintiff which escaped from his enclosure and got upon the railway and were killed. The plaintiff was a lessee from the owner for one year, and his animals got on the railway owing to a defective gate at the farm crossing. Prior to the plaintiff's lease the owner had agreed with the defendants that he might put in the crossing, provided he did it himself and would keep his gates up, and that the defendants should not be responsible for anything he might lose on that crossing:—*Held*, that this agreement exonerated the defendants, the plaintiff being bound by it whether he knew it or not when he took his lease. —*Held*, also, *per* Riddell, J., that the plaintiff's contributory negligence disentitled him to recover. It was proved by evidence properly admitted that the plaintiff had agreed with the owner to keep up the gates, and, while this could not be relied upon by the defendants as an estoppel, or in itself a perfect defence by way of contract, it was cogent evidence of contributory negligence, for the plaintiff knew it was his duty to keep the gate in repair, and he knew that the gate was not a safe gate, yet he deliberately put his animals into the field. *Yates* v. *Grand Trunk Rw. Co.*, 9 O. W. R. 423, 14 O. L. R. 63.

Dominion Railway Act, 1903, s. 237, s.-s. 4 — Animals killed on track—Liability of railway company — Animals at large through negligence of owner — Absence of evidence that horses killed by train. *Becker* v. *Can. Pac. Rw. Co.* (N.W.P.), 5 W. L. R. 569.

Dominion Railway Act, 1903, s. 237, s.-s. 4, s. 199 — "*Animals at large upon the highway or otherwise*" — *Pleading — Amendment.*]—The plaintiff's animals were set at large to pasture in the open country, and were killed at a place where the company were not bound to fence:—*Held*, that he could not invoke the aid of s. 237, s.-s. 4, of the Railway Act, 1903. *Melbaniel* v. *Can. Pac. Rw. Co.*, 5 W. L. R. 564, 13 B. C. R. 49.

Dominion Railway Act, R. S. C. 1906 c. 37, s. 254 (4) — *Obligation to fence — "Locality" — Board of Railway Commissioners.*]—The plaintiff's animals were killed on the defendants' track, the right of way of which passed in front of his land. There was no fence erected on this portion of land, either by the defendants or the plaintiff. The north end of the plaintiff's ranch was within 800 yards of the municipal limits of Fernie. There were about two acres of the

ranch with a frontage of 450 feet on the right of way, and about 200 feet off was an enclosure used as a goat pen, about 20 by 30 feet. There was also a potato patch of about three-quarters of an acre, and a movable fence separating this patch from a grassy portion. This, together with a piece of fencing along a waggon road, but not reaching the right of way by some 225 feet, was the only fencing on the ranch. There was evidence of scattered places in the vicinity, some being fenced and others not but with unfenced and unoccupied land intervening:—*Held*, by the full Court, Clement, J., dissenting, that, as the land in question *per se* could not be classed as a settled or inclosed locality, there was no obligation on the defendants to fence the right of way, in the absence of an order from the Board of Railway Commissioners to do so; and that their contiguity to the limits of an incorporated town did not constitute the lands a portion of the settled locality of such town.—Having regard to the powers given the Board of Railway Commissioners by s. 254 of the Railway Act, and particularly the language of s-s. 4, the word "locality" must be construed without reference to proximity to town limits. *Cortese* v. *Can. Pac. Rw. Co.*, 7 W. L. R. 392, 13 B. C. R. 322.

Duty to fence — *Unenclosed lands* — *Dominion Railway Act, ss. 254, 294—"At large" on owner's land—Negligence—Pleading—"Not guilty by statute"—Other defences—Reference to sections of statute—Amendment.*]—The plaintiff resided and his stable was on the north-east quarter of a section of land, and he had a lease of the south-west quarter, through which the defendants' railway ran, and both quarter sections were used by the plaintiff as pasture. There was no fence on the south-west quarter. On a morning in March the plaintiff, as was his custom, let his horses out of the stable to feed, and they proceeded to the south-west quarter, where they usually grazed, and eventually crossed the railway track to the south side, and were there when a train passed in the afternoon. When the horses saw the train, they started to run home, crossing the track in front of the train, which was running about 25 miles an hour, on a fairly straight track, in daylight. One of the horses, having crossed the actual track, got into a cut, and, stumbling over the wire brace of a telegraph pole, fell in between the engine and the tender, and was killed. It was on account of the depth of the cut and the snow that the horse could not escape, but was compelled, having once started in it, to follow the track:—*Held*, that there was no liability on the defendants to fence, the locality being one in which the lands on either side were not enclosed and either settled or improved: Dominion Railway Act, s. 254.—*Held*, also, that, the animal having been killed on the property of the defendants, and there being no evidence of the existence of any highway, the burden was on the defendants, under s. 294 of the Railway Act, to shew that the animals were at large through the negligence or wilful act of omission of the owner; and they had satisfied this onus by shewing, from the plaintiff's own evidence, that when the horses were let out of the stable they could go anywhere they wished—that no restraint was imposed on them, and no care taken to see that they did not go directly to the railway track.—Whether cattle are "at large" or no, depends on whether they are under restraint or control, quite irrespective of whether they are on their owner's land or not.—Review of the authorities. —If, however, the animals were not "at large" in this case, s. 294 did not apply, and the plaintiff had no cause of action, because the defendants were under no liability to fence.—*Semble*, that, upon the evidence, the injury might have been averted by more care on the part of the defendants' servants; but that was immaterial, because the defendants owed no duty in respect of cattle trespassing on their property, in the circumstances of this case.—The defendants, in addition to pleading "not guilty by statute," pleaded a number of other defences, but, no leave to do so having been obtained, they were not considered: Rule 113, Judicature Act.—The statement of defence was also insufficient in not stating the sections of the special Act relied on; but an amendment was permitted in this respect. *Kreuzenbeck* v. *Can. North. Rw. Co.* (1910), 13 W. L. R. 414.

Escape from adjoining field of owner — Gap in fence — Negligence — Contributory negligence — Railway Act, R. S. C. 1906 c. 37, ss. 254, 294 — Animals not "at large"—Statutory duty to fence — Lands not inclosed and either settled or improved—Misdirection — Evidence — Onus. *McLeod* v. *Can. North. Rw. Co.* 12 O. W. R. 1279.

Escape from open shed to unfenced land adjoining railway — Wilful omission of owner—Railway Act, s. 294 (4). *Fair* v. *Can. Pac. Rw. Co.*, 9 W. L. R. 202.

Escape from owner's field into neighbour's field adjoining railway — Railway Act, s. 294 (4) — Animals "at large"—Fences and gates. *Higgins* v. *Can. Pac. Rw. Co.*, 12 O. W. R. 1030.

Escape into neighbour's field adjoining railway — *Dominion Railway Act, s. 294 (4)—Animals "at large"—Fences and gates.*]—The plaintiff's sheep, without any negligence on his part, escaped from his farm into that of the adjoining owner, through which the defendants' railway ran, and thence having got upon the railway track were killed. There was a gate at a farm crossing on the adjoining owner's farm, which had been raised by the defendants at the request of such adjoining owner, leaving an opening under the gate sufficient for the sheep to get through. There were also openings in the fence through which the sheep could have got upon the track; but there was no finding of the jury as to the place at which the sheep got upon the track:—*Held*, that the defendants were liable under s. 294 (4) of the Dominion Railway Act, even assuming that the sheep got upon the track through the opening under the gate.—The effect of the words contained in the section, namely, "at large whether on the highway or not," is that the section is not limited to cattle being at large on the highway and thence getting upon the railway

premises. *Higgins* v. *Canadian Pacific Rw. Co.*, 18 O. L. R. 12, 12 O. W. R. 1030, 9 Can. Ry. Cas. 34.

Escape to highway from enclosure —*Open gate from highway to track—Negligence — Liability.*]—Section 237, s.-s. 4, of the Dominion Railway Act, 1903, provides that if an animal at large upon the highway gets upon the property of the railway company and is killed, the owner may recover the amount of his loss from the company, unless it be proved that the animal got at large through the owner's negligence.—The plaintiff's horse escaped, without any negligence on his part, from a pasture field adjoining the railway, and got upon the highway, and then going a short distance, passed through an open gateway into the defendants' freight yards, and then on to the track, where it was killed by a passing train:—*Held*, that the defendants were liable. *Lebu* v. *Grand Trunk Rw. Co.*, 12 O. L. R. 590, 8 O. W. R. 418.

Escape to highway from field—Fence of insufficient height — Open gate into station grounds — Negligence — Cause of injury — Fault of owner. *Laporte* v. *Canadian Northern Quebec Rw. Co.* (Superior Court, Que.), 8 Can. Ry. Cas. 137.

Extension of siding into private property—*Order of Board of Railway Commissioners—Jurisdiction — Dominion Railway Act, ss. 217, 221, 222, 223—Expropriation—Warrant for immediate possession—Necessity —"Shall" — Discretion — "Satisfaction of Judge."*]—A spur track connected the main line of the Canadian Northern Railway with private property. This spur track or siding was constructed, under an agreement between the railway company and the private owners, by the latter, who were also to pay annual compensation for the use thereof—the railway company having a right to use the siding for shunting. The railway company desired to continue the siding so as to reach the property of S., and in order to do so had to cross the land of B. An order was made by the Board of Railway Commissioners of Canada giving leave to extend the track across B.'s land and authorising the expropriation of a strip of B.'s land for the purpose:—*Held*, that the extension of the siding was within the purview of the Railway Act of Canada, and that the Board had power to make the order under ss. 221, 222, and 223; their order concluded the matter until it was reversed on appeal; and it was not open to a Judge, upon an application by the railway company under s. 217 for a warrant for immediate possession, to consider whether the right was disputable. —*Held*, however, that the company had not made out a right to the warrant under the terms of s. 217.—The effect of the change of the word "may" in that section to "shall" is that, once it is established to the satisfaction of the Judge that immediate possession of the land by the company is necessary the Judge has no alternative but to grant the warrant. He must exercise his discretion, however, as to whether necessity is established. And here there was no suggestion of the necessity of immediate provision of facilities for the public; the possession was not necessary for any urgent purpose of the company; the basis of the application was the necessity of S.; and B.'s property rights were as much entitled to consideration as the necessities of S. *Re Can. North. Rw. Co. & Blackwood*, 15 W. L. R. 454, 20 Man. L. R. 113.

Fences — *Negligence — Liability—Railway Act, ss. 254, 294, 295.*]—The plaintiff's son, a boy of only 12, but a "competent person," was leading the plaintiff's horse along a highway parallel with the defendants' railway, when the horse became frightened, broke away from the boy, left the highway, crossed lots, and got upon the defendants' track, where it was killed by one of the defendants' trains.—The facts, as found, were: (1) that there was no negligence on the part of the train crew; (2) that the animal did not get at large through the negligence or wilful act of the owner or custodian of the animal; (3) that the lands on either side of the railway at the place where the horse was killed were not enclosed or either settled or improved, and there were no fences, gates or cattle-guards:—*Held*, upon consideration of ss. 254, 294, and 295 of the Railway Act of Canada, that, in these circumstances, the law imposed no duty on the defendants, and they were not liable to the plaintiff for the loss of the horse. *Seigle* v. *Can. Pac. Rw. Co.* (1910), 13 W. L. R. 627.

Fences — Negligence of owner — Nonsuit. *Armour* v. *Grand Trunk Rw. Co.*, 12 O. W. R. 927, 13 O. W. R. 264.

Fences — *Statutory obligation as to — Lands enclosed and either settled or improved —Onus of proof — Dominion Rw. Act, ss. 254, 294, 295.*]—The plaintiffs had leased a field, on which they pastured their horses, adjoining the track of the defendants' railway, from which it was separated by a fence erected by the defendants, in which they had left a gap, through which the horses strayed on to the track, where they were run down by a train and killed:—*Held*, that the horses were not "at large" within the meaning of s. 294 of the Rw. Act, R. S. C. 1906, c. 37, which was in force at the date of the accident, and which does not cover the case of such owners as the plaintiffs, who were using their pasturing land adjoining the railway track in the usual manner for the purpose of keeping and feeding their cattle, nor could such owners be considered as "suffering" their animals to "enter upon" the railway, and so losing their right of action under s. 295 (e). 2. There is no express provision in the present Railway Act equivalent to s. 16 of the Consolidated Railway Act of 1879, as amended by 46 Vict. c. 24, s. 9 (D.), under which it was decided in *Davis* v. *Canadian Pacific Rw. Co.* (1886), 12 A. R. 724, that the question of contributory negligence did not arise where the proximate cause of the damage was the omission of the railway company to make or maintain fences as required by the statute. (3) Notwithstanding the absence of an express provision such as is above referred to, the defendants were liable to the plaintiffs for the damages sustained by them, by reason of the duty imposed upon the defendants by s. 254 of the Railway Act to "erect and maintain upon the railway" fences "suitable and sufficient to prevent . . . animals from getting on the railway," for breach of which

duty a statutory right of action against the company is given by s.s. 2 of s. 427 of the Act, to any person injured, for the full amount of damages sustained thereby. (4) *Prima facie* the fence was erected by the company in accordance with their statutory obligations to do so where the lands through which the railway passes are "enclosed and either settled or improved" (s. 254, s.s. 4); and the onus lay on the defendants to shew that at the time when the fence was erected, it was not "required" by the Act. *New Brunswick Rw. Co.* v. *Armstrong* (1883), 23 N. B. R. 193, approved and followed. Judgment of Clute, J., affirmed. *McLeod* v. *Canadian Northern Rw. Co.*, (1908), O. L. R. 636, 12 O. W. R. 1279, 13 O. W. R. 378, 9 Can. Ry. Cas. 39.

Fences — *Trespass* — *Negligence* — *Onus.*]—A railway company are liable for damages for killing a cow, which was at large on the highway with the knowledge of the owner, contrary to the Railway Act, 1903, and which strayed from the highway to the land of D., and from there to the railway track through a defective fence which the company were obliged to maintain. — The company are liable for damage done to the land of an adjoining owner by cattle of a neighbour trespassing by reason of a defective fence which it was the duty of the company to maintain. *Lizotte* v. *Temiscouata Rw. Co.*, 37 N. B. R. 397, 1 E. L. R. 365.

Horses belonging to plaintiffs were turned loose to range unattended near the defendants' railway track, on a bright moonlight night. A train overtook the band and killed 44 of them, the bodies being found along several hundred feet of the line, which the railway company were under no obligation to fence at that point and which was not fenced.—*Held* (Wetmore and Prendergast, JJ., *dissenting*), that although the animals were trespassers, the trial Judge's finding, on the evidence, that the horses were killed through the negligence of the defendants' engineer, should not be disturbed.—*Eggleston* v. *Can. Pac. Rw. Co.* (1905), 6 Terr. L. R. 168; 1 W. L. R. 358.

Supreme Court held that a railway company are not charged with any duty in respect to avoiding injury to animals wrongfully upon their line of railway until such time as their presence is discovered; Idington, J., dissenting, though concurring in the judgment on other grounds. Judgment of the Court below, 1 W. L. R. 356, reversed. *Canadian Pacific Rw. Co.* v. *Eggleston*, 26 C. L. T. 74, 36 S. C. R. 641.

Liability — *Railway companies created by the Parliament of Canada* — *Burden of proof of negligence.*]—A railway company created by the Parliament of Canada is responsible for the loss of animals killed by their trains unless it proves that at the time of the accident, the animals were wandering abroad and were on its right of way through the negligence of their owner or keeper. *LePorte* v. *N. Rw. Co.* (1909), O. R. 36 S. C. 179.

Liability of company to fence — Exemption in certain cases — Dominion Railway Act, s. 254 (4) — Application where fences already existing and maintained — Defective fence — Animal wandering from highway through fence to railway track — Liability of company. *Quinn* v. *Canadian Pacific Rw. Co.* (4th Div. Ct. Rainy River, Ont.), 8 Can. Ry. Cas. 143.

Municipal by-law prohibiting animals running at large — Validity — Defective fences — Nova Scotia Railway Act. *McDonnell* v. *Inverness Rw. and Coal Co.*, 4 E. L. R. 365.

Negligence — *Failure to blow whistle and ring bell on approaching crossing*—*Railway Act, 1903, s. 224* — *Onus of proof as to existence of by-law of municipality*—*New trial* — *Evidence by affidavit.*]—Action for damages for the killing of the plaintiff's horses at a highway crossing by an engine of the defendants. — The trial Judge did not think it necessary to decide, upon the conflicting evidence, whether the whistle had been blown as required by s. 224 of the Railway Act, 1903, but he found that the bell had not been rung, and the defendants had, therefore, been guilty of negligence. He was, however, inclined to believe that the plaintiff's driver had been guilty of contributory negligence in not looking out for the engine. The action was dismissed on the ground that the plaintiff had not proved that there was no by-law of the city prohibiting the blowing of whistles and ringing of bells because, under that section, if such a by-law was in force, the whistle should not be blown nor the bell rung:—*Held*, on appeal, that, upon the plaintiff filing an affidavit proving the non-existence of such a by-law, there should be a new trial, as the evidence strongly indicated negligence, and there was no positive finding of contributory negligence.—*Quære*, whether the onus was on the plaintiff to prove the non-existence of such a by-law.—*Semble*, that the trial Judge might properly have allowed such proof to have been made by affidavit. *Pedlar* v. *Canadian Northern Rw. Co.*, 18 Man. L. R. 525, 10 W. L. R. 503.

Negligence — *Fences* — *Enclosed and improved land* — *Railway Act, R. S. C. 1906, c. 37, s. 254, s.s. 4.*]—Action for damages for killing plaintiffs' cattle which broke through fence of defendants' line of railway running through lands where plaintiffs had right of pasturage:—*Held*, that defendants were negligent, that fences unsuitable and insufficient owing to dilapidations. The lands in question were enclosed and improved. No order had been obtained from Railway Board under s.s. 4 of above section. Damages allowed. *McCracken* v. *Canadian Pacific*, 13 O. W. R. 412.

Negligence — *Liability* — *Fences*—*Railway Act, 1903, s. 237* — "*Otherwise.*"] — Cattle being pastured in common by the occupiers of improved lands bordering on the defendants' railway found their way to the track, and were killed by a passing train of the defendants. It was proved that the defendants' fence along the common pasture was defective, that they had notice of the defect and neglected to repair it, but there was no evidence as to how the cattle got on the track:—*Held*, that under the Railway Act it might be inferred that the cattle found their way to the track through the defendants' defective fence, and a verdict for the

plaintiff should have been sustained.—Subsection 4 of s. 237 of the Act provides that when any cattle or other animals at large upon the highway or "otherwise" get upon the property of the company and are killed or injured by a train, the owner shall be entitled to recover for the loss or injury from the company, unless they shew the negligence or wilful act or omission of the owner.—*Held*, that the word "otherwise" means "otherwise at large," and not otherwise at large in a place *ejusdem generis* with a highway. *Daigle* v. *Temiscouata Rw. Co.*, 37 N. B. R. 219.

Obligation to fence right of way — *Railway Act, R. S. C. 1906 c. 37, ss. 255, 294, 295 — Animal getting on track through open gate at farm crossing — Non-suit — New action.*]—If a gate in the fence at a farm crossing of a railway is left open by the person for whose use the crossing is provided or any of his servants or by a stranger or by any person other than an employee of the company, the company are relieved by s. 295 of the Railway Act, R. S. C. 1906 c. 37, from the liability imposed by s.-s. 4 of s. 294 to compensate the owner for the loss of an animal at large without his negligence or wilful act or omission getting upon the railway track through such gate and killed by a train. — *Flewelling* v. *Grand Trunk Rw. Co.*, 6 Can. Ry. Cas. 47, followed. —*Per* Perdue, J.A.: — Some negligence or breach of statutory duty on the part of the railway company in respect of such gate would have to be shewn to render the company liable in such a case.—*Per* Howell, C.J.A.—If railway fences or gates are torn down or get open by the action of the elements or by some accident or default not caused by the act of man, and an animal thereby gets upon the track and is killed, none of the exceptions in s. 295 would apply, and the company would be liable under s.-s. 4 of s. 294.—Non-suit ordered, reserving the right to the plaintiff to bring another action. *Atkin* v. *Canadian Pacific Rw. Co.*, 18 Man. L. R. 617, 11 W. L. R. 1.

Ontario Railway Act — Animals killed on track — Electric Railways Act—Duty to fence — Passing "along" a public highway — Negligence. *Gunning* v. *South Western Traction Co.*, 10 O. W. R. 285.

Plaintiff, as was his custom, turned his horses loose in a shed one night. The horses next morning walked across his unfenced farm, got on the road allowance, and then on defendants' line of railway and were killed; — *Held*, that the horses were "at large" through the plaintiff's wilful omission, and that he could not recover. *Fair* v. *Canadian Pacific*, 9 W. L. R. 202.

Railway Act, 1903, s. 237 — *Negligence — Burden of proof — Jury.*]—In an action for damages for the loss of a horse killed by a train upon the defendants' track, the jury found that the horse was killed upon the property of the defendants, and that the defendants were responsible for that:—*Held*, that upon the proper construction of s. 237, s.-s. 4, of the Dominion Railway Act, 1903, a finding that the horse was killed upon the property of the defendants was sufficient to entitle the plaintiff to recover unless it was shewn by the defendants that the animal got at large through the negligence of the owner or custodian, and such negligence was sufficiently negatived, in view of the Judge's charge, by the finding of the jury that the defendants were responsible. Judgment of the County Court of Simcoe reversed. *Bacon* v. *Grand Trunk Rw. Co.*, 12 O. L. R. 196, 7 O. W. R. 753.

Rule as to presumption of fault]—Under the common law, a railway company within the control of the Parliament of Canada, is responsible for the value of animals killed on its line when it is in fault. In such a case, there is no reason for applying the rule as to presumption of fault contained in sec. 294, c. 37, R. S. C. 1906. *Mathieu* v. *Que. Rw. Light & Power Co.*, 37 Que. S. C. 164.

Statutory warnings — *Head-light enveloped in steam — Contributory negligence, absence of—Liability — Damages.*]—A pair of horses and a waggon of the plaintiff, in charge of his servant, were crossing the defendants' railway at a highway crossing in a city, when they were struck by an engine of the defendants; the horses were killed and the waggon and harness injured. The servant saw or heard nothing to warn him of the approach of the engine till after he was upon the railway, when he saw the head-light and endeavoured to turn, but was too late. The evidence was conflicting as to whether the engine whistle was sounded as required by s. 224 of the Dominion Railway Act, 1903, but there was no pretence that the bell was rung, as also required by that section. The servant might have seen the head-light sooner, but there was evidence which shewed that the head-light was enveloped in steam:—*Held*, that the defendants' servants had been guilty of negligence which was the proximate cause of the damage to the plaintiff; that the plaintiff's servant had not been guilty of contributory negligence; and therefore the defendants were responsible for the plaintiff's damages, assessed at $575. *Pedlar* v. *Can. Nor. Rw. Co.* (1910), 15 W. L. R. 613, Man. L. R.

See ANIMALS—PLEADING.

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2. BOARD OF RAILWAY COMMISSIONERS.

Continuous route — *Joint tariff — Reasonable tolls — Railway Act, s. 333.*]—Dom. Board of Railway Comr. ordered the White Pass & Yukon Rw. Co., the British Yukon Rw. Co., the British Columbia Rw. Co., to file a joint tariff for the land portion of their route from Skagway to White Horse, and also ordered the White Pass & Yukon Rw. Co. to require the Pacific and Arctic Rw. Co. (a foreign railway) to enter into agreement for filing such joint tariff. The Board to deal with question of reasonable rates and tolls in such joint tariff or disallow it when said joint tariff is filed:—*Held*, further, that the Board had no jurisdiction over defendants' water route between White Horse and Dawson, it not being a part of a "continuous route in Canada" as dealt with in s. 333 of the Railway Act. *Dawson* v. *White Pass & Yukon Rw. Co.* (1909), 9 Can. Ry. Cas. 190.

Contract with municipality — Confirmation by statute — By-law — Permission to alter grade of streets and construct subway — Injury to land fronting on streets —Construction of agreement — Work done in accordance with — Injunction — Interim order affirmed on appeal — Effect as to judgment at trial. *Fraser* v. *Canadian Pacific Ry. Co.*, 7 W. L. R. 734, 8 W. L. R. 380, 17 Man. L. R. 667, 8 Can. Ry. Cas. 205.

Demurrage — *Average plan — Canadian car service rules — Contract of carriage.*]— The applicants asked the Board to establish the average demurrage plan, under which the railway company grant a credit of free time to a consignee, when he unloads a car in a shorter time than the maximum provided in the car service rules, which credit is set off against excess time for the use of other cars for which the railway company charge the consignee demurrage. The Canadian car service rules have been in force only since 1st March, 1906:—*Held*, that the rules are founded on sound principles which should not be departed from. Exceptions should not be made in the case of sugar refineries. The average system is not justifiable under the contractual relations between the consignor or consignee and the railway company. Application refused. *Wallaceburg Sugar Co.* v. *Canadian Car Service Bureau*, 8 Can. Ry. Cas. 392.

Demurrage — *Extension of time — Car service rules — Unreasonableness — Onus.*] —The car service rules allow 48 hours for the unloading of charcoal, and the applicants asked that this free time be extended to 72 hours:—*Held*, that the burden of shewing that the two-day limit was unreasonable was upon the applicants, and, as there was no general complaint, the application failed. *McDiarmid & Gall* v. *Grand Trunk Ryc. Co. and Canadian Pacific Ryc. Co.*, 8 Can. Ry. Cas. 337.

Diversion of highway — *Expropriation of lands — Dominion Railway Act, s. 178 — Compensation to land-owners—Conditions — Foot crossings.*]—The railway company asked the Board, under s. 178 of the Dominion Railway Act, for authority to expropriate certain lands for the purpose of diverting a highway, the diversion having been authorised by a previous order of the Board. The land-owners interested opposed the application unless three conditions were imposed, two of which related to compensation and the third to a right of crossing. The Board granted the application, subject only to the third condition, viz., that the owners be given the right of crossing on foot over the company's right of way next the river opposite the lands of each owner. *Vancouver, Victoria and Eastern Rw. and Navigation Co.* v. *Municipality of Delta*, 8 Can. Cas. 354.

Ex parte order — *Jurisdiction—Crossing order — Appeals from Board — Right of way — "As now enjoyed" — Construction — Railway Act, 1903.*]—On the sale and conveyance of land to a railway company, on which there existed a bridge or viaduct spanning a valley, the vendors reserved "the right of way under the said bridge as now enjoyed by the vendors." At that time the only use made of the right of way was by persons on foot, or with horses, carts, etc.:—*Held*, that "as now enjoyed" meant "as now used," *i.e.*, for farm purposes, and did not justify the laying and using a railway under the bridge. *Dand* v. *Kingscote*, 6 M. & W. 174, and *United Land Co.* v. *Great Eastern Rw. Co.*, L. R. 17 Eq. 158, 10 Ch. 586, distinguished.—The defendants obtained an *ex parte* order from the Board of Railway Commissioners authorising them to construct, maintain, and operate certain sidings involving the crossing of the right of way of another railway. The plaintiffs, on becoming aware of this order, moved against it before the Board, under ss. 25 and 32 of the Railway Act, 1903, 3 Edw. VII. c. 58 (D.), but the Board confirmed it:—*Held*, that by such application to vary or amend the order the plaintiffs had submitted to the jurisdiction of the Railway Commissioners, and were concluded within the scope of their judgment, and could not now go behind the orders in the present action, which was for damages and an injunction; and this, whether the application for the *ex parte* order could be considered an application under s. 177 of the Railway Act for a crossing order, or not.—The plaintiffs objected that the Railway Commissioners had no jurisdiction because the line in question being a branch line, the plans were not filed in the registry office, pursuant to s. 175, s.-s. 2, and s. 122 of the Act.—*Held*, that they could not raise the question of jurisdiction in this way, the Act specially providing by s. 44 for an appeal from orders of the Board to the Supreme Court of Canada on such questions.—By virtue of s. 7 of the Railway Act, 1903, where one railway crosses another which is subject to the Act, the Board of Railway Commissioners have exclusive jurisdiction. *Canadian Pacific Rw. Co.* v. *Grand Trunk Rw. Co.*, 12 O. L. R. 320, 7 O. W. R. 814.

Farm crossing — *Undercrossing—Contract.*]—The applicant asked the Board under ss. 252 and 253 of the Dominion Railway Act for an order requiring the company to provide and construct a suitable farm crossing. The application was refused, the company having carried out their contract in regard to an under-crossing, though the applicant complained that it was too small. *Stiles* v. *Canadian Pacific Rw. Co.*, 8 Can. Ry. Cas. 190.

Fencing — *Unenclosed lands — Jurisdiction of Board of Railway Commissioners— Construction of statute — "The Railway Act," R. S. C. 1906, c. 37, ss. 30, 254.*]— Under the provisions of "The Railway Act" the Board of Railway Commissioners for Canada does not possess authority to make a general order requiring all railways subject to its jurisdiction to erect and maintain fences on the sides of their railway lines where they pass through lands which are not enclosed and either settled or improved; it can do so only after the special circumstances in respect to some defined locality have been investigated and the necessity of such fencing in that locality determined according to the exigencies of each case. Duff, J., *contra*. The "Railway Act" empowers the Board to order that, upon lines of railway not yet completed or open for traffic or in course of construction, where they pass through enclosed lands,

the railway companies should construct and maintain such fences or take such other steps as may be necessary to prevent cattle and other animals from getting upon the right-of-way. Idington, J., *contra*. *In re Can. North. Rw. Co.* (1905), 42 S. C. R. 443, 30 C. L. T. 172.

Freight rates — *Discrimination — Excess — Evidence.*]—The applicants applied to the Board for an order requiring the railway company to restore the former Winnipeg west-bound rates to the Kootenay district. The application was dismissed, there being no evidence that the rates were excessive. *Winnipeg Jobbers Association* v. *Canadian Pacific Rw. Co.*, 8 Can. Ry. Cas. 173.

Freight rates — *Lumber — Unjust discrimination — Special contract.*]—The applicants complained that the freight rates charged on telegraph, telephone, and trolley poles were unjustly discriminatory with respect to the rates charged on lumber and other forest products. It was ordered by the Board that the rates charged on poles loaded on one car should not be greater than those on common lumber as provided in the special local and joint tariffs of the railway companies; that on poles so long as to require more than one car for their carriage the companies be authorised to charge 20 per cent. higher than for one car; that poles may be exported by Canadian railway companies, with the concurrence of their United States connections, under joint rail rates for general traffic at the lumber classification. *Rideau Lumber Co.* v. *Grand Trunk Rw. Co., and Canadian Pacific Rw. Co.*, 8 Can. Ry. Cas. 339.

Freight rates — *Tan bark—Discrimination — Criteria — Grouping.*]—The complaint was that the company charged higher rates on tan bark from Sprucedale than from Burk's Falls and Sundridge, shewing an unjust discrimination against Sprucedale: — *Held*, that group rates necessarily result in discrimination, but such rates are not unlawful so long as the discrimination is not undue.—In the application of s. 315 of the Dominion Railway Act, s.-ss. 1 and 5 afford certain tests which are to be used by the Board as criteria of discrimination.—While under existing tariff conditions the Sprucedale rate is 9 cents and the Burk's Falls rate 8 cents a difference in rate is not conclusive as regards the question of discrimination.—The application was refused by the Board, Mr. Commissioner Mills dissenting. *Malkin & Sons* v. *Grand Trunk Rw. Co.*, 8 Can. Ry. Cas. 183.

Freight rates — *Tariff approved by Board of Railway Commissioners—Enquiry by shipper as to rate — Misrepresentation by agent of railway company — Contract based on false information obtained — Damages for tort — Negligence — Breach of duty — Measure of damages.*]—Appeal from judgment herein dismissed so far as defendants' liability is concerned, but action remitted for a new assessment of damages. *Urquhart* v. *Canadian Pacific*, 11 W. L. R. 425.

Freight rates for carriage of stone— *Mileage basis — Scale of rates — Dominion Railway Act, s. 323.*]—Application by stone quarry operators to the Board of Railway Commissioners for an order under s. 323 of the Dominion Railway Act disallowing a proposed increase in freight rates for the carriage of stone, at the rate of 5 cents per ton, within certain areas. The Board refused to adopt a mileage basis for stone rates and approved a new scale of rates based upon the existing system. *Doolittle and Wilcox* v. *Grand Trunk Rw. Co. and Canadian Pacific Rw. Co.*, 8 Can. Ry. Cas. 10.

Freight and passenger rates—*British Columbia — Discrimination — Contract — Breach — Status of province to complain.*]—Application by the Attorney-General for British Columbia for an order placing that province upon the same favourable condition in respect of tolls for freight and passenger traffic over the Canadian Pacific Railway in British Columbia as are other portions of Canada over the main line; reducing the existing freight and passenger tolls; and restraining the railway company from charging other or higher rates within British Columbia than in other parts of Canada:—*Held*, that no contract, express or implied, prevented the company from increasing their tolls in localities where the circumstances justified it, and as permitted by the Railway Act of 1879. If there is undue or unjust discrimination, it is illegal, and if proved will be dealt with as a violation of the law; but this was a matter of evidence, and no evidence was given.—*Held*, also, that the applicant had no status to complain of a breach of the contract between the government of Canada and the company as to the construction of the road; and in any event that had nothing to do with freight and passenger rates. *Attorney-General for British Columbia* v. *Canadian Pacific Rw. Co.*, 8 Can. Ry. Cas. 346.

Joint tariff — *Public interest—Existing rate arrangement — Reasonableness.*]—Application by the Algoma Central and Hudson Bay Railway Company to the Board of Railway Commissioners for an order under ss. 7, 317, 333, 334, and 338 of the Dominion Railway Act for a joint tariff with the Grand Trunk Railway Company:—*Held*, that the applicants had not proved that there was a public interest involved or that the existing rate arrangement was unreasonable. *Algoma Central and Hudson Bay Rw. Co.* v. *Grand Trunk Rw. Co.*, 8 Can. Ry. Cas. 46.

Jurisdiction — *Appeal to Supreme Court.*] — The Board of Railway Commissioners granted an application of the James Bay Railway Company for leave to carry their line under the track of the Grand Trunk Railway Company, but, at the request of the latter, imposed the condition that the masonry work of such under-crossing should be sufficient to allow of the construction of an additional track on the line of the Grand Trunk No evidence was given that the latter company intended to lay an additional track in the near future, or at any time. The James Bay Company, by leave of a Judge, appealed to the Supreme Court of Canada from the part of the order imposing such terms, contending that the same was beyond the jurisdiction of the Board:—*Held*, that the Board had jurisdiction to impose said terms. —*Held, per* Sedgewick, Davies and Maclennan, JJ., that the question before the Court

was rather one of law than of jurisdiction, and should have come up on appeal by leave of the Board or been carried before the Governor-General in council. *James Bay Ry. Co.* v. *Grand Trunk Ry. Co.*, 26 C. L. T. 382, 37 S. C. R. 372.

Jurisdiction.]—Board of Railway Commissioners for Canada has no power to order that a private industrial spur-track or siding, constructed and operated under an agreement between a railway company and the owner of the land upon which it is laid, and used only in connection with the business of such owner, shall be also used and operated as a branch of the railway with which it is connected.—Appeal allowed with costs. *Blackwoods Co.* v. *Can. Northern Ry. Co.* (1910), 31 C. L. T. 254, 44 S. C. R. 92.

See 15 W. L. R. 110; 20 Man. L. R. 161.

Jurisdiction — *Construction of subway —Apportionment of cost — Company interested or affected — Street railway — Agreement with municipality.*]—The power of the Board of Railway Commissioners, under s. 186 of the Railway Act, 1903, to order a highway to be carried over or under a railway, is not restricted to the case of opening up a new highway, but may be exercised in respect of one already in existence. The application for such order may be made by the municipality as well as by the railway company.—The Board, on application by the corporation of the city of Ottawa, ordered a subway to be made under the tracks of the Canada Atlantic Railway Company where they cross Bank street, the cost to be apportioned among the city corporation, the Canada Atlantic Railway Company, and the Ottawa Electric Railway Company. By an agreement between the electric company and the city corporation the company were given the right to run their cars along Bank street and over the railway crossing, paying therefor a specified sum per mile. The company appealed from that portion of the order making them contribute to the cost of the subway, contending that the city corporation were obliged to furnish them with a street over which to run their cars, and they could not be subjected to greater burdens than those imposed by the agreement:—*Held*, that the electric company were a company "interested or affected" in or by the said work, within the meaning of s. 47 of the Railway Act, and could properly be ordered to contribute to the cost thereof.—*Held*, further, that there was nothing in the agreement between the company and the city to prevent the Board making the order, or to alter the liability of the company so to contribute. Decision of the Board affirmed. *Ottawa Electric Ry. Co.* v. *Ottawa*, 26 C. L. T. 381, 37 S. C. R. 354.

Jurisdiction — *Crossing — Access to brick yard — Railway Act, s. 253 — "Farm crossing" — Discretion — Convenience — Expense — Indemnity against damages by accidents at crossing.*]—The applicant's land was bounded on the south by the Grand Trunk Railway, on the north by the respondent's line of railway, immediately north of the latter being an electric road, and north of that was a travelled road. The applicant carried on a brick business on his land and desired to have a crossing maintained over the respondent's right of way. The Dominion Railway Board holds that "farm crossing" should not be narrowly construed to mean a crossing for farm purposes only. The Board decided to grant the crossing as a matter of discretion. Indemnity refused to respondents and engineer to report. *Acre* v. *Toronto, Hamilton and Buffalo Ry. Co.*, 12 O. W. R. 1049, 8 Can. Ry. Cas. 59.

Jurisdiction — *Crossing — Contribution to cost — Party interested — Municipality —Distance from work.*]—A municipality may be a "party interested" in works for the protection of a railway crossing over a highway, though such works are neither within or immediately adjoining its bounds, and the Board of Railway Commissioners has jurisdiction to order it to pay a portion of the cost of such work. *Carleton* v. *Ottawa*, 41 S. C. R. 552, 9 Can. Ry. Cas. 154.

Jurisdiction — *Dominion and provincial railways — Crossing — Connections — Statutes.*] — Where a provincial railway which has not been declared a work for the general advantage of Canada crosses a Dominion railway, the Board of Railway Commissioners has no power to order a connection to be made or traffic to be interchanged between the railways; under s. 8 of the Dominion Railway Act the jurisdiction is confined to the point of crossing.—A railway company incorporated by the Dominion Parliament were authorised to acquire two provincial railways; no work had been done in connection with the Dominion railway; and the Act provided that the acquisition should not make the provincial railways subject to the Dominion Railway Act, or works for the general advantage of Canada, but that they should remain subject to the legislative control of the province:—*Held*, that the Board had no jurisdiction to order connections to be made. *Galt Board of Trade et al.* v. *Grand Trunk Ry. Co. et al.*, 8 Can. Ry. Cas. 195.

Jurisdiction — *Dominion Railway Act —Flag stations — Agents.*]—The applicants petitioned the Board of Railway Commissioners for an order directing the railway company: (1) where the traffic warrants it, to erect a freight shed and appoint a permanent agent in charge of the business at that station; (2) not to reduce any regular station with an agent in charge to a flag station without an agent; (3) not to close any regular or flag station without the approval of the Board:—*Held*, that the Dominion Railway Act confers power upon the Board to deal with the subject matter of the application.—Directions given as to stations, waiting rooms, agents, etc. *Winnipeg Jobbers and Shippers Association* v. *Canadian Pacific Ry. Co., Canadian Northern Ry. Co., and Grand Trunk Pacific Ry. Co.*, 8 Can. Ry. Cas. 151.

Jurisdiction — *Electric railway—Works constructed before Dominion jurisdiction declared — Dominion Railway Act, s. 238 — Power line — Protection of existing lines and public — Discretion.*] — The company were incorporated by 1 Edw. VII. c. 92 (O.) and authorised to construct a railway to be operated by electricity in the county of Essex. The Act provided that the railway

might be carried along such highways as might be authorised by the by-laws of the respective corporations having jurisdiction. By 6 Edw. VII. c. 184 (D.) the railway works were declared to be for the general advantage of Canada, and it was provided that the Dominion Railway Act, 1903, and amendments, should thereafter apply to the company and the works, to the exclusion of provincial enactments, but that nothing therein should affect any action theretofore taken pursuant to the powers in such Acts contained. In 1902 the council of the town of Essex passed a by-law granting to the company the right to construct their line through the town, but not so as to interfere with any poles or wires of any other person. The company constructed their line of railway in the town and put up poles and wires, and in doing so interfered with poles and wires already there for the purpose of lighting:—*Held*, that if the railway and power lines were constructed before the passing of 6 Edw. VII. c. 184 (D.), no order of the Board was necessary to authorise their subsequent maintenance and use; if none of these things were done before the passing of the Act, the company required the leave of the Board under ss. 235 and 237 of the Dominion Railway Act; if part only was done before the Act and part afterwards, *quære*, as to the result.—If the railway and its power lines were lawfully upon the street when the Act was passed, the Board still had the power under s. 238 to impose conditions; and in exercising that jurisdiction the Board must take into consideration the nature of the works and of the protective measures necessary.—The case was one for the Board's discretion; and the company should adopt the measures and bear the expense necessary to the protection of the existing lines and the public. *Naylor* v. *Windsor Essex and Lake Shore Rapid Rw. Co.*, 8 Can. Ry. Cas. 14.

Jurisdiction — *Enforcement of agreement* — *Reduction in freight rates* — *Adequate consideration* — *Unreasonable preference.*]—In 1897 the railway company, for valuable consideration, agreed to charge the coal company at the rate of not more than six-tenths of the ordinary tariff rates for plant shipped by the coal company over the lines of the railway company and required by the coal company for the construction and operation of their works. The coal company asked the Board of Railway Commissioners for an order that the railway company should file a tariff from all points in Canada to all points on the property of the applicants. The railway company said that the agreement was illegal:—*Held*, that, admitting the jurisdiction of the Board, which was doubtful, the application could not succeed. It was impossible to find that the consideration was adequate; but, even if it were, no undue or unreasonable preference or advantage could be permitted to any person or company; the Railway Act requiring that the tolls charged should be equal to all persons. *Crow's Nest Pass Coal Co.* v. *Canadian Pacific Rw. Co.*, 8 Can. Ry. Cas. 33.

Jurisdiction — *Highway* — *Construction of statute* — *R. S. C. 1906, c. 37, s. 2* — *Deviation of tracks* — *Dedication user* —"*Public way or means of communication*" —*Access to harbour* — *Navigable waters.*]—Prior to 1888 the G. T. Rw. Co. operated a portion of its railway upon the "Esplanade" in Toronto, and in that year, the C. P. Rw. Co. obtained permission from the Dom. Gov. to fill in part of Toronto Harbour lying south of "Esplanade" and to lay and operate tracks thereon, which it did. Several city streets abutted on north side of "Esplanade" and the general public passed along the prolongations of these streets, with vehicles and on foot, for purposes of access to harbour. In 1892 an agreement was entered into between city and the two railway companies respecting the removal of the sites of terminal stations, the erection of overhead traffic bridges and closing or deviation of some of these streets. This agreement was ratified by statutes of the Dominion and provincial legislatures, the Dominion Act providing that the works mentioned in the agreement should be works for the general advantage of Canada. To remove doubts respecting the rights of the C. P. Rw. Co. to the use of portions of the bed of harbour on which they had laid their tracks across the prolongations of streets mentioned, a grant was made to that company by Dom. Gov. of the "use for railway purposes" on and over the filled in areas included within the lines formed by production of the sides of the streets. At a later date Dom. Gov. granted these areas to the city, in trust to be used as public highways, subject to an agreement respecting railways, known as "Old Windmill Line" agreement, and excepting therefrom strips of land 66 feet in width between the southerly ends of the areas and the harbour reserved as and for "an allowance for a public highway." In June, 1909, Board of Railway Committee, on application by the city, made an order directing that the railway companies should elevate their tracks on and adjoining "Esplanade" and construct a viaduct there:—*Held*, Girouard and Duff, JJ., dissenting, that the Board had jurisdiction to make such order; that the street prolongations mentioned were highways within the meaning of "Railway Act;" that the Act of Parliament validating agreement made in 1892 did not alter the character of agreement as a private contract affecting only the parties thereto, and that the C. P. Rw. Co., having acquired only a limited right in the filled in land, had not such a title thereto as would deprive the public of the right to pass over the same as a means of communication between streets and harbour. *C. P. Rw. Co.* v. *Toronto* (1910), 30 C. L. T. 525.

Jurisdiction — Location of railway — Consent of municipality—Crossing—Leave of board — Discretion.—See *Essex Terminal Rw. Co.* v. *Windsor Essex & Lake Shore Rapid Rw. Co.*, 40 S. C. R. 620, 8 Can. Ry Cas. 1.

Jurisdiction — *Location of railway* — *Consent of municipality—Crossing—Leave of board — Discretion.*]—On the 12th August, 1905, the township of Sandwich West passed a by-law authorising the Windsor, etc., Railway Company to construct their line along a named highway in the municipality, but the powers and privileges conferred were not to take effect unless a formal acceptance thereof should be filed within 30 days from

waters.]— operated a "Esplan- r, the C. P. m the Dom. arbour lying y and oper- id. Several of "Esplan- assed along reets, with es of access ent was en- e two rail- noval of the erection of ng or devia- This agree- the Domin- ie Dominion entioned in for the pu- move doubts P. Rw. Co. l of harbour racks across entioned, a by the Dom. urposes" on luded within of the sides Dom. Gov. in trust to bject to an known as and except- feet in width ie areas and r "an allow- June, 1909, a application recting that elevate their lanade" and ld. Girouard the Board order; that d were high- ailway Act;" dating agree- er the char- ate contract to, and that uired only a and, had not deprive the the same as ween streets v. *Toronto*

railway — ng—*Leave of ex Terminal Lake Shore* 8 Can. Ry.

railway — ng—*Leave of* 12th August, West passed or, etc., Rail- ir line along eipality, but nferred were al acceptance 0 days from the passing of the by-law. Such acceptance was filed on the 12th September, 1905. This was too late, and on the 20th July, 1907, the council of Sandwich West and that of Sandwich East respectively passed by-laws containing the necessary authority. In April, 1906, the location of the line of the Essex, etc., Railway Company was approved by the Board. In June, 1906, the Board made an order allowing the Windsor company to cross the line of the Canadian Pacific Railway. In March, 1907, another order respecting said crossing was made, and also an order approving the location of the Windsor company, the municipal consent being obtained three months later. The Essex company applied to the Board to have the orders of June, 1906, and March, 1907, rescinded, and for an order requiring the Windsor company to remove their track from the highway at the point where the applicants proposed to cross it, to discontinue its construction at such point, or, in the alternative, for an order allowing it to cross the line of the Windsor company on the highway. The applicants claimed to be the senior road, and alleged that the Windsor company had never obtained the requisite authority for locating their line. On a case stated to the Supreme Court by the Board:—*Held*, that the Board had power to refuse to set aside the orders; that the by-laws passed in July, 1907, were sufficient to legalise the construction of the Windsor company's line on the highway; and that the Board can now lawfully authorise the latter company to maintain and operate their railway thereon.—*Held*, further, that leave of the Board is necessary to enable the Essex company to lay their tracks across the railway of the Windsor company on the highway.—*Held*, also, that the Board, in the exercise of its discretion, has power by order to authorise the maintenance and operation of the Windsor company, along the highway, and to give leave to the Essex company to cross it and the line of the Canadian Pacific Railway, near the present crossing, and to apportion the cost of maintaining such crossing equally between the two companies, instead of imposing two-thirds thereof upon the Essex company, as was done by a former order not acted upon; and to order that if the Essex company finds it necessary in its own interest to have the points of crossing differently placed, it should bear the expense of removing the line of the Windsor company to the new point of crossing.—Judgment of the Board of Railway Commissioners, 7 Can. Ry. Cas. 109, affirmed. *Essex Terminal Ry. Co.* v. *Windsor Essex & Lake Shore Rapid Rw. Co.*, 40 S. C. R. 620.

Jurisdiction — *Municipal streets—Railway upon or along highway—Leave to construct—Approval of location—Condition imposed—Payment of damages to abutting landowners—Construction of statute—R. S. C. (1906) c. 37, ss. 47, 155, 159, 235, 237.*]—Having obtained consent of municipality to use certain public streets for that purpose, the G. T. Rw. Co. applied to Board of Rw. Com. for Canada for leave to construct and approval of location of line of their railway upon and along highways in question. No lands abutting on these highways were to be appropriated for purposes of the railway, nor were the rights or facilities of access thereto to be interfered with except in so far as might result from inconvenience caused by construction and operation of the railway upon and along the streets. In granting the application, the Board made order complained of subject to condition that the Co. should "make full compensation to all persons interested for all damage by them sustained by reason of the location of the said railway along any street." On appeal to Supreme Court of Canada:—*Held*, Davies and Duff, JJ., dissenting, that under provisions of s. 47 of "Railway Act," R. S. C. (1906), c. 37, the Board had, on such application, power to impose condition directing that compensation should be made by Co. in respect to damages which might be suffered by proprietors of lands abutting on highways of municipality upon and along which the line of railway so located was to be constructed. *Grand Trunk Rw. Co. & Can. Pac. Rw. Co.* v. *Fort William* (1910), 30 C. L. T. 741, 43 S. C. R. 412.

Jurisdiction — *Railway Act, s. 237 — Payment of expenditure made to meet danger where wires cross.*] — Section 237 of the Dominion Railway Act does not authorise the Board of Railway Commissioners to make an order against a railway company for payment of the reasonable expenditure of a telephone company made without the sanction of the Board to meet a dangerous situation at a crossing; the whole object of the section is to give the Board authority to deal with the danger. *Bell Telephone Co.* v. *Windsor Essex & Lake Shore Rapid Rw. Co.*, 8 Can. Ry. Cas. 20.

Jurisdiction — *Running rights — Compensation — Arbitration — Statute.*]—Application by the R. of Q. R. Co. to the Board of Railway Commissioners, under s. 364 of the Dominion Railway Act, for an order requiring the K. and P. R. Co. to ascertain and settle the compensation payable by the former to the latter in respect to the running rights of the applicants over a portion of the K. and P. railway. The Board refused the application for want of jurisdiction; by an agreement and statute (52 V. c. 77, D.), such compensation is to be settled by arbitration. *Bay of Quinté Rw. Co.* v. *Kingston & Pembroke Rw. Co.*, 8 Can. Ry. Cas. 202.

Jurisdiction — *Telephone company — Subscriber — Directory.*] — The Dominion Board of Railway Commissioners have no jurisdiction to order a telephone company to furnish one of their subscribers with a telephone directory. *Semble*, if there were jurisdiction, the telephone company's refusal to furnish a subscriber in a city with a directory of subscribers in a part of the province outside the city, was reasonable. *Dignam* v. *Bell Telephone Co.*, 8 Can. Ry. Cas. 200.

Jurisdiction — *Traffic accommodation—Restoring connections.*]—On an application to the Board of Railway Commissioners for Canada, under the Railway Act, 1903, for a direction that a railway company should replace a siding, where traffic facilities had been formerly provided for the respondents

with connections upon their lands, and for other appropriate relief for such purposes:—*Held*, that, under the circumstances, the Board had jurisdiction to make an order directing the railway company to restore the spur-track facilities formerly enjoyed by the applicants for the carriage, despatch, and receipt of freight in car-loads over, to, and from the line of railway. *Can. North. Rw. Co.* v. *Robinson*, 37 S. C. R. 541.

Lord's Day Act — *Freight — Undue delay—Order under s. 12 (x).*]—Application by the Grand Trunk Railway Company for an order under s. 12 (*x*) of the Lord's Day Act, 6 Edw. VII. c. 27, permitting the company in the province of Ontario to do on any Sunday such work as may be necessary: (1) For the purpose of furnishing to shippers of live stock a continuous railway service; (2) For the purpose of furnishing to and from lake ports a continuous railway service for carrying grain from elevators and vessels; (3) For the purpose of unloading grain from vessels at lake ports and loading grain into cars at such ports; and also permitting the company, in order to prevent undue delay to traffic, to do on any Sunday, work incidental to the continuance to their destination of cars in transit at the beginning of each Sunday, notwithstanding that such cars may not have a common destination:—*Held*, that the evidence submitted did not justify any order as to live stock; but the application as to the other three heads was granted to a limited extent. *Re Lord's Day Act & Grand Trunk Rw. Co.*, 8 Can. Ry. Cas. 23.

Order — Establishment and maintenance of fireguard — Conviction of railway company for neglecting — Non-publication of order in Canada Gazette — No proof of notice to railway company — Objection not taken before magistrate — Jurisdiction — Conviction contrary to natural justice — Certiorari — Motion to quash — Evidence — Requirements of fireguard—Prairie country — Absence of proof of — Amendment — Legislative authority of Parliament—Proof that railway operated by steam — Judicial notice — Duplicate offence. *Rex* v. *Can. North. Rw. Co.* (Sask.), 8 W. L. R. 889.

Order — Establishment and maintenance of fireguard — Conviction of railway company for neglecting — Justice of the peace — Jurisdiction — Evidence — Proof of order of Board — Seal — Prairie country —Absence of proof of—Certiorari—Quashing convictions. *Rex* v. *Can. Pac. Rw. Co.* (Sask.), 8 W. L. R. 899.

Passenger rates — *Trip tickets — Unjust discrimination — Evidence.*]—Application to the Board of Railway Commissioners to compel the railway company to issue trip tickets good between Toronto and Brampton upon a basis similar to the existing passenger rates between Toronto and Oakville, upon the ground that the action of the company was an unjust discrimination against Brampton in favour of Oakville:—*Held*, upon the evidence not so; and the application was refused; Mr. Commissioner Mills dissenting. *Wegwanat* v. *Grand Trunk Rw. Co.*, 8 Can. Ry. Cas. 42, 168.

Protective measures in streets—*Orders of Railway Committee of Canadian Privy Council and Board of Railway Commissioners—B. N. A. Act, 1867, s. 91, s.-s. 29, s. 92, s.-s. 10 (a)—Canadian Railway Act, 1888, ss. 187, 188, held intra vires — Interpretation Act, 1906, R. S. C. c. 1, s. 9, s.-s. 2.*]—Railways extending from one province to another are placed within the exclusive jurisdiction of the Parliament of Canada, under B. N. A. Act, 1867, s. 91, while municipal institutions, property and civil rights in a province are placed within the jurisdiction of the legislature of the provinces by s. 92 of said Act. The Railway Committee of the Canadian Privy Council and Board of Railway Commissioners made an order that gates and watchmen should be provided by the Canadian Pacific Railway Co. at certain level crossings in the city of Toronto, and the expense should be paid in equal proportions by the C. P. R. Co. and by the city. The plaintiffs' claim was for $4,677.11, being the proportion that was alleged the defendants were liable to pay towards the maintenance of the gates, etc.:—*Held*, that in matters within the jurisdiction of the Parliament of Canada, it has the fullest legislative power, and for the purpose of effectively legislating, it may, if need be, deal with matters that otherwise are within provincial control, and as to such matters, though the Dominion and provincial legislation may overlap, yet in case of conflict that of the Dominion must prevail; ss. 187 and 188 of the Can. Rw. Act, 1888, are *intra vires* by virtue of B. N. A. Act, 1867, s. 91, s.-s. 29, notwithstanding s. 92, s.-s. 10 (a) of that Act.—*Held*, also, that the word "person" used in s. 188 includes a municipality having regard to R. S. C., 1906, c. 1, s. 7, s.-s. 2, and the defendants must pay amount claimed. Judgments of the Court of Appeal for Ontario and Mabee, J., at trial, affirmed. *Can. Pac. Rw. Co.* v. *Toronto*, C. R., [1908] A. C. 402.

Spur track facilities — *Order of Board of Railway Commissioners—Statutory obligations—Railway Act, 1903, s. 253 (1), (2) —Jurisdiction of Board — Jurisdiction of Court to award damages for breach of obligation—Damages from date of breach — Arbitration — Appeal — Damages during delay—Limitation of actions—3 Edw. VII. c. 58, s. 242, s.-s. 1.*]—Plaintiffs sued for damages caused by defendants removing a spur track and failing to supply plaintiff with proper siding facilities. Judgment for plaintiffs with reference as to damages:—*Held*, (1) that the Court had jurisdiction; (2) That damages ran from date of breach; (3) It is not *res judicata*; (4) That damages ran pending an appeal to Supreme Court; (5) s.-s. 1 above does not apply. *Robinson* v. *Can. North.*, 11 W. L. R. 578.

Spur track facilities — *Order of Board of Railway Commissioners—Statutory obligation—Railway Act, 1903, s. 253 (1), (2) —Jurisdiction of Board — Jurisdiction of Court to award damages for breach of obligation—Damages from date of breach—Arbitration—Appeal—Damages during delay — Limitation of actions—Railway Act, s. 242.*] —The plaintiffs owned land adjoining the yards of a railway company, who in 1888

constructed a siding for the plaintiffs' use in their business as fuel merchants. In 1901 the defendants succeeded to the rights of that railway company, and in 1904 removed the siding. About a year later the plaintiffs applied to the Dominion Board of Railway Commissioners for an order that the siding be replaced, and in February, 1906, the Board ordered that the defendants "restore the spur track facilities formerly enjoyed by the applicants for the carriage, dispatch, and receipt of freight in car-loads over, to, and from the line of the (defendants) and the connection for that purpose between such spur track and the railway siding on the land of the applicants." The application was made under ss. 214 and 253 of the Railway Act of 1903. The defendants appealed to the Supreme Court of Canada, which dismissed the appeal, holding that the Board had jurisdiction to make the order: 37 S. C. R. 541. This was on the 10th October, 1906, and in the meantime the amendment to be found in the present s. 317 of the Railway Act had been passed, and under it a second application had been made to the Board and an order made on the 22nd September, 1906, directing the siding to be restored; and on the 10th October of that year the order was complied with. This action was brought for damages caused to the plaintiffs by reason of the failure of the defendants to supply the plaintiffs with reasonable facilities for receiving, forwarding, and delivering freight upon the defendants' railway:—*Held*, that the finding as to the jurisdiction of the Board was binding upon the defendants, and the question of jurisdiction, being *res judicata*, could not be raised in this action.—2. That, under s. 42, s.-s. 3, of the Railway Act of 1903 (R. S. C. 1906 c. 37, s. 54, s.-s. 3), the findings of the Board were to be taken as findings of fact binding and conclusive in the present action.—3. That the refusal by the defendants to furnish reasonable facilities to the plaintiffs was a breach of the provisions of the Railway Act, and the plaintiffs were entitled to recover damages for the injuries occasioned by such breach.—4. That the Board had no power to entertain a claim for damages such as made in this action.—*Dathie* v. *Grand Trunk Rw. Co.*, 4 *Can. Ry. Cas.* 304, followed.—5. That s. 242 of the Railway Act of 1903 did not apply, and the plaintiffs' claim was not barred by reason of the time-limit therein imposed.—*Per* Cameron, J.A., that "railway," under the Railway Act of 1903, s. 2, s.-s. (5), includes stations and sidings, and not only those constructed and in use, but those which the company have power to construct or operate; and in this respect the statutory provisions in Great Britain and in this country are widely different.—*South Eastern Rw. Co.* v. *Railway Commissioners*, 6 Q. B. D. 586, and *Barlaston Local Board* v. *London and North Western Rw. Co.*, [1894] 2 Q. B. 694, distinguished.—Judgment of Metcalfe, J., 11 W. L. R. 578, affirmed. *Robinson* v. *Can. North. Rw. Co.* (1910), 13 W. L. R. 8.

Switching charges paid under protest — *Recovery — New tariff.*] — The applicants asked the Board for an order directing the railway company to refund certain switching charges collected prior to the 1st September, 1908, the date on which the company's interswitching tariff No. C. R. C. 1380 became effective. The application was refused, the charges, although paid under protest, not being recoverable.—*Canadian Manufacturers' Association* v. *Canadian Freight Association*, 7 Can. Ry. Cas. 302, and *Dominion Concrete Co.* v. *Can. Pac. Rw. Co.*, 6 Can. Ry. Cas 514, followed. *Laidlaw Lumber Co.* v. *Grand Trunk Rw. Co.*, 8 Can. Ry. Cas. 192.

Trader's tariffs — *Distributing centre — —Restoration of former tariffs — Reduced rates—Evidence.*]—The applicants asked the Board for an order requiring the Canadian Pacific Railway Company to restore the traders' tariffs previously existing in Western Canada, from Winnipeg, as a distributing centre (giving the Winnipeg traders the benefit of the balance of the through rate on reshipments) instead of the new tariffs recently put in force by the company.—Upon a complaint by the Portage La Prairie Board of Trade, the Commissioners had held that this system of traders' tariffs was illegal as being an unjust discrimination and undue preference in favour of particular persons and between different localities, and the charging of higher tolls for a shorter than for a longer distance where the shorter distance is included in the longer. The railway company, complying with the view taken by the Board, had substituted the tariffs complained of.—The application was dismissed, there being no evidence upon which the Board could reduce the rates charged in the existing tariffs to the same sums that were paid by the favoured few under the old traders' tariffs. *Winnipeg Jobbers' Association* v. *Can. Pac. Rw. Co., Can. North. Rw. Co., & Grand Trunk Pac. Rw. Co.*, 8 Can. Ry. Cas., 175.

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3. Bonds, Mortgages and Sale of Railways.

Before an order for sale of an insolvent railway is made under Exchequer Court Act, R. S. C. (1906), c. 140, s. 26, an enquiry before a Referee into the validity and priority of the claims of creditors may be ordered. *Royal Trust Co.* v. *Baie de Chaleurs Rw. Co.* (1907), 13 Ex. C. R. 1.

Bondholders — *Right to vote at annual general meeting of company — Interest in arrear — Scope of right as to future meetings — Number of votes — Value of bonds compared with shares — Construction of statutes.*]—The right of bondholders of a railway company to vote exists, under s. 15 of the Act 36 V. c. 73, and it may be exercised at any time when interest is in arrear. It could not have been intended that it should be restricted to the one general annual meeting next after the interest fell into arrear, and that it was not to be exercised at another meeting although the arrear continued. The language does not drive one to that conclusion, and, in view of the end manifestly aimed at, that construction should be adopted which will secure to the bondholders a voice in the affairs of the company as

long as their interest is in arrear. The language of s. 15, "all holders of bonds shall have and possess the same rights and privileges and qualifications for directors and for voting as are attached to shareholders," was very comprehensive. It implies equality with the shareholders in every respect as regards directors and voting. It did not deal with their rights, privileges, and qualifications as between the bondholders themselves, but as between them and the shareholders. And as against the latter the bondholders are given the same rights, privileges, and qualifications for directors and voting. The only just way of effecting this is by giving to each holder of a bond one vote for each portion equivalent to the amount of one share. Thus each share being for $100, each holder of a bond for $1,000 should be upon an equal footing with the holder of 10 shares. Osler and Maclaren, J.J.A., agreed in the result, except that they were of opinion that the bondholders' right of voting was confined to one vote on each bond. *Weddell* v. *Ritchie*, 5 O. W. R. 733, 10 O. L. R. 5.

Bonds.] — A railway company issued bonds under usual deed of trust. The N. T. C., a body corporate, was the original trustee, but after having executed the deed, resigned. Another trustee was appointed who signed and issued a number of bonds a few days before the company passed into hands of a receiver. The bonds on their face recited that they should not be "obligatory until certified by the N. T. C., trustee." D., the new trustee, signed bonds in name of original trustee, adding thereto "succeeded to D." The bonds were also signed by president and secretary of the company. *Held*, that the apparent irregularity in the signature of bonds by trustee was not sufficient to put a *bona fide* purchaser for value upon enquiry, and that the bonds were valid in his hands. 2. A certain number of bonds were handed to H., president of the company, by trustee D., after he had signed them. H. borrowed money for his own use from R., and gave bonds as collateral security, also depositing sixteen of them with R. for safe keeping. R. used all the bonds as collateral for a loan subsequently obtained by him for his own use. The holders of these bonds for value and without notice made claim, and they were allowed to recover against the company on ground that the company had by their negligence in allowing H. to have the bonds under his control made it possible for the bonds to find their way into the hands of *bona fide* purchasers. *Minister of Railways & Canals* v. *Que, Southern Rw. Co.* (Pilling's claim) (1908), 12 Ex. C. R. 152.

Bonds—*Part guaranteed by municipality — Construction of clauses of agreement — Progress certificate of engineer—Values of two classes of bonds*.]—Where municipalities guaranteed bonds of a railroad to the extent of $400,000, when the bond issue aggregated $900,000, the question arose as to making advances of the proceeds of the $400,000 guaranteed bonds. Under the trust instrument the proceeds of all the bonds were to be paid out to the amount of 90% of the cost of construction, and 60% to be paid from the proceeds of the guaranteed bonds. — Middleton, J., *held*, 90% of the work having exceeded the amount of $600,000, that the railway was entitled to demand the whole of the $400,000 from the trustees. That there was no right to retain a sum of money until the road was completed. That the letter of the agreement governed. That the progress certificates granted by the engineer in charge of construction were intended to govern.—The proceeds of guaranteed bonds are of higher value than the others. *Re Ontario & West Shore Rw. Co.* (1911), 19 O. W. R. 209, 2 O. W. N. 1041.

Bonds held as security by creditor.] —H. had a claim guaranteed by bonds against a railway. It was agreed between H., together with certain other creditors, and D. that the latter would purchase the railway at sheriff's sale in trust for such creditors, and that after purchase D. would execute a mortgage in favour of these creditors. H. to benefit by such mortgage to amount of his claim guaranteed by bonds. To facilitate such arrangement H. transferred the bonds to D. The railway was purchased by D. but thereafter he refused to execute the mortgage as agreed. H., on 4th April, 1901, obtained a judgment against the railway directing D. to execute in his favour a valid hypothec upon the railway, and in default thereof that the judgment should stand in lieu of such hypothec. D. not complying with the direction, H. registered this judgment. D. having allowed a bank, for whom he professed to act in purchasing the railway, to assume the right to dispose of same, the bank sold the road to a company incorporated for purpose of acquiring it, and D. conveyed the road to the company on 7th August, 1900:—*Held*, that although H. was not entitled to assert his claim as a hypothec against the railway in hands of the company, inasmuch as the bank had guaranteed the purchaser a clear title the claim was allowed to be collocated upon the moneys coming to bank from such sale. *Minister of Railways & Canals* v. *Que, Southern Rw. Co.* (Hanson Bros.' claim) (1908), 12 Ex. C. R. 93.

Collateral security — Injury — Judgment—Reference. *Knickerbocker Trust Co. of New York* v. *Brockville, Westport, & Sault Ste. Marie Rw. Co.*, 1 O. W. R. 211.

Contract—*Sale of controlling interest in railway—Time essence of agreement—Default in making payment on day appointed—Forfeiture of deposit.*]—An agreement for the sale of the controlling interest in the Canada Atlantic Rw. Co., provided that in default of payments of the purchase money, for the bonds, on a certain day, the deposit paid thereon should be forfeited as liquidated damages. The bonds were not ready for delivery on the appointed day and the purchase money was not paid. In an action by the assignee of the purchaser to recover the deposit paid by the purchaser:—*Held*, that the evidence shewed that the purchaser or his assignee was responsible for the non-delivery and non-completion of the contract; that there had been default in payment of the price, and plaintiff could not recover. Action dismissed. Judgments of the Court of Appeal for Ontario, 21 O. L. R. 637, 12 O. W. R. 973, and Mabee, J., at trial, 11 O. W. R. 151, affirmed. *Sprague* v. *Booth*, C. R., [1909] A. C. 263.

Deposit by purchaser to guarantee fulfilment of contract—*Default by purchaser or his assignee—Action to recover deposit dismissed.*]—Under a contract for sale of railway stock and also for transfer of bonds to be thereafter executed, a deposit of $250,000 was received by the respondent vendor as security for and to be credited towards the payment of the price on June 1st, 1902, or to be forfeited on default. In an action by the assignee of the purchaser without tendering the price to recover back the deposit, as the bonds were not ready for delivery at due date, *held*, that as the evidence showed that the purchaser or his assignee was responsible for the non-production and non-completion thereof, there was default by him in payment of the price, and the action must be dismissed. *Sprague* v. *Booth*, [1909] A. C. 576.

Director of railway company, being a creditor and present at a meeting where authority was given to pledge the bonds of the company, is estopped from setting up the invalidity of such bonds in an action by the pledgee. *Royal Trust Co.* v. *Baie de Chaleurs Rw. Co.* (1907), 13 Ex. C. R. 1.

Exchequer Court in exercising its jurisdiction in respect of railway debts, will not review a judgment of another Court of competent jurisdiction affecting the railway, but will leave the rights of any person to attack such judgment to the determination of the Court which pronounced the judgment. *Royal Trust Co.* v. *Baie de Chaleurs Rw. Co.* (1907), 13 Ex. C. R. 1.

Holder of attached coupons — *Conditions—Action—Trustee for bondholders — Parties.*]—A holder of coupons is bound by the conditions appearing upon the bonds to which the coupons were attached as to the amount payable and the manner of recovery thereof; he is therefore in the same position as the holder of the bonds before the coupons were attached, and is, like him, in the present case, subject to the condition in the mortgage which gives the trustee thereunder the sole right to recover payment of principal and interest. So any action for the recovery of principal or interest must be brought in the name of the trustee, and when a statute has been passed to ratify the contract between the company and the trustee, an action, in the name of the holder of such coupons, notwithstanding that they are made payable to bearer, is wrongly framed and will be dismissed. *Lewis County Rw. Co.* v. *Pontaine*, 13 Que. K. B. 523.

Judicial sale—*Jurisdiction under special act — Interpretation — Tenders—Exchequer Court.*]—By 4 & 5 Edw. VII. c. 158, respecting the South Shore Railway Company and the Quebec Southern Railway Company, the Parliament of Canada, among other things, provided that the Exchequer Court might order the sale of the railways mentioned and their accessories, as soon as possible and convenient after the passing of the Act, and that such railways and their accessories, respectively, should be sold separately or together as, in the opinion of the Exchequer Court, would be best for the interests of the creditors of the said companies. An order for such sale was made and tenders received in accordance therewith: — *Held*, that in respect of the tenders so received the statute left it to the Court to determine which of them it was in the best interests of the creditors to accept. — 2. That, inasmuch as if the property were sold in part to one purchaser and in part to another, two new and diverse interests would arise, and it would be necessary to divide the property, both real and personal, and to make two transfers instead of one, it was in the best interests of the creditors, as well as of the public, to accept a tender for the property as a whole, although such tender was for a less sum, by some $3,000, than the aggregate of two separate tenders for distinct portions of the whole property. *Minister of Railways and Canals for Canada* v. *Quebec Southern Rw. Co.*, 10 Ex. C. R. 139.

Judicial sale — *Purchase by solicitor of party — Capacity to purchase — Special statute—Discretionary order — Appeal.*]—Solicitors and counsel retained in proceedings for the sale of property are not within the classes of persons disqualified as purchasers by Art. 1484, C. C.—The Act 4 & 5 Edw. VII. c. 158 directed the sale of certain railways separately or together, as, in the opinion of the Exchequer Court, might be for the best interests of creditors, in such mode as that Court might provide, and that such sale should have the same effect as a sheriff's sale of immovables under the laws of the province of Quebec. The Judge of the Exchequer Court directed the sale to be by tender for the railways *en bloc* or for the purchase of each or any two of the lines of which they were constituted:—*Held*, that the Judge had properly exercised the discretion vested in him by the statute in accepting a tender for the whole system, in preference to two separate tenders for the several lines, at a slightly larger amount, and that his decision should not be disturbed on appeal. *Rutland R. R. Co.* v. *Beique*, *White* v. *Beique*, *Morgan* v. *Beique*, 26 C. L. T. 379, 37 S. C. R. 393.

Mortgage — *Bondholders — Working expenditure — Lien — Priorities — Railway Acts.*]—The Railway Act, 1888 (D.), after providing that a railway company may secure their debentures by a mortgage upon the whole of such property, assets, rents, and revenues of the company as are described in the mortgage, provides that such rents and revenues shall be subject in the first instance . . . to the payment of the working expenditure of the railway. By the Railway Act, 1903 (D.), the lien is enlarged to apply to the property and assets of the company, in addition to their rents and revenues. A mortgage by the defendants, made in 1897, was foreclosed and property sold, the proceeds being paid into Court. In a claim for a lien thereon in priority to the mortgagee for working expenditure made after the commencement of the Act of 1903:—*Held*, that the lien under the Act of 1903 was not retroactive, and that, as the lien under the Act of 1888 was limited to rents and revenues, and did not apply to the fund in Court, the claim should be disallowed. *Barnhill* v. *Hampton & St. Martins Rw. Co.*, 3 N. B. Eq. 371, 2 E. L. R. 31.

Mortgage — *Foreclosure — Receivers.*]—A railway company issued bonds secured by mortgage of the company's property. In a suit by the mortgagee for foreclosure, receivers and managers of the property and business of the company were appointed, with liberty to operate the railway and to maintain the road and property in good and sufficient repair, either by credit or by cash out of the earnings of the road. Repairs being necessary and the earnings being insufficient, the receivers were empowered to issue receivers' certificates, made a first charge on the company's property, and on the moneys to be realised from the sale of the company's property, in priority to the bondholders. *Sage v. Shore Line Rw. Co.*, 22 C. L. T. 38, 2 N. B. Eq. Reps. 321.

Part of a railway may be sold, under Exchequer Court Act, R. S. C. (1906), c. 140, s. 26, when the railway is in default in payment of interest on its bonds. *Royal Trust Co. v. Baie de Chaleurs Rw. Co.* (1907), 13 Ex. C. R. 1.

Pledgee of railway bonds has a sufficient interest (in nature of a mortgagee) in such bonds to institute an action for sale of an insolvent railway under Exchequer Court Act, R. S. C. (1906), c. 140, s. 26. *Royal Trust Co. v. Baie de Chaleurs Rw. Co.* (1907), 13 Ex. C. R. 1.

Provisional directors — *Consideration — Bonus—Conditions* — *Amalgamation.*]—A railway company, by the bond of its provisional directors, in consideration of a bonus in aid of the company, agreed to erect and maintain workshops during the operation of the railway. The company, after certain changes of name, amalgamated with other companies, and formed a larger one, which ceased to maintain the workshops. That company subsequently amalgamated with and became part of the defendants' company:—*Held*, that the bond of the provisional directors of the first company was a corporate one binding on its successors, and by consequence on the defendants, who had acquired the road; that the road, though it formed part of a larger railway connection represented by the defendants, was still in operation, and, as the contract was to maintain the workshops during the operation of the railway, it remained a binding engagement; and a reference to ascertain the damages, if any, for breach of the covenant, was directed. *Whitby v. Grand Trunk Rw. Co.*, 20 C. L. T. 379, 32 O. R. 99.

Railway Act, 1903, ss. 285, 286—Application to confirm scheme—Enrolment where no objections made. *See In re Great Northern Rw. Co. of Canada*, 9 Ex. C. R. 337.

Railway Act, 1903, s. 285—*Petitioners not in possession of railway—Application to confirm.*] — Where the petitioners for the confirmation of a scheme of arrangement, filed under the provisions of the Railway Act, 1903, s. 285, are not in possession of the railway which they seek to mortgage as security for the issue of new bonds, the application to confirm will be refused. *In re Atlantic & Lake Superior Rw. Co.*, 25 C. L. T. 145, 9 Ex. C. R. 413.

Recital — *Consideration — Bonus—Conditions.*]—A railway company had power to receive and take grants and donations of land and other property made to it to aid in the construction and maintenance of the railway, and any municipality was authorised to pay by way of bonus or donation any portion of the preliminary expense of the railway, or to grant to the railway company sums of money or debentures by way of bonus or donation to aid in the construction or equipment of the railway. The railway company, in consideration of a bonus by a municipality, agreed to keep for all time its head office and machine shops in the municipality:—*Held*, that the recital of the agreement in a bond signed by the railway company amounted to a covenant on their part to observe its terms, but that such an agreement was not justified by the statutory provisions and was not enforceable. Judgment in 32 O. R. 99, 20 C. L. T. 379, reversed. *Whitby v. Grand Trunk Rw. Co.*, 21 C. L. T. 226, 1 O. L. R. 480.

Sale of railway.]—A purchaser of a railway does not acquire an absolute right to the railway. What he acquires is an interim right to operate the railway to be followed up by incorporation as provided by the Railway Act, R. S. 1906, c. 37, s. 209. *Ministers of Railways and Canals v. Que. Southern Rw. Co.* (Hodge & White's claim) (1908), 12 Ex. C. R. 11.

Sale of railway.]—The acceptance by the vendor of a railway of the bonds of the company purchasing the road is a waiver by implication of his lien, if any, for balance of unpaid purchase money.—*Semble*, that a vendor's lien for unpaid purchase money does not obtain in case of sale of a railway under the operation of the Railway Act, R. S. 1906, c. 37. The rights of vendor in such a case are limited to remedies prescribed by statute. *Minister of Railways and Canals v. Que. Southern Rw. Co.* (Bank of St. Hyacinthe's claim) (1908), 12 Ex. C. R. 61.

Sale of railway.]—Where purchasers of a railway, having acquired same on their own behalf and with their own money, organise a company to operate it, in compliance with requirements of the Railway Act, R. S. 1906, c. 37, 209, and turn over the railway to such company at an enhanced price, they are entitled in law to their profit on the transaction. *Minister of Railways and Canals v. Que. Southern Rw. Co.* (Standard Trust claim) (1908), 12 Ex. C. R. 125. See also, R. C. (Hodge & White's claim) (1908), 12 Ex. C. R. 11.

Sale of railway by mortgagee—*Interest—Arrears—Foreclosure—Limitation of actions—Jurisdiction of Court—Dominion Railway—46 V. c. 24, ss. 14-16 (D.)—Dominion Railway Act, 1888.*] — Bonds contained a covenant to pay half-yearly instalments of interest, evidenced by attached coupons, and payment of principal and interest secured by a mortgage of the undertaking, which also contained a covenant to pay, under seal issued by a railway company incorporated in 1873 by an Ontario statute, whose railway was declared by a Dominion statute in 1881 to be a work for the general advantage of

Canada (thereupon becoming subject to the legislation of the Dominion):—*Held*, in foreclosure proceedings upon this mortgage, by the trustees for bondholders, that the interest being a specialty debt, and the mortgaged undertaking consisting in part of realty and in part of personalty not subject to division, the holders of coupons, whether attached to the bonds or detached therefrom, were entitled to rank for all instalments which had fallen due within twenty years, and not merely for those which had fallen due within six years. Judgment of Boyd, C., 6 O. L. R. 534, 24 C. L. T. 14, 2 O. W. R. 270, 946, affirmed.—*Held*, also, that, even if the case were dealt with upon the footing of the mortage being one of realty only, there was the right to rank, for there were no subsequent incumbrancers, and there had been shortly before the action a valid acknowledgment by the railway company of liability for all the interest in question. Judgment in 24 C. L. T. 392, 8 O. L. R. 604, 3 O. W. R. 910, 4 O. W. R. 357, affirmed.—*Held*, also that the railway could be sold by virtue of the provisions contained in 46 V. c. 24, ss. 14, 15 and 16 (D.), re-enacted by the Dominion Railway Act, 1888 (51 V. c. 29). *Central Ontario Rw. Co.* v. *Trusts and Guarantee Company*, [1906] A. C. 576.

Sale of railway charter—Share of promoter in proceeds — Remuneration for services—Amount fixed by referee — Quantum meruit—Evidence. *Paradis* v. *National Trust Co.*, 7 O. W. R. 756, 8 O. W. R. 707.

Sale under execution — *Description in advertisement—Sale en bloc—Franchises and privileges of railway.*] — The designation, in a notice of sale published by the sheriff, of a railway by its name, by its terminals, and by the numbers of the lots which it traverses, as appears in the registry office, is sufficient, more especially when the execution creditor has obtained an order by virtue of Art. 754, C. P. C., that the property advertised may be sold *en bloc*. The franchises and privileges of a railway company (apart from those which appertain to it as a corporation), and which are necessary for the operation of the road, are a necessary part of the railway property, and exigible. *Bogin* v. *Levis County Rw. Co.*, 27 Que. S. C. 180.

Scheme of arrangement between a railway company and its creditors had been confirmed by order of Court after the company had complied with all the requirements of the statute and the Rules of Court made thereunder, and after notice given to all parties interested. Furthermore, as the confirmation had been opposed, enrolment of the scheme and the order of confirmation was not made until the expiry of thirty days after the date of the order confirming the scheme, and after notice of the said order had been published in compliance with Rule 60 of the Rules and Orders regulating the practice of the Court. Following upon that new proceedings were taken, and an order obtained, on behalf of the company, for the sale of the railway, and it was sold thereunder. More than fifteen months after the scheme was confirmed, by a judgment of the Court, although the fact of such confirmation had become known to him some four months before he applied, a creditor of the railway applied for an extension of time for appealing from the judgment confirming the scheme.—The Registrar in Chambers, in view of the facts above stated, refused the creditor's application.—*Held*, on appeal from the decision of the Registrar, that the application was properly refused. *Atlantic & Lake Superior Rw. Co.* v. *North Eastern Banking Co.* (1908), 13 Ex. C. R. 127.

Second issue without payment of first — *Conventional hypothec — Specific performance — Judgment.*]—Where a valid issue of bonds has been made by a railway company under the provisions of the Quebec Railway Act, which at the time of their issue governed the company, defendant,—the validity of the bonds so issued not being affected by the bringing of the company under the legislative control of the Parliament of Canada and the Railway Act of Canada by 57 & 58 V. c. 84,—the company cannot, in view of the provisions of s. 93, s-s. 4, of the Act above-mentioned, exercise again the bond-issuing power, unless the bonds first issued have been withdrawn and paid, or duly cancelled. 2. The obligation to grant a conventional hypothec constitutes an obligation to do an act (execution of an authentic instrument) which can only be performed by the debtor himself or some person authorised by him, and whereof the Court has no means of compelling specific performance, and the law nowhere authorises the substitution by the Court of its own judgment for the authentic act executed by the debtor personally, or his authorised agent, which is essential to the creation and existence of a conventional hypothec. 3. The only hypothec which can result from the judgment of a Court is the judicial hypothec which results from such judgments only as contain a condemnation to pay a specific sum of money. 4. An order to execute a conventional hypothec, unaccompanied by any alternative condemnation, —no alternative condemnation being asked in the event of failure to obey the order— would constitute a judgment not susceptible of execution, in contravention of Art. 541, C. C. P. 5. Where the plaintiff asks that a property be declared hypothecated, but does not indicate or sufficiently describe the property, either in the allegations or conclusions of his declaration, the Court cannot take upon itself to ascertain and determine what specific property should be declared hypothecated. *Connolly* v. *Montreal Park and Island Rw. Co.*, 22 Que. S. C. 322.

Seizure under execution—*Description —Resaisure.*] — A railway was seized and sold by sheriff's sale to the present opposant. It was described as fifty feet in width, but the greater part of the line was actually sixty-six feet wide. The present plaintiff now caused the line to be seized again, but stated exceptions from the seizure, which exceptions really included the entire road, less the surplus width:—*Held*, that the seizure was irregular and illegal, the adjudication by the sheriff being of a specific object, fenced at the time of the sale, and known as consisting of the property so enclosed. The error as to the width was immaterial unless it were to give a ground of action by the defendant to have the sale set aside. Moreover, a railway can only be

seized as an entirety, which had not been done in the present case. *Carter* v. *Montreal & Sorel Rw. Co.*, 23 Que. S. C. 3.

Seizure under execution — *Opposition to sale—Question as to ownership—Depreciation—Appointment of receiver.*]—Article 1823 of the Civil Code, which treats of the appointment of receivers, is not restricted, but simply enumerative, and therefore the Court may exercise its discretion in the matter. Railway companies incorporated by the provincial legislatures are subject to the ordinary law as to the appointment of receivers, and, therefore, it follows that if a seizure of a railway has been made under a judgment, and there are oppositions which prevent the sale of it, the provisions of Art. 713, C. P. C., apply. Several oppositions to a sale in this case having been filed, the right of ownership and the right of possession of the railway being brought in question, and the depreciation likely to ensue by its not being operated being shewn by the petition and the affidavits in support thereof, all these facts constituted good reasons for the appointment by the Court of a receiver of the railway property. *Begin* v. *Levis County Rw. Co.*, 27 Que. S. C. 61.

Statutory contract — *Construction bonds of railway company — Government guarantee.*]—By contract with the G. T. Pacific Rw. Co., published as a schedule to 3 Edw. VII. c. 71, the Government of Canada agreed to guarantee the payment of bonds of the company to be issued for an amount equal to 75 per cent. of the cost of construction of the western division. By a subsequent contract (sch. to 4 Edw. VII., c. 24), the Government agreed, subject otherwise to the provisions of the first contract, to implement its guarantee so as to make the proceeds of the said bonds a sum equal to 75 per cent. of such cost of construction:—*Held*, that the liability of the Government under the second contract was only to guarantee bonds of the company, the proceeds of which would produce a defined amount and was not to make up in cash or its equivalent any deficiency between such proceeds and the said 75 per cent. of the costs. *In re Guarantee of Bonds of the Grand Trunk Pacific Rw. Co.* (1909), 42 S. C. R. 555, 30 C. L. T. 174.

Trustee for bondholders of an insolvent railway may become a purchaser, as such trustee, at the sale of the railway. *Royal Trust Co.* v. *Baie de Chaleurs Rw. Co.* (1907), 13 Ex. C. R. 1.

Unsecured creditor not assenting to scheme — *Objection to confirmation of scheme.*]—An unsecured creditor who does not assent to a scheme of arrangement filed under s. 285 of the Railway Act, 1903, is not bound thereby.—It is, however, a good objection to such a scheme that it purports in terms to discharge the claim of such a creditor. By a scheme of arrangement between an insolvent railway company and its creditors, it was proposed to cancel certain outstanding bonds and to issue new debentures in lieu thereof against property that was at the time in the possession of the trustees for the bondholders of another railway company. Part of such new debentures were to be issued upon the insolvent company acquiring the control of certain claims, bonds, and liens against the railway; and part upon a good title to the railway being secured and vested in the trustees for the new debenture holders. The other railway company, the trustees for whose bondholders were in possession of the railway, objected to the scheme of arrangement. Their rights therein had not been determined or foreclosed:—*Held*, that the railway company were entitled to be heard in opposition to the scheme, and that the latter was open to objection in so far as it purported to give authority to issue a part of the new debentures upon acquiring the control of such claims, bonds, and liens, and without any proceedings to foreclose or acquire the rights of such railway company in the railway. No scheme of arrangement under the Railway Act, 1903, ought to be confirmed, if it appears or is shewn that all creditors of the same class are not to receive equal treatment. *In re Baie des Chaleurs Rw. Co.*, 25 C. L. T. 86, 139, 9 Ex. C. R. 386.

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4. BRIDGES.

Bridge over highway crossing — Protection of public—Order of Railway Committee of Privy Council—Jurisdiction—Action—Injunction—Declaration — Existence of highway — Harbour — Water lots — *Jus publicum* — Construction of statutes, patents, and agreements — Municipal corporation — Diversion of highway — Expropriation of lands — Compensation — Navigable waters — Order in council sanctioning order of Railway Committee — Time for commencement and completion of work — Variation of order without appeal. *Grand Trunk Rw. Co.* v. *Toronto, Can. Pac. Rw. Co.* v. *Toronto*, 10 O. W. R. 483.

Contribution to cost and maintenance — Liability of company — Construction of contract with city corporation — Exemption or indemnity. *Toronto* v. *Grand Trunk Rw. Co.*, 4 O. W. R. 398, 6 O. W. R. 632.

Diversion of stream — *Repair—Municipal corporation.*]—A railway company, desiring to carry their railway across a highway at a point where it was carried by a bridge over a small stream, in pursuance of its statutory powers, diverted the stream to a point some distance away, and built a new bridge over it where it then intersected the highway:—*Held*, that, whatever remedy the municipality might have, if they had sustained damage by reason of the exercise by the railway company of their rights, the latter were under no liability, in the absence of special agreement, to keep the substituted bridge in repair. *Peterborough* v. *Grand Trunk Rw. Co.*, 32 O. R. 154.

An appeal by the plaintiffs from above judgment was dismissed with costs, the Court agreeing with the reasons for judgment in the Court below. *Peterborough* v. *Grand Trunk Rw. Co.*, 21 C. L. T. 129, 1 O. L. R. 144.

Overhead bridge — *Headway space — Brakesman killed — Contributory negligence.*]—Upon the proper construction of s. 192 of the Dominion Railway Act, 1888, a railway company, whether the owners or not of a bridge under which their freight cars pass, are prohibited from using higher freight cars than such as admit of an open and clear headway of seven feet between the top of such cars and the bottom of the lower beams of any bridge which is over the railway. *McLauchlin* v. *Grand Trunk Rw. Co.*, 12 O. R. 418, and *Gibson* v. *Midland Rw. Co.*, 2 O. R. 658, distinguished. Contributory negligence may be a defence even to an action founded on a breach of a statutory duty. A brakesman standing on top of a car passing under a bridge was killed by striking the bridge:—*Held*, that, as the evidence shewed that he was standing where he was contrary to the rules of the company and warning received, he was guilty of contributory negligence, and the defendants were not liable, although it was also shewn that there was not a clear headway space of 7 feet between the top of the car and the bottom of the lower beams of the bridge, as provided for by s. 192 of the Railway Act, 51 V. c. 29 (D.). *Dyer* v. *Kingston and Pembroke Rw. Co.*, 24 C. L. T. 293, 8 O. L. R. 588, 4 O. W. R. 182.

Protection of public — Order of Railway Committee of Privy Council — Jurisdiction — Action — Injunction — Declaration — Existence of highway — Harbour — Water lots — *Jus publicum* — Statutes — Crown patents — Contracts — Municipal corporation — Diversion of highway — Expropriation — Compensation — Navigable waters — Order in council — Time for commencement and completion of work — Variation of order without appeal — Suspension of judgment. *Grand Trunk Rw. Co.*, v. *Toronto, Canadian Pacific Rw. Co.* v. *Toronto*, 6 O. W. R. 852.

Subway — *Municipal corporation—Order of Railway Committee of Privy Council—"Person interested"—Rule of Court.*]—The municipal corporation of a city was one of the movers in an application to the Railway Committee of the Privy Council for an order authorising the construction of a subway under a railway, by which one of the city streets was made to connect with a country road, the works leading adjacent to the city street but not within the city limits:—*Held*, that the city corporation was interested, within the meaning of the terms as used in s. 188 of the Railway Act, which provides that the Railway Committee may apportion the costs of such works as those in question between the railway company and "any person interested therein."—2. On an application to make an order of the Railway Committee of the Privy Council a rule of Court, the Court will not go into the merits of the order, or consider objections to the procedure followed by the Railway Committee.—*Semble*, that while the Railway Committee of the Privy Council has jurisdiction in such a case to impose upon the party interested an obligation to bear part of the expenses, it has no jurisdiction to compel a party other than the railway company to execute the works. *In re Grand Trunk Rw. Co. and Kingston*, 24 C. L. T. 1, 8 Ex. C. R. 349.

5. CARRIAGE OF ANIMALS.

Injury to animal in transportation —*Special contract limiting liability—Negligence — Notice of loss — Omission to give —Waiver — Railway Act, R. S. C. 1906 c. 37, ss. 284 (7), 340.*]—By s. 284 (7) of the Railway Act, R. S. C. 1906 c. 37: "Every person aggrieved by any neglect or refusal of the company to comply with the requirements of this section shall, subject to this Act, have an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or its servants." By s. 340: "No contract, condition, by-law, regulation, declaration or notice made or given by the company, impairing, restricting or limiting its liability in respect of the carriage of any traffic, shall, except as hereinafter provided, relieve the company from such liability, unless such class of contract, condition, by-law, regulation, declaration or notice shall have been first authorised or approved by order or regulation of the Board. (2) The Board may in any case, or by regulation, determine the extent to which the liability of the company may be so limited." The defendants received from the plaintiff a mare, with other animals, to be carried from a station on their line of railway in Ontario to a point in British Columbia, under a special contract, which had been approved of by the Railway Board (which the plaintiff signed). Under this contract the animals were carried at a lower rate than the company were entitled to charge. The contract contained a provision that the defendants should in no case be responsible for an amount exceeding $100 for the loss of any one horse, or a proportionate sum in any one case for injuries to the same, and that any loss or damage should be computed and paid for on such basis. There was a further provision relieving the company from liability "unless a written notice, with the full particulars of the loss or damage and of the claim to be made in respect thereof, is delivered to the station agent at the said point of delivery within 24 hours after the said property, or some part of it, has been delivered."—During the carriage on the railway, the mare was, through the defendants' negligence, seriously injured. Before the consignment arrived at its destination the plaintiff, finding that the mare was permanently injured, by the permission of the railway superintendent there, removed the mare from the car at an intermediate station and sold her at a loss, the remainder of the shipment being carried on to the place of delivery. No notice of the loss was given there to the company's official within the 24 hours:—*Held*, that, notwithstanding that the loss was sustained through the defendants' negligence, the special contract was binding on the plaintiff, so that in no event could he recover more than the proportionate part of $100; but that the omission to give the required notice relieved the company from all liability. *Robertson* v. *Grand Trunk Rw. Co.*, 24 S. C. R. 611, followed; *St. Mary's Creamery Co.* v. *Grand Trunk Rw. Co.*, 8 O. L. R. 1, distinguished. *Mercer* v. *Canadian Pacific Rw. Co.*, 17 O. L. R. 585, 12 O. W. R. 1212, 8 Can. Ry. Cas. 372.

Liability for injury caused by animal in transport.]—The carrier who receives an animal to transport it, takes it under his care and is in the same position as one who uses the animal. Therefore, he is responsible, in the terms of Art. 1065, C. C., for the damage caused by this animal. *Leonard* v. *Canadian Pacific Ry. Co.*, 35 Que. S. C. 382.

Live stock contract — *Restriction of liability — Contract made in the United States for transit of stock to Canada—Provisions of contract similar to those approved by Railway Board — Validity of contract—Railway Act, R. S. C. 1906 c. 37, ss. 284 (7), 340.*]—The plaintiff delivered to a railway company at Brockton, Mass., U.S., a number of valuable horses for carriage to Grimsby, Ontario, under a contract known as a live stock contract, by which the horses were to be carried on the line of that railway as far as it went and then by connecting lines to the place of delivery, the contract being expressly entered into by the contracting railway company on their own behalf, as well as on behalf of the connecting lines. The contract contained a provision that on payment of a specified rate of freight, being a rate lower than that which the company were entitled to charge, liability was to be limited to an amount not exceeding $100 for each animal, or a total liability not exceeding $1,200, the plaintiff having the option of shipping at a higher rate and obtaining the company's liability as common carriers. The provision restricting liability was similar to that contained in the form of live stock contract of the defendants approved by the Railway Board under s. 340 of the Railway Act, R. S. C. 1906 c. 37. The horses were carried by the contracting railway company as far as their line extended, and were then delivered to a connecting railway, and thence to the defendants, and during the transit on the defendants' line an accident occurred through the negligence of the defendants, in which some of the animals were killed and others injured:—*Held*, that by the terms of the contract it applied not only to the railway company with which it was made, but to the connecting railways, and that by its terms the defendants were exempted from liability beyond the amount stipulated for; and that, even if the approval of the Railway Board was essential to its validity, such approval had been obtained, for it was, in substance, the same class of contract which had been approved. *Sutherland* v. *Grand Trunk Ry. Co.*, 18 O. L. R. 139, 13 O. W. R. 321, 8 Can. Ry. Cas. 389.

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6. Carriage of Goods.

Action for freight — *Contract.*] — Cement was shipped to defendants over plaintiffs' railway from O. to R., and placed on sidings at R., as directed by defendants' officers:—*Held*, that plaintiffs having completed their contract are entitled to be paid the freights. It is immaterial that defendants instructed W. to take away the cement on paying the freight. *Can. Pac. Ry. Co.* v. *Forrest* (1909), 12 W. L. R. 229.

Animals — *Nuisance — Proper exercise of powers — Negligence.*]—*Held*, that the Grand Trunk Railway Company of Canada are authorised by law to carry on the business of carrying cattle and hogs, and they are not liable if, in the proper exercise of their powers, and without negligence, they create a nuisance. *Truman* v. *London and Brighton Ry. Co.*, 11 App. Cas. 45, followed. *Bennett* v. *Grand Trunk Ry. Co.*, 21 C. L. T. 504, 2 O. L. R. 425.

Arrival at destination — Destruction by fire in warehouse — Liability of railway company — Conditions of shipping bill. *Chandler & Massey Co.* v. *Grand Trunk Ry. Co.*, 2 O. W. R. 286, 407, 427, 1044.

Bill of lading — Connecting lines — Erroneous charge by one carrier — Subsequent carrier's responsibility. *Grand Trunk Ry. Co.* v. *Vipond*, 3 E. L. R. 281.

Bill of lading — *Delay of trains — Condition as to.*]—When a shipper signs conditions inserted in a bill of lading, he is bound by these conditions. In this case the plaintiffs having subscribed to the condition that the defendant company would not be responsible for delay of trains, and the train by which the animals should have been shipped being two hours late, thus causing damage to the shipper, the latter could not recover. If the animals are abandoned to the company for what they will bring at a sale, the latter have a right to the return of the bill of lading before paying over the proceeds. *Lafontaine* v. *Grand Trunk Ry. Co.*, 26 Que. S. C. 455.

Bill of lading — *Delivery of goods without surrender of — Condition — Claim for loss — Time — Breach of contract—Quantity — "More or less."*]—A bill of lading of the defendants, covering wheat shipped, provided that its surrender should be required before delivery of the wheat, and that claims for loss or damage must be made in writing to the defendants' agent at point of delivery promptly after arrival of the wheat, and if delayed for more than thirty days after such delivery, or after due time for delivery, the defendants should not be liable in any event:—*Held*, that the failure to make such claim in writing within the time specified did not relieve the defendants from liability resulting from breach, not of their contract of affreightment, but of their contract to deliver the wheat to the holder of the bill of lading and to no one else. Where, therefore, the defendants had delivered the wheat without obtaining surrender of the bill of lading, *held*, that the defendants were liable to the consignor to the value of the number of bushels of wheat expressed in the bill of lading to have been received by them, but not for any more, although more had been actually shipped, and the words "more or less" in the bill of lading did not, in the circumstances, alter the matter. *Mercer* v. *Can. Pac. Ry. Co.* (1908), 17 O. L. R. 585, distinguished. *Tolmie* v. *Michigan Central Ry. Co.* (1909), 19 O. L. R. 26, 14 O. W. R. 72, 9 Can. Ry. Cas. 336.

Car of lumber — *Failure to deliver — Connecting carriers refused to forward lumber — Return of lumber and amount paid*

for freight — Action for non-delivery—Defence conditions of shipping bill — Railway Act, s. 284.]—Plaintiff shipped a car of lumber to Gowganda on defendants' line of railway, paying $643.45 freight. Defendants carried the car as far as Selwood, where a connecting transport company refused to forward the lumber owing to accumulation of more freight than the transport company could handle. Defendants immediately returned the car of lumber to plaintiffs and refunded the amount paid for carriage. Plaintiff brought action for breach of contract, for non-delivery and for damages for loss of profit. Defendants pleaded the terms of the shipping bill wherein it was agreed that defendants did not contract for the safety or delivery except on defendants' lines. At trial Magee, J., dismissed plaintiff's appeal with costs. *Laurie* v. *Can. North. Ry. Co.* (1910), 16 O. W. R. 139, 21 O. L. R. 178, 10 Can. Ry. Cas. 431.

Claim for non-delivery — *Special instructions — Acceptance by consignees — Warehousemen — Negligence — Amendment.*]—The plaintiffs for some time prior to and after 1897, had sold iron to a rolling mills company at Sunnyside. The defendants had no station at Sunnyside, the nearest being at Swansea, a mile further west, but the rolling mills company had a siding capable of holding three or four cars. In 1897 the plaintiffs instructed the defendants to deliver all cars addressed to their order at Swansea or Sunnyside to the rolling mills company, and in October, 1899, they had a contract to sell certain quantities of different kinds of iron to the company, and shipped to them at various times up to the 2nd January, 1900, five cars, one addressed to the company and the others to themselves, at Sunnyside, which the company refused to receive:—*Held*, affirming the judgment of the Court of Appeal, 22 C. L. T. 176, that the rolling mills company were consignees of all the cars, and that they had the right to reject them at Swansea if not according to contract. Having exercised such right, the defendants were not liable as carriers, the transitus having come to an end at Swansea by refusal of the company to receive the iron. The Court of Appeal, while relieving the defendants from liability as carriers, held them liable as warehousemen, and ordered a reference to ascertain the damages on that head:—*Held*, reversing the decision, Mills, J., dissenting, that, as the action was not brought against the defendants as warehousemen, and as they could only be liable as such for gross negligence, and the question of negligence had never been raised nor tried, the action would be dismissed *in toto*, with reservation of the right of the plaintiffs to bring a further action should they see fit. *Frankel* v. *Grand Trunk Rw. Co.*, 23 C. L. T. 134, 33 S. C. R. 115, 1 O. W. R. 254, 339, 396.

Common carriers — Goods in bond — Arrival at destination — Notice to consignees — Payment of duty — Collector's warrant for delivery — Negligence of customs officer in mislaying warrant—Quantity of goods undelivered — Destruction by fire while in customs warehouse — Non-liability of carriers. *De Tonnancourt* v. *Grand Trunk Rw. Co.* (Que.), 6 E. L. R. 367.

Condition limiting liability for loss.]—The Railway Act of Canada is not applicable to a railway situate in a foreign country, though operated by a company incorporated by or under the authority of the Parliament of Canada. Therefore, where goods shipped from Scotland to be delivered at Portland, Maine, to the Grand Trunk Railway Company, and by that company to be forwarded thence to the plaintiffs at Toronto, were destroyed by fire on the line of that company in New Hampshire, by negligence from which they were protected from liability by the terms of the contract for carriage:—*Held*, that the provisions of s. 246 of 51 V. c. 29 (D.) were not applicable to the defendants' contract; and an action to recover damages for the loss of the goods failed. *Macdonald* v. *Grand Trunk Rw. Co.*, 20 C. L. T. 259, 31 O. R. 633.

Contract — Rates — By-law — Invalidity — Unreasonableness of rates—Set-off. *Rodger* v. *Minudie Coal Co.*, 4 E. L. R. 255.

Contract limiting liability for loss —*Validity — Order of Board of Railway Commissioners — Judicial proceeding—Fraction of day.*]—On the 17th October, 1904, the plaintiff shipped three packages of household goods on the defendants' railway, and signed a special contract by which he undertook that no claim in respect of injury to or loss of the goods should be made against the defendants exceeding the amount of $5 for any one of the packages. On the same day the Board of Railway Commissioners by order approved of the form of special contract signed by the plaintiff, under s. 275 of the Dominion Railway Act, 1903, providing that no such contract should be valid unless "such class of contract" shall have been first authorised or approved by the Board. In an action to recover the value of the goods, which were lost by the defendants:—*Held*, that under ss. 23, 24, 25, and 275 of the Act, the Board had jurisdiction to make the order, the making of it was a judicial proceeding, and the order must be regarded as in full force during the whole of the 17th October, 1904; and therefore the contract was valid, and the plaintiff entitled to recover only $15. —Review of cases bearing upon the rule that in judicial proceedings fractions of a day are not regarded. *Ruskey* v. *Can. Pac. Rw. Co.*, 11 O. L. R. 1, 6 O. W. R. 698.

Delay in delivery — Perishable goods—Damage to goods — Connecting line—Contract — Absence of privity — Departure from customary route — Evidence — New trial. *Corby* v. *Grand Trunk Rw. Co.*, 6 O. W. R. 81, 492.

Delivery to consignee — *Seizure by railway company for unpaid tolls—Dominion Railway Act, s. 345 — "Seize" — Termination of carrier's lien — Demand — Conversion — Damages.*]—By s. 345 of the Dominion Railway Act, R. S. C. 1906 c. 37, a railway company may, instead of proceeding by action for the recovery of tolls upon goods carried, "seize the goods for or in respect whereof such tolls are payable, and may detain the same until payment thereof," etc.:—*Held*, that a railway company are not, by this enactment, given a lien on property

carried, to such an extent and of so general and wide an application as to allow them to re-take goods which have been delivered, and as to which the ordinary carrier's lien has terminated; the section does nothing more than confirm and establish the carrier's lien; there is the right to seize and detain, but the right must be exercised and enforced before there is an absolute and unconditional delivery of the goods to the consignee.—*Semble*, that in this case there was not a sufficient demand for the tolls due to the defendants, on account of which they seized goods which they had previously delivered to the consignee, the demand being for a gross sum, including a sum for tolls.—*Held*, also, that the defendants, having converted the goods, were liable for damages; and the measure was the value of the goods. *Clisdell* v. *Kingston and Pembroke Ry. Co.*, 18 O. L. R. 169, 13 O. W. R. 626, 9 Can. Ry. Cas. 73.

Delivery to wrong person—*Liability.*]—The plaintiff consigned to the defendants certain goods addressed to the "I. C. Company" simply. He knew that the company had not yet been incorporated; he also knew that the defendants' practice was never to deliver goods consigned "to order" without the production and endorsement of the shipping bill, but that when not consigned "to order" they did sometimes deliver the goods without the production of the shipping bill. The defendants did deliver the goods to a person carrying on business under the name of the I. C. Company, and at the ostensible office of the company:—*Held*, that the plaintiff was most to blame for such delivery, and that the defendants were not liable by reason of their having delivered the goods without first requiring the production of the shipping bills. There is no law here requiring carriers to take up the shipping bills before the delivery of goods. *Conley* v. *Can. Pac. Ry. Co.*, 29 C. L. T. 458, 32 O. R. 258. Affirmed on ground of ratification, 1 O. L. R. 345.

Denial of traffic facilities — *Injury by reason of operation of railway—Limitation of Actions — "Railway Act," 3 Edw. VII. c. 58, s. 242 — Construction of statute.*]—Injuries suffered through the refusal by a railway company to furnish reasonable and proper facilities for receiving, forwarding and delivering freight, as required by the "Railway Act," to and from a shipper's warehouse, by means of a private spur-track connecting with the railway, do not fall within the classes of injuries described as resulting from the construction or operation of the railway, in s. 242 of the "Railway Act," 3 Edw. VII. c. 58, and, consequently, an action to recover damages therefor is not barred by limitation prescribed by that section for commencement of actions and suits for indemnity.—Judgment appealed from, 19 Man. L. R. 300, affirmed, Girouard and Davies, JJ., dissenting. *Can. Nor. Ry. Co.* v. *Robinson* (1910), 30 C. L. T. 741, 43 S. C. R. 387.

Dominion Railway Act, 1903—*Validity of by-law made under Dominion Railway Act of 1888 — Conditions limiting liability — Notice of loss of goods — Privity of contract between shipper and second carrier.*]—Plaintiffs shipped 11 cases of goods to Winnipeg, *via* D. company, which carried them to St. John, N.B., where they were delivered to defendants. Three cases were lost in transportation by defendants:—*Held*, that the direction by plaintiffs to the D. company to ship by defendant company constituted the D. company plaintiffs' agent to enter into a new contract with defendants, and that plaintiffs are entitled to sue defendants for the loss. The condition in defendants' contract limiting liability cannot avail as this clause of the contract had not been approved of by the Railway Board when it was made. Its subsequent validation does not help defendants. Judgment for plaintiffs. *Mackenzie* v. *C. P. R.*, 7 E. L. R. 26.

Failure to fulfil contract — *Inevitable accident.*]—A railway company who engage to furnish a complete cargo for the loading of ships and to make up the freight representing any part which may be lacking, are relieved of their obligation, on the ground of inevitable accident, when a bridge forming part of their line is destroyed by a forest fire in such a way that they find it impossible to transport the cargo to fill the vessel. *Furness, Withy & Co.* v. *Great Northern Ry. Co.*, 32 Que. S. C. 121.

Injury in transit — *Evidence — Condition limiting liability — Authorization by Board — Owner's risk — Negligence.*]—In an action against a carrier for damage to goods in transit, it must be proved that the goods were undamaged when delivered to the carrier.—2. When goods are shipped by rail under a contract limiting liability (approved by the Board of Railway Commissioners), and providing for transport at owner's risk, the railway company are not liable for damage to such goods unless it be proved that such damage is the result of negligence on the part of the company. *Mason & Risch Piano Co.* v. *Can. Pac. Ry. Co.*, 8 W. L. R. 951, 4 Sask. L. R. 213, 8 Can. Ry. Cas. 369.

Injury to animal in transportation —Special contract of carriage — Necessity for pleading — Approval of form of contract by Board of Railway Commissioners — Absence of notice provided for in contract — Limitation of amount of damages — Railway Act, R. S. C. 1906 c. 37, s. 284 (7)— Validity of contract — Negligence—Payment of proportionate sum in case of injury — Time and place for giving notice — Waiver of notice — New evidence on appeal. *Mercer* v. *Can. Pac. Ry. Co.*, 12 O. W. R. 1212.

Injury to goods in transit — *Contract —Condition requiring notice of claim for damage — Railway Act, 1903, s. 215, s.s. 3, s. 275 — Negligence — Railway Commissioners.*]—A condition in a shipping bill providing that there should be no claim for damage to goods shipped over a railway unless notice in writing and the particulars of the claim are given within 36 hours after delivery, if it has been approved by order or regulation of the Board of Railway Commissioners of Canada under s. 275 of the Railway Act, 1903, is binding upon the shipper, even if negligence on the part of the railway company is proved, notwithstanding the language of s.-s. 3 of s. 214 of the Act.

enacting that, "subject to the Act," the company shall not be relieved from an action by any notice, condition, or declaration, if the damage arises from any negligence or omission of the company or of its servants, as both sections of the Act must be read together. *Grand Trunk Rw. Co.* v. *McMillan*, 16 S. C. R. 543, and *Mason* v. *Grand Trunk Rw. Co.*, 37 U. C. R. 103, followed. *Hayward* v. *Can. North. Rw. Co.*, 4 W. L. R. 298, 16 Man. L. R. 158.

Liability for acts of employees.] — Notwithstanding any condition to the contrary in its bills of lading, a railway company is liable for the tortious acts of its employees when they result in damage to the shipper. *Harvey Co.* v. *Can. Pac. Rw. Co.* (1910), 17 R. de J. 178.

Liability for loss — *Dog* — *Common carriers.*]—The defendants are, by the Railway Act, 51 V. c. 29 (D.), common carriers of animals of all kinds; and in this case were held liable for the loss of a dog which was received by them for carriage by their railway and was not delivered to the plaintiff in accordance with the contract made with him. Distinction between the English and Canadian Railway Acts pointed out. *McCormack* v. *Grand Trunk Rw. Co.*, 24 C. L. T. 33, 6 O. L. R. 577, 2 O. W. R. 1053.

Liability for loss — Place of delivery—Connecting lines. *Parker* v. *Grand Trunk Rw. Co.*, 3 O. W. R. 651.

Live stock — *Special contract limiting liability — Collision — Contravention of Lord's Day Act — Action in tort — Negligence — Proximate cause — Unlawful corporate act of railway company.*] — The plaintiff shipped goods, including horses, by the defendants' line, and signed a special contract providing that the defendants should not be liable for any loss or damages in respect of the live stock by reason of injury except such as might arise from a collision, and should in no case be responsible for any amount exceeding certain small sums named. The plaintiff accompanied his goods, and the train was lawfully proceeding on a Sunday, notwithstanding the Lord's Day Act, when a collision occurred with one of the defendants' trains, which was being run unlawfully because in contravention of that Act, and some of the horses and other goods of the plaintiff were destroyed or damaged. The plaintiff sued in tort for the amount of his loss, claiming much more than the limited amounts stated in the special contract. The defendants set up the special contract:—*Held*, that the provision of the contract limiting the liability of the defendants in the case of a collision to a stated sum did not sustain the defence, because that provision must be taken not to have contemplated a collision occurring by reason of the breach of a statute distinctly prohibiting and making unlawful the act which caused the collision. It was not a case of negligence at all, but a case of wilful contraventic.. of a prohibitive statute. The unlawful act must be looked upon as a corporate act of the defendants; and an unlawful corporate act occasioning a collision must be taken to have been excluded by implication of law from the clause limiting the defendants' liability. The question whether the unlawful running of the train was the proximate cause of the collision was not open, the defendants having admitted that they were operating the train in contravention of the Lord's Day Act.—Judgment of Sifton, C.J., upon a stated case, in favour of the plaintiff, affirmed; Stuart, J., dissenting. *Rice* v. *Can. Pac. Rw. Co.* (1910), 14 W. L. R. 635.

Loss — *Negligence — Bill of lading — Condition exempting from liability—Weight of grain — Certificate of weighmaster — Weights and Measures Act — Endorsement of bill — Action for loss.*]—When it clearly appears that the loss of goods shipped by railway must have been caused by the negligence or omission of the railway company or their servants, the company are precluded by s-s. 3 of s. 246 of the Railway Act, 1888, from relying on a condition of the bill of lading exempting them from liability for any deficiency in weight or measurement. *McMillan* v. *Grand Trunk Rw. Co.*, 16 S. C. R. 543, followed. The certificate of a weighmaster under s. 9 of the Manitoba Grain Act, 1900, being only *prima facie* evidence of the weight of grain in a car, may be rebutted. The endorsement of a bill of lading to a bank for collection, though it passes the property in the goods, does not prevent the shipper from bringing an action in respect of the loss of the goods, if he still has an interest in them. Section 21 of the Weights and Measures Act, R. S. C. c. 104, does not apply to a contract for carrying wheat by the carload, although the number of bushels in the car had been ascertained by bag measurement. *Ferrie* v. *Can. North. Rw. Co.*, 15 Man. L. R. 134, 1 W. L. R. 177.

Loss — Negligence — Contract limiting liability — Findings of jury — Recovery of amount fixed by contract — Costs. *Costello* v. *Grand Trunk Rw. Co.*, 7 O. W. R. 846.

Loss — *Value — Freight — Consignees — Right of action — Negligence.*]—The value at the place of destination of goods destroyed in a railway accident, is presumed to include the freight on the goods; and where a railway company is condemned to pay the value of the goods destroyed, the freight will be deducted from the amount of the value at place of destination. — 2. The consignees, though not the owners, have a right of action against the railway company for the value of personal effects and wearing apparel destroyed in a railway accident, when the same are destroyed through the company's negligence, the consignors being responsible as depositaries to the owners for the value of such wearing apparel and effects: C. C., Art. 1808, —3. Where effects saved are allowed by the consignors to remain in the defendant company's possession, and are partly destroyed by rats, the company will not be held liable for such destruction where it is not proved that the loss occurred through the fault or negligence of the defendant. *Rosenbloom* v. *Grand Trunk Rw. Co.*, 16 Que. S. C. 360.

Loss by fire — *Negligence — Just and reasonable condition — Notice.*]—Although the statute law of Canada prevents a railway company from relieving itself from liability

for damage caused by fire arising from any negligence or omission of it or its servants, still such a condition, when the damage arises otherwise than from any negligence or omission of the company or its servants, is valid, and there is no law in Canada requiring that such a condition shall be just and reasonable. The goods arrived on the 21st April; notice of their arrival was given to the owner on the same day, and they were destroyed on the 26th:—*Held*, on the evidence, that the notice was sufficient, and that the owner had a reasonable time within which to remove them, and not having done so, the defendants were not liable. *McMorrin v. Can. Pac. Rw. Co.*, 21 C. L. T. 292, 1 O. L. R. 561.

Loss of boxes shipped — *Condition of contract — Necessity for notice of loss.*]—One of the conditions of a railway bill was that there shall be "no claim for damage for loss of or detention of or injury or damage to any goods for which the company is accountable, unless and until notice in writing and the particulars of the claim of said loss, damage, or detention, are given to the station freight agent at or nearest to the place of delivery within thirty-six hours after the goods in respect of which said claim is made, or such portion of them as are not lost, are delivered." Two boxes of blankets shipped by the plaintiff were re-shipped by the railway to the original place of shipment, and an advice note of their arrival sent to the plaintiff, which stated that there was "one box short:"—*Held*, that under the terms of the condition the box could not be said to be "lost," and notice in writing by the plaintiff to the defendants, within 36 hours of the receipt of the advice note, of the loss of the box, was not essential to entitle the plaintiff to recover its value. *Sheppard v. Can. Pac. Rw. Co.*, 16 O. L. R. 259, 11 O. W. R. 697.

Loss or damage in transit — *Contract limiting liability — "Brittle and fragile objects" — Proof of damage.*]—Common carriers, as the insurers of the goods intrusted to them, are liable for loss of and damage to them. Stipulations in contracts for the carriage of goods and in bills of lading, exempting the carrier from liability in certain cases, are construed strictly.—Wooden cheese boxes do not come under the description, in such a stipulation, of "brittle and fragile objects," especially when it appears at the end of a long enumeration of objects wholly dissimilar. Supposing, however, the clause to apply, the carrier would still be liable for damage proved to be caused by his fault, and such fault is established, as to one shipment of cheese in wooden boxes, by shewing that 11 per cent. of the boxes were damaged, with the additional proof that the average number damaged, in ordinary shipments in the cheese trade, is only 5 per cent. *Alexander v. Can. Pac. Rw. Co.*, 33 Que. S. C. 438; 8 Can. Ry. Cas. 406.

Loss while in possession of intermediate carrier — *Terms of contract.*]—Plaintiffs made an arrangement with the Grand Trunk to ship a car of tools from K. to S., *via* defendants' line of railway to Port Arthur, thence by Northern Navigation Co. and Grand Trunk to S. The defendants carried the car to Port Arthur and delivered it to the Navigation Company, whose steamer on which the tools were shipped was wrecked and the tools lost:—*Held*, that defendants by delivery to the Navigation Co. had performed their contract. On appeal, action dismissed. *Jenckes v. Can. North.* (1909), 14 O. W. R. 397.

Lost luggage — *No proof of negligence —Right of action in passenger, not in order of contents of luggage — Personal luggage of passenger — No right to recover property of others.*]—Action to recover the value of lost luggage:—*Held*, that the plaintiff was only entitled to have her personal baggage carried and could not recover for her husband's clothing, household effects and articles belonging to her daughter in Germany. The officials of the defendants could not infer from knowing that the plaintiffs were immigrants that their possessions contained goods other than personal baggage. *Cotton v. Can. North.*, 11 W. L. R. 341.

Luggage — *Commercial samples.*]—Plaintiffs sent their traveller to Alberta by defendants' railway. His trunks were delayed ten days through neglect of defendants' servants, damages were allowed for loss of time, proportion of return expenses, and special damages for loss of profits during the ten days. *Chapman v. Can. North.*, 12 O. W. R. 1035.

Misdelivery — New contract — Breach —Negligence. *Armstrong v. Michigan Central Rw. Co.*, 1 O. W. R. 714.

Negligence — Loss of horses — Special contract exempting carriers from liability—Construction — Exclusion of negligence — Findings of jury — Proximate cause of loss —Avoidance of loss by reasonable care of plaintiff — Finding against evidence—New trial. *Booth v. Can. Pac. Rw. Co.*, 7 O. W. R. 593.

Negligence — *Loss of trunk of valuable merchandise — Liability of railway — Express company's limitation of $50.*] — A manufacturers' agent and commission merchant brought action to recover $3,500 for a trunk of valuable merchandise alleged to have been destroyed by the negligence of the defendant company while in transit on their line. Defendants alleged that the goods had not been entrusted to them, but to the Dominion Express Co., for whom they were carrying them, and who made it a condition of their receiving the goods that they should not be liable beyond $50, and the defendants claimed the benefit of this condition and paid $50 into Court.—At trial Riddell, J., *held* (14 O. W. R. 752, 19 O. L. R. 510), that an action for the loss of goods will lie against the railway company, and that they are not entitled to claim the limitation of the express company. Judgment for plaintiff for 16,000 francs and costs.—Court of Appeal affirmed above judgment. *Allen v. Can. Pac. Rw. Co.* (1910), 16 O. W. R. 512, 21 O. L. R. 416, 1 O. W. N. 897, 10 Can. Ry. Cas. 424.

Negligence in delivery—*Delay in notification of arrival of perishable fruit—Consigned to defendants by another railway—Liability of defendants — Damages.*]—Plaintiff brought action to recover $659.05 damages

for loss of a carload of pineapples while in transit from New York to Ottawa, alleged to have been spoiled through defendants' delay in delivery. At the trial the action was dismissed on the ground that defendants were not the proper parties to be sued for the loss. —Divisional Court *held*, that upon delivery of the car of pines to the defendants by the original railroad, the defendants came under an obligation to the plaintiffs as consignees (the purchasers of the fruit) whether by contract or as common carriers to carry the car to its destination:—That they received it either as common carriers or as under a new contract conformable to the terms of the original carriers' bill of lading, and in either aspect, were liable for negligence in handling the car or in the lack of due diligence in giving notice of its arrival.—That the delay in notifying plaintiff was excessive, under the circumstances, and warranted plaintiff's claim for damages against the railroad.—That the want of privity of contract successfully pleaded at trial was no defence.—Judgment for plaintiff for $303 as a proper estimate of damages suffered by plaintiff, with costs of action and appeal. *Corby* v. *Grand Trunk Rw. Co.* (1911), 18 O. W. R. 766, 2 O. W. N. 793.

Negligence in delivery — *Terms of contract of shipment.*]—Plaintiff shipped a car load of beans from Ridgetown to Montreal. Through the negligence of the yard master at Montreal the defendants unreasonably delayed delivery of the beans and plaintiff suffered damages to extent of $313.13. Defendants pleaded the terms of the shipping bill as a bar to the plaintiff's action. At trial Teetzel, J., dismissed the action without costs. Divisional Court *held*, that effect must be given to the contract, and as plaintiff had failed to give the required notice in writing the appeal should be dismissed, but without costs, as defendants had been guilty of negligence. Judgment of Teetzel, J., 15 O. W. R. 101, 20 O. L. R. 285, affirmed. *Newman* v. *Pere Marquette Rw. Co. and Grand Trunk Rw. Co.* (1910), 15 O. W. R. 845, 21 O. L. R. 72.

Passenger's luggage — *Negligence — Loss — Liability.*]—Plaintiff while travelling over defendants' railway lost a trunk in which there were certain clothes and some money:—*Held*, that on the evidence these clothes and the money were in the trunk when the plaintiff commenced his journey, and as defendants had negligently given the trunk up to some other party than plaintiff, they are liable. *Macintosh* v. *Cape Breton*, 7 E. L. R. 142.

Perishable goods — *Delay in transportation and want of ventilation in car — Absence of evidence as to condition when shipped — Bill of lading — Condition limiting liability — Form approved by Board of Railway Commissioners — Dominion Railway Act, s. 284 — No route being designated, carriers choosing longer route—Shorter route used in precious shipments — "Delay" —Notice in writing not given in time — Waiver — Authority of station agent — Estoppel — Pleading — Amendment.*] — Action for damages for negligence in carrying plaintiff's produce shipped by defendants' line. Plaintiffs for some time had been shipping similar produce over defendants' line and C. N. R. to Saskatoon. The shipping bill in this instance did not indicate any particular way. Defendants without advising plaintiffs sent this perishable produce to Saskatoon over their own line, causing considerable delay:—*Held*, negligence under s. 284 above. — *Held*, that defendants are estopped from raising defence of want of notice of damage. Judgment for plaintiffs. *Vernon* v. *Can. Pac.* (1909), 12 W. L. R. 445.

Shipping bill — *Bill of lading — Condition requiring insurance — Breach of — Loss of goods — Negligence.*]—Under s. 246 of the Dominion Railway Act, a railway company is precluded from setting up a condition endorsed on a bill of lading relieving the company from liability for damage sustained to goods whilst in transit, where damage is occasioned through negligence. Consignors, by their own shipping bill, agreed to insure the goods to be shipped, the railway company being thereby subrogated to consignors' rights in case of loss, and a condition of a bill of lading given by the railway company on the shipment of goods, required the consignors to effect an insurance thereon, which in case of loss or damage, the company were to have the benefit of: —*Held*, affirming the judgment of Meredith, J., 5 O. L. R. 742, 23 C. L. T. 226, 2 O. W. R. 328, 472, that the contract being one for exemption from total liability, even where, as here, the damage to the goods was occasioned by negligence, the defendants were precluded, under the above section, from setting up the breach of such condition as aforesaid as a ground of relief from liability. *Vogel* v. *Grand Trunk Rw. Co.*, 11 B. C. R. 612, followed. *Robertson* v. *Grand Trunk Rw. Co.*, 24 S. C. R. 611, distinguished. *St. Mary's Creamery Co.* v. *Grand Trunk Rw. Co.*, 21 C. L. T. 332, 8 O. L. R. 1, 3 O. W. R. 472.

Special contract limiting liability — Approval of form of contract by Board of Railway Commissioners on same day as contract made — Judicial proceeding — Practice of day. *Bradley* v. *Can. Pac. Rw. Co.*, 6 O. W. R. 698, 11 O. L. R. 1.

"Switching charges" — *Right to exact.*] —Action by Grand Trunk Rw. Co. to recover $298 for "switching charges" in transferring to the Can. Pacific Rw. Co., certain cars of lumber received from defendants.—Divisional Court *held*, that defendants' contract did not entitle them to have the cars delivered at their yards without paying anything beyond the freight charges for the carriage of the lumber from the point of shipment to Toronto, and that the contract was completed when the cars reached their freight terminals at Toronto, and no duty rested on them to carry or to have carried beyond their line and over another line to the defendants' yard except as agents for and on behalf of the defendants: That the right to exact the switching charges depended not upon the right of the plaintiff to exact them, but upon the right of the Can. Pac. Rw. Co. so to do, and *The Canada Gazette* of Dec. 3rd, 1904, shewed that they were entitled to have charged a much larger toll than was exacted. Judgment for the plaintiffs with costs. *Can. Manufacturers*

Assoc. v. *Can. Freight Assoc.* (1907), 7 Can. Ry. Cas. 302, approved. *Grand Trunk Rw. Co.* v. *Laidlaw Lumber Co.* (1911), 18 O. W. R. 340; 2 O. W. N. 548.

Termination of transit — *Common carriers — Warehousemen — Conditions — Negligence — Railway Act — Discharge of goods — Judicature Ordinance.*]— The defendant company between the 30th April and the 4th May received goods at Winnipeg from the plaintiffs for carriage. The goods were addressed to the plaintiffs, in some instances, "Prince Albert," in others, "Prince Albert, *via* Qu'Appelle," in others, "Prince Albert, Qu'Appelle," in others, "Duck Lake, Qu'Appelle," in others, "C/o George Hanwell, Qu'Appelle." Of the places named, only Qu'Appelle was a station on the company's line. The goods were destroyed by fire about noon, on the 13th May. They had arrived at Qu'Appelle from day to day between the 5th and noon of the 12th May, and were apparently on the same days put in the company's freight sheds. The plaintiff's agent at Qu'Appelle was aware each day of the arrival of the goods:—*Held*, following *Mayer* v. *Grand Trunk Rw. Co.*, 31 C. P. 248, that the company's duties as common carriers had ceased before the fire, and that they were liable, if at all, only as warehousemen. The shipping note was endorsed with conditions to the following effect: 3. That the company should not be liable for damages occasioned by fire. 5. That the company should not be liable for any goods left until called for or to order, and warehoused for the convenience of the owner, etc. 10. That all goods addressed to consignees at a point beyond the places where the company had stations, and respecting which no directions were received at those stations, should be forwarded to their destination by public carrier or otherwise as opportunity offered, without any claim for delay against the company, etc. *Per* Richardson, J.—The goods having reached Qu'Appelle, conditions 3 and 5 applied and protected the company. *Per* Wetmore, J.—The Consolidated Railway Act, 1879, s. 25, s.-s. 4, did not prevent an agreement being made that when the goods should reach the point on the company's railway to which they were to be carried, a certain act or dealing with the goods by the company should constitute a discharge of the goods within the meaning of the statute, and that thereupon the character of the company should be changed from that of common carriers to that of warehousemen, and that conditions 5 and 10 constituted such an agreement. *Per* McGuire, J.—Independently of the conditions, the company were not liable even as warehousemen; the company in this capacity being bound to use only ordinary care, and there was no evidence of negligence. *Per curiam.*—That the Consolidated Railway Act, 1879, s. 27, s.-s. 1, applies to an action charging the company with negligence as warehousemen, and therefore, the action, not having been commenced within six months, was barred. *Per* Wetmore and McGuire, JJ.—The Consolidated Railway Act, 1879, s. 25, s.-s. 4, applies only to receiving, transporting, and discharging. It being contended that the jury having found that the company had not performed its contract by delivery of the goods, the Court could not find that the character of the defendant company had been changed from that of common carriers to that of warehousemen, on the ground that the effect would be to draw an inference of fact inconsistent with the finding of the jury, which is not permissible under Judicature Ordinance, 1886, s. 331:—*Per* Wetmore, J.—The section refers to inferences of fact inconsistent with the finding of the jury, when such finding is within the province of the jury. *Walters* v. *Can. Pac. Rw. Co.*, 1 Terr. L. R. 88.

Tolls—*By-law fixing rates—Non-approval by Governor in council—Reasonableness of rate—Amendment to raise question — New trial.*]—To an action by the liquidator of the Canada Coal and Railway Company Limited, to recover an amount claimed from the defendants for car rental, etc., the defendants pleaded, by way of offset, a claim for repayment of overcharges for the carriage of coal made by the company in liquidation. The evidence shewed that the Joggins Railway Company, predecessors in title of the Canada company, passed a by-law which was approved by the Governor in council, fixing the rate per ton for the carriage of coal over their line, and that the Canada company subsequently passed a by-law increasing the rate, and that the defendants were charged tolls as fixed by the latter by-law, although it had never received the sanction of the Governor in council, and they claimed the difference between the two amounts:—*Held*, that the by-law passed by the Joggins company relating to the tolls to be taken by that company, was not a regulation affecting the road and running with the property, and was not binding upon their successors in title.—*Held*, also, that the Canada company were not liable to refund moneys paid to them for the carriage of goods, simply because they had failed to secure the approval of the Governor in council to the by-law fixing the rates.—*Held*, nevertheless, that the trial Judge should have allowed an amendment applied for on the trial, intended to raise the question of the reasonableness of the rates taken, and that the appeal must be allowed and a new trial ordered on this ground. *Rodger* v. *Minudie Coal Co.*, 42 N. S. R. 210, 4 E. L. R. 255.

7. Construction of Railway.

Branch lines—*Canadian Pacific Railway Company's charter—Contract—Limitation of time—"Lay out," "construct," "acquire"—"Territory of Dominion"—Railway Act, 1903.*]—The charter of the Canadian Pacific Railway Company, 44 V. c. 1 (D.), and schedules thereto appended, imposes limitations neither as to time nor point of departure in respect of the construction of branch lines; they may be constructed from any point of the main line of the Canadian Pacific Railway between Callender station and the Pacific seaboard, subject merely to the existing regulations as to approval of location, plans, etc., and without the necessity for any further legislation. On a reference concerning an application to the Board of Railway Commissioners for Canada for the approval of deviations from plans of a proposed branch line, under s. 43 of the

Railway Act, 1903, it is competent for objections as to the expiration or limitation of time to be taken by the Board, of its own motion, or by any interested party. *In re Can. Pac. Rw.—Sudbury Branch*, 36 S. C. R. 42.

Injunction — *Interested party — Public corporations—Franchises—Lapse of powers —"Railway" or "tramway"—Agreement as to local territory—Invalidity—Public policy —Work for general advantage of Canada.*]— An agreement by a corporation to abstain from exercising franchises granted for the promotion of the convenience of the public is invalid as being contrary to public policy, and cannot be enforced by the Courts. *Per* Sedgewick and Killam, JJ. A company having power to construct a railway within the limits of a municipality has not such an interest in the municipal highways as would entitle it to an injunction prohibiting another railway company from constructing a tramway upon such highways with the permission of the municipality under the provisions of Art. 479 of the Quebec Municipal Code. The municipality has power, under the provisions of the Municipal Code, to authorise the construction of a tramway by an existing corporation, notwithstanding that such corporation has allowed its powers as to the construction of new lines to lapse by non-user within the time limited in its charter. *Per* Girouard and Davies, JJ. A railway company which has allowed its powers as to construction to lapse by non-user within the time limited in its charter, and which does not own a railway line within the limits of a municipality where such powers were granted, has no interest sufficient to maintain an injunction prohibiting the construction therein of another railway or tramway. Where a company subject to the Dominion Railway Act, with power to construct railways and tramways, has allowed its power as to the construction of new lines to lapse by non-user within the time limited, it is not competent for it to enter into an agreement with a municipality for the construction of a tramway within the municipal limits under the provisions of Art. 479 of the Quebec Municipal Code. *Montreal Park & Island Rw. Co.* v. *Chateauguay & North, Rw. Co.*, 24 C. L. T. 302, 35 S. C. R. 48.

Receiver — *Authority to construct portion of line.*]—The Court will not grant to the receiver and manager of a railway, authority to proceed with the construction of a small portion of the incomplete part of the line of the railway, where it is questionable whether such construction will be of any real benefit to the undertaking, and in the face of the opposition of bondholders whose interest is largely in excess of those desiring it, and in the face of a judgment directing a sale of the road. *Ritchie* v. *Central Ontario Rw. Co.*, 24 C. L. T. 340, 7 O. L. R. 727, 3 O. W. R. 909.

Siding—Construction of—Cutting down or through highway—Right of municipality to enjoin—Leave of railway commissioners —Necessity for. *Innisfil* v. *Grand Trunk Rw. Co.*, 6 O. W. R. 69.

Time for construction — *Interpretation of statutes—Lapse of powers—Rival company—Forfeiture — Waiver — Contract —Public policy.*]—Where a time limit for the completion of a work is enacted by a section of a statute, and by an amending Act the term of years prescribed for the completion of the work is extended, by a section which expressly replaces the section of the original Act, the term fixed by the substituted section runs from the coming into force of the original Act, and not of the amending Act. 2. The lapse of a railway company's construction powers does not divest it of interest to prevent similar construction by a rival company, if it had once utilised its own powers of construction, and still remained in the use of this constructed work or any part of it. 3. Forfeiture of franchise powers by a railway company, for non-completion within the time prescribed, is a prerogative of the Crown, which may be waived, and so long as it has not been enforced, it cannot be invoked by any individual or other company similarly incorporated. 4. A railway which has been declared by a Dominion statute to be a work for the general advantage of Canada, is subject to s. 89 of the Railway Act of Canada, and if not finished and put in operation within 7 years from the passing of the Act giving it construction powers, the powers cease and are null and void as respects the uncompleted portion of the line. 5. The above section applies to tramways as well as to railways. 6. A contract between two railway companies, by which they mutually undertake not to construct lines on each other's territory, is not invalid as being contrary to public policy. *Montreal Park & Island Rw. Co.* v. *Chateauguay & North, Rw. Co.*, 13 Que. K. B. 250.

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8. Contracts with Municipalities.

Confirmation by statute — *By-law — Permission to alter grade of streets and construct subway—Injury to land fronting on streets—Construction of agreement — Work done in accordance with—Board of Railway Commissioners — Jurisdiction — Injunction —Interim order affirmed on appeal—Effect as to judgment at trial.*]—For many years the defendants, by agreement with the corporation of the city of Winnipeg, had occupied a portion of the width of Point Douglas avenue in that city with the tracks of their main line. In 1904 a further agreement was made between the corporation and the defendants, and ratified by the legislature, whereby the defendants obtained the right to raise the grade of Point Douglas avenue or of any part thereof to a height not exceeding 10 feet above the then existing grade, upon certain conditions: — *Held*, that the words "or of any part thereof" related to a part of the breadth as well as of the length of the avenue, and that the defendants had a right to raise the grade of the southerly 45 feet in width of the avenue, leaving 21 feet at its original height, although the result of that was to diminish the value of the plaintiff's lots, on account of the construction of a subway alongside of them.— *Held*, also, that an order of the Board of Railway Commissioners granting leave to the defendants to construct such subway was valid and binding, although it had been made *ex parte* and in ignorance of the fact that

the plaintiff had previously obtained an interim injunction against such construction, the plaintiff having made no application to rescind or vary the order as he might have done.—*Can. Pac. Ry. Co.* v. *Grand Trunk Ry. Co.*, 12 O. L. R. 320, 7 O. W. R. 814, followed. The interim injunction granted in 1905 had been affirmed on appeal before the hearing of the cause.—*Held*, that that decision was not binding on the trial Judge, and did not divest him of the responsibility of deciding the case upon the merits at the hearing. *Fraser* v. *Can. Pac. Ry. Co.*, 7 W. L. R. 734, 8 W. L. R. 380, 17 Man. L. R. 667.

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9. Crossings.

Absence of protection — *Negligence.*]—Where the railway traffic at the crossing of a highway was very great, and there was no gate, guardian, lamp, or other protection for the public, although the railway company had been notified of the dangerous condition of the crossing, the company was held responsible, under s. 288 of the Railway Act of Canada, for a collision of an engine with a vehicle crossing the track, which caused the death of the plaintiff's son, and which occurred without any fault on his part. *Girouard* v. *Can. Pac. Ry. Co.*, 19 Que. S. C. 529.

Access to brick yard — Railway Act, s. 253 — "Farm crossing" — Jurisdiction of Board of Railway Commissioners — Discretion — Location of crossing — Convenience—Expense—Indemnity against damages by accidents at crossing. *Re New and Toronto Hamilton & Buffalo Ry. Co.*, 12 O. W. R. 1049.

Action for damages for filling up cattle pass and substituting a drainage pipe—*Agreement with farmer—Easement by prescription — Dominion Railway Act, s. 257—No application—Action dismissed —No costs.*]—Plaintiff brought action for damages for filling up a cattle pass under defendants' line of railway and substituting for it an embankment with a pipe through it to carry off the water, and asked for a mandatory order requiring defendants to restore it to its former condition. Plaintiff claimed under a clause of a deed of conveyance to defendants' predecessors in title which provided that the parties of the second part would not interfere with the flow of the waters of a certain drain upon the said lot. Plaintiff also claimed an easement by prescription and sought to invoke s. 257 of the Railway Act to shew that the railway had no authority to do what they had done without leave of the Board of Railway Commissioners. — Meredith, C.J.C.P., *held*, that above see. of the Railway Act had no application; that there was no evidence of any agreement that plaintiff or his predecessors should have any right to use the culvert as a cattle pass; that *Can. Pac. Ry. Co.* v. *Guthrie*, 31 S. C. R. 155, was decisive against the claim for an easement; and that defendants had the right to substitute any other means of drainage which was sufficient to enable the water to flow through the drain mentioned in the conveyance. Plaintiff's action dismissed without costs. *Gatman* v. *Grand Trunk Ry. Co.* (1910), 16 O. W. R. 905, 2 O. W. N. 21.

Approaches — *Repair.*]—Where a railway severs a farm and the company have constructed a farm crossing, no duty is cast upon them, in the absence of an express agreement, to keep in repair the approaches thereto within the farm. *Palmer* v. *Michigan Central Ry. Co.*, 23 C. L. T. 265, 6 O. L. R. 90.

Board of Railway Commissioners — *Jurisdiction — Appeal — Statutory contract.*]—Orders directing the establishment of farm crossings over railways subject to the Railway Act, 1903, are exclusively within the jurisdiction of the Board of Railway Commissioners for Canada. — The right claimed by the plaintiff's action, instituted in 1904, to have a farm crossing established and maintained by the railway company, cannot be enforced under the provisions of 16 V. c. 37 (Can.) incorporating the Grand Trunk Railway Company of Canada.—An application to have the appeal quashed, on the grounds that the cost of establishing the crossing demanded, together with the damages sought to be recovered by the plaintiff, would amount to less than $2,000, and that the case did not come within the provisions of the Supreme Court Act permitting appeals from the province of Quebec, was dismissed. —Judgment of the Court below reversed. Idington, J., dissenting as to damages and costs. *Grand Trunk Ry. Co.* v. *Perrault*, 28 C. L. T. 71, 36 S. C. R. 671.

Compensation to municipality — *Terminus "at or near" point named.*]—Authority to a company to build a railway empowers them to cross every highway between the termini without permission of the municipal authorities being necessary and without liability to compensate the municipalities for the portions of the highways taken for the road. A charter authorised the construction of a railway from Vaudreuil to a point at or near Ottawa, passing through the counties of Vaudreuil, Prescott, and Russell:—*Held*, that, if it were necessary, the railway could pass through Carleton county, though it was not named.—*Held*, also, that in this Act the words "at or near the city of Ottawa" meant "in or near" said city. Judgment of the Court of Appeal, 4 O. L. R. 56, 22 C. L. T. 224, affirming the judgment at the trial, 2 O. L. R. 336, affirmed. *Montreal & Ottawa Ry. Co.* v. *Ottawa, Canada Atlantic Ry. Co.* v. *Ottawa*, 23 C. L. T. 209, 33 S. C. R. 376.

Dangerous crossing — *Failure to give warning—Negligence — Contributory negligence.*]—A siding of the defendants' line of railway, which was not used by the defendants more than two or three times a week, crossed a narrow arched-in lane or alleyway, held on the evidence to be a highway, was close to the face of the walls. The plaintiff's servant had driven the plaintiff's horse and wagon across the siding and through the alleyway to a warehouse close by, there being no engine or cars on the siding. The wagon was within a short time loaded with boxes, and the plaintiff's servant then returned through the alleyway, the servant

walking beside the wagon in order to steady the load. Just as the horse came out of the alleyway it was struck by a passing engine and severely injured. The whistle of the engine had not been sounded, nor the bell rung. The plaintiff's servant did not stop the horse at the mouth of the alleyway or look or listen for trains:—*Held*, that, assuming but not deciding that the duty to sound the whistle or ring the bell did not apply in the case of engines using a siding, it was nevertheless incumbent upon the defendants to give some warning before crossing the lane, especially in view of the very dangerous nature of the crossing, and that not having done so they were guilty of negligence and *prima facie* liable in damages.—*Held*, also, that in all the circumstances it could not be said that there was not some evidence to support the finding of the Judge at the trial (the case having been tried without a jury) that the plaintiff's servant had not acted unreasonably and was therefore not guilty of contributory negligence. *Smith v. Niagara & St. Catharines Rw. Co.*, 25 C. L. T. 34, 9 O. L. R. 158, 4 O. W. R. 526.

Destruction of, by train — Negligence of engine-driver — Evidence — Trespass — Fences — Damages. *Eggleston* v. *Can. Pac. Rw. Co.*, *Duggan* v. *Can. Pac. Rw. Co.*, (N.W.T.), 1 W. L. R. 356, 576.

Dominion Railway Act, 1888, s. 191 —*Construction — Heading and side-note — Use of crossing for business of brickyard — Agreement to provide and maintain crossing —Reservation — Easement — Interference with operation of railway — Severance of ownership—Cesser of right.*]—Section 191 of the Dominion Railway Act of 1888 is not restricted in its application to crossings for farm purposes merely, notwithstanding the heading and side-note "Farm Crossings," which may be taken as descriptive of the character of the construction of the crossing, and not restrictive of the purposes for which it may be used or of the uses to which the lands crossed by the railway may be put, and notwithstanding the words of the section itself, "convenient and proper for the crossing of the railway by farmers' implements, carts, and other vehicles," which may be similarly interpreted.—The defendants, as lessees of S., occupied and operated a brick-yard, in a city, on the north side of the plaintiffs' railway, and in connection with their business used a private lane over the property of M., lying to the south of the railway. This lane led to a street, and was the only means of access from the brick-yard to a public highway. To reach this lane the defendants used a crossing over the railway, and their right to do so was called in question by this action. When the railway was built, the land leased by the defendants and that owned by M. were the property of the Messrs. B., who in December, 1894, conveyed to the plaintiffs a right of way through their property, and obtained simultaneously with their conveyance an agreement by which the plaintiffs covenanted to provide and maintain "a farm crossing" at the point now in question, which was duly constructed. The Messrs. B. conveyed both properties to M. in 1901, and in 1903 F. acquired from M. the premises afterwards leased by the defendants. In his conveyance M. granted to F. a right of way over the lane opposite the crossing. S. acquired title from F. and subsequently leased to the defendants. The land leased by the defendants had been in use as a brick-yard for 25 years before 1903, but lay idle from that year until 1903, when S. established a brick-making industry upon it. The plaintiffs were aware that S. bought with the intention of using the crossing and the lane to the south as the means of conveying from his yard brick for local trade, and with this knowledge they reconstructed and kept in repair the crossing in question, which was used by S. and the defendants for that purpose, without objection by the plaintiffs, until 1906, when they complained of its use and began this action in July, 1907:—*Held*, that a railway company acquiring a right of way may take the land required subject to reservations in favour of the grantor of such rights of crossing or other easements as may be agreed upon, and are not inconsistent with the use of the right of way for railway purposes; an agreement for a crossing contemporaneous with the deed of the right of way is equivalent to a reservation in the deed itself; and, the vendors having made such an agreement, the character and extent of the right of crossing must be determined by the terms of that agreement. Subject to the question of severance, the covenant of the plaintiffs with the vendors, their heirs, executors and administrators," enured to the benefit of the assigns or grantees of the vendors, including lessees of such grantees; and the use which the defendants were making of this crossing was within the rights conferred upon the Messrs. B. by the agreement of the plaintiffs, not being, upon the evidence, inconsistent with the safe operation of the railway, nor unduly increasing the burden of the easement created by the agreement.—*Held*, also, that, although when the right of crossing was created the lands on either side of the railway belonged to the same owners, and were now held by different owners, there was no such severance as would involve the cesser of the right of crossing. *Midland Rw. Co.* v. *Gribble*, [1895] 2 Ch. 827, distinguished. *Toronto, Hamilton and Buffalo Rw. Co.* v. *Simpson Brick Co.*, 17 O. L. R. 632, 13 O. W. R. 215, 8 Can. Ry. Cas. 464.

Farm crossings — *Agreement — Maintenance — Rights of land owners — Application to Board of Railway Commissioners.*]—A railway constructed by the defendants' predecessors in title crossed the plaintiffs' respective farms. In 1854, when the line of railway was being laid down, bridges and an under-pass were constructed by the railway company to enable the owners of the farms to pass from one side of the railway to the other, and were for more than 50 years maintained and used in connection with the plaintiffs' farms, with the knowledge of the defendants and their predecessors in title, without any objection on their part:—*Held*, on the evidence, that the bridges and under-pass were provided for and enjoyed by the plaintiffs' predecessors in title as part of the agreements or arrangements under which the defendants' predecessors in title acquired

their right of way through the lands in question, and the defendants were bound by them. There could be no question of *ultra vires;* the subject matter of the agreements was within the powers and authority of the railway company in dealing for the acquisition of a right of way. The defendants were in the wrong in assuming to alter or reconstruct the bridges and under-pass without the sanction of the Board of Railway Commissioners; and it was for them, and not for the plaintiffs, to apply to the Board.—Judgment of Boyd, C., and Meredith, C.J.C.P., 7 O. W. R. 598, affirmed. *McKenzie* v. *Grand Trunk Rw. Co., Biddie* v. *Grand Trunk Rw. Co.*, 9 O. W. R. 778, 14 O. L. R. 671.

Farm crossing — *Approaches—Repair.*]—*Held*, affirming the judgment of Street, J., 23 C. L. T. 265, 6 O. L. R. 90, that the accident to the plaintiff having arisen on his own property and from his own default in not remedying the defect in the approach, and in not giving notice to the company that any such defect existed, he could not recover. —*Semble*, that a distinction exists between the approach to an overhead bridge on a public highway and the approach on private lands to a farm crossing over the line of rail. While the presumption will be, in the case of the former, that the approach is part of the bridge and to be kept in repair by the railway company, in the case of the latter, in the absence of original compensation as to the crossing, and of express agreement, while it is for the company to maintain the crossing over its limits, it is for the owner to maintain the approach within the limits. *Palmer* v. *Michigan Central Rw. Co.*, 24 C. L. T. 85, 7 O. L. R. 87, 3 O. W. R. 89.

Farm crossing — *Compensation in lieu of.*]—When the value of a piece of land enclosed by a line of railway is so small as to be disproportionate to the cost of a farm crossing; and is of no utility to the farm from which it is so separated, the Court has the power and the discretion to grant to the proprietor a pecuniary compensation in lieu of a crossing. *Martin* v. *Maine Central Rw. Co.*, 19 Que. S. C. 561.

Farm crossings — *Duty to provide — Statute — Retroactivity.*]—Before the Dominion Railway Act of 1888 there was no statutable obligation upon a railway company to provide and maintain a farm crossing where the railway severed a farm, and s. 191 of that Act, providing that every company shall make crossings for persons across whose lands the railway is carried, is not retrospective. *Vezina* v. *The Queen*, 17 S. C. R. 1, and *Qua* v. *The Queen*, *ib.* 20, in effect overrule *Canada Southern Rw. Co.* v. *Clouse*, 13 S. C. R. 139, and approve *Braun* v. *Toronto and Nipissing Rw. Co.*, 26 C. P. 280, *Ontario Lands and Oil Co.* v. *Canada Southern Rw. Co.*, 24 C. L. T. 188, 1 O. L. R. 215.

Farm crossings — *Duty to provide — Statutes — Railway Act of Canada—Jurisdiction of Provincial Legislatures.*] — An owner whose lands adjoin a railway subject to the Railway Act of Canada, upon one side only, is not entitled to have a crossing over such railway under the provisions of that Act; and the special statutes in respect to the Grand Trunk Railway of Canada do not impose any greater liability in respect to crossings than the Railway Act of Canada. The Provincial Legislatures in Canada have no jurisdiction to make regulations in respect to crossings or the structural condition of the roadbed of a railway subject to the provisions of the Railway Act of Canada. *Cox, Pac. Rw. Co.* v. *Corp. of Parish of Notre Dame de Bonsecours*, [1899] A. C. 367, followed. *Therrien* v. *Grand Trunk Rw. Co.*, 20 C. L. T. 431, 30 S. C. R. 485.

"Farm purposes" — *Injury to stranger —Duty.*]—The defendants having, in compliance with the requirements of s. 191 of the Railway Act of Canada, 51 V. c. 29, made, and assumed the duty of keeping in repair, a crossing over their railway where it crossed a certain farm, nevertheless allowed it to get into an unsafe and defective condition, whereby a horse of the plaintiff was injured. The plaintiff was at the time using the horse with the permission of the owner of the farm, in hauling gravel from a part of the farm to the highway, for which purpose it was necessary to cross the railway:—*Held*, without deciding whether the right of user of such a crossing is limited to a user for farm purposes, but assuming it to be so limited, that the hauling of gravel was, under the circumstances, a farm purpose, and that the defendant owed a duty, even apart from s. 289, towards one using the crossing by invitation of the owner. *Plester* v. *Grand Trunk Rw. Co.*, 20 C. L. T. 352, 32 O. R. 55.

Fences — Dominion Railway Act, 1906, c. 37, s. 254 — *Absence of cattle-guards at highway crossing — Track not fenced off from field.*]—Cattle not belonging to plaintiff got upon defendants' railway track at a crossing, because of the absence of cattle guards, and thence wandered on the plaintiff's field of growing grain, because of the want of a fence between plaintiff's land and the railway track, where defendants, by above section, were required to fence, and did damage:—*Held*, that defendants are not bound to fence their right of way but only put up such fences as are required to protect the track from cattle. Where fences are not built and maintained as required by above section, defendants are only liable for cattle killed or injured on the track. At the trial the action was dismissed and an appeal to the Manitoba Court of Appeal was dismissed. *Hunt* v. *Grand Trunk Pacific*, 10 W. L. R. 581.

Leave to make — *Railway Committee of Privy Council — Private bridge — Approaches to — Compensation — Injunction.*] —Leave granted by the Railway Committee of the Privy Council to a railway company to cross a public road upon which are the approaches of a bridge belonging to a private person, does not deprive this private person of his recourse for compensation, and, in default of a previous offer of compensation, he may by writ of injunction prevent the company from building their line upon these approaches. *Jones* v. *Atlantic and North West Rw. Co.*, 12 Que. K. B. 392.

Liability of municipal corporation to contribute to maintenance of gates at crossings — Dominion railway—Cer-

stitutional law. *Grand Trunk Rw. Co.* v. *Toronto*, 4 O. W. R. 459; 6 O. W. R. 27.

Negligence — *Contributory negligence—Excessive speed.*]—Where all the usual signals and warnings were given by the railway company, and the proximate and determining cause of the accident of which the plaintiff complained was the imprudence and recklessness of her deceased husband and his brother, the plaintiff was held not entitled to recover. It was unnecessary to decide whether s. 249 of the Railway Act prohibiting a rate of speed, through a thickly peopled portion of a city, exceeding six miles an hour, applies to highway crossings, because, in the opinion of the Court of Review, the accident would have happened even if the rate of speed had been less than six miles an hour. *Tousaway* v. *Grand Trunk Rw. Co.*, 20 Que. S. C. 90.

Obligation to provide — *Dominion Railway Act — Midland Railway Company —Ontario Statutes.*]—The plaintiff's father in 1882 conveyed part of his farm to the Midland Railway Company, who constructed their railway so as to sever the farm, but did not agree to make a farm crossing. In 1890 the father conveyed to the plaintiff all the farm not previously conveyed to the railway company:—*Held*, that the plaintiff could not compel the defendants who had acquired the Midland Railway in 1895, to provide a farm crossing, either by virtue of the Dominion Railway Act or of Ontario legislation applicable to the railway before 1893. Review of the statutes affecting the Midland Railway Company. *Ontario Lands and Oil Co.* v. *Canada Southern Rw. Co.*, 1 O. L. R. 215, 21 C. L. T. 188, followed. *Carew* v. *Grand Trunk Rw. Co.*, 23 C. L. T. 226, 5 O. L. R. 653, 2 O. W. R. 313.

Obligation to provide — *Owner of farm — Date of acquisition — Jurisdiction of magistrate's Court.*]—In an action for a farm crossing, it is sufficient if the plaintiff be shewn to be the actual *bona fide* owner, and in possession as such, of the land crossed by the railway, although his title is not registered; and the fact that the land was purchased and cleared by him, long subsequent to the building of the railway, is no bar to his right of action. 2. The district magistrate's Court has no jurisdiction to order the construction of a farm crossing, even when the cost thereof is alleged to be less than $50, because such order would involve also the future maintenance of the crossing, would create a servitude, and would be interfering with future rights. *Bolduc* v. *Can. Pac. Rw. Co.*, 23 Que. S. C. 238.

Omission to ring bell or sound whistle — *Contributory negligence.*]—The word "highway" in s. 256 of the Railway Act, 1888, requiring a bell to be rung or a whistle sounded by a railway locomotive engine on approaching a crossing over a highway, means a public highway, which is so as of right.—*Semble*, that the question whether there is a public highway at any point is one which a County Court is precluded by s. 59 (d) of the County Courts Act, R. S. M. c. 33, from trying. 2. Where a trail or way over a railway track is used by the public by invitation or license of the railway company, a person crossing the track upon the same is bound to observe reasonable precautions to avoid injury by trains; and where the evidence shews that he has not done so, he cannot recover from the company for such injuries without proving that they were immediately caused by the negligence of the company's servants only. — *Quære*, whether the failure of the person in charge of a locomotive to ring a bell or sound a whistle or observe other precautions on approaching such a crossing constitutes actionable negligence. *Cotton* v. *Wood*, 8 C. B. N. S. 568, and *Weir* v. *Can. Pac. Rw. Co.*, 16 A. R. 109, followed. *Royle* v. *Can. North. Rw. Co.*, 23 C. L. T. 25, 14 Man. L. R. 275.

Overhead bridge and underpass — Depriving owner of — Damages — Measure of — Reference. *McKenzie* v. *Grand Trunk Rw. Co.*, 7 O. W. R. 798.

Overhead bridge maintained for 50 years — *Destruction by railway company without authority from Board of Railway Commissioners — Order of Board for construction of overhead bridge — Dom. Rw. Act.*]—Where defendants, without authority of the Railway Commission, removed an overhead bridge connecting the parts of the plaintiff's farm and afforded him no means of access from the one part of his farm to the other, it was *held*, that plaintiff was entitled to $560 damages for injury caused by defendants' delay in furnishing proper means of communication between the parts of the plaintiff's farm separated by the defendants' railway. Judgment of Clute, J., at trial (1909), 13 O. W. R. 784, affirmed. *Kelly* v. *Grand Trunk* (1909), 14 O. W. R. 992, 1 O. W. N. 24, 211.

Private way — *Depriving owner of underpass — Contract — Prescription — Presumption — Measure of damages — Intravires of railway company—Jurisdiction of Railway Board.*]—An action for damages for removal and destruction of plaintiff's underpass which connected two portions of his farm as separated by the railway right of way, and for a mandamus, etc. — The Railway Board had no power to settle the matter, as it was based on an agreement, and the only remedy was by way of the Courts. —Clute, J., at trial, *held*, that when a railway company verbally agrees to construct and maintain for the use of the vendor of the right-of-way a free underpass, as part of the consideration for selling, and the pass is used in connection with and for the purposes of the farm for over 20 years, the vendor is entitled to rely on the presumption that the enjoyment was part of the arrangement, despite the fact that there is no written agreement; and so is entitled to damages for depreciation in value of his land, by the underpass having been removed—*Mackenzie* v. *Grand Trunk Rw. Co.*, 9 O. W. R. 778, 14 O. L. R. 671, followed. *Leslie* v. *Pere Marquette Rw. Co.* (1911), 19 O. W. R. 613, 2 O. W. N. 1316.

Protection of public at highway crossings — Gates and watchmen — Liability of municipality—Orders of Railway Committee of Privy Council and Board of Railway Commissioners — Acquiescence. *Can. Pac. Rw. Co.* v. *City of Toronto*, 8 O. W. R. 348, 9 O. W. R. 785.

Protective works — *Contribution to cost — Party interested — Municipality — Distance from works.*]—On an application under ss. 237 and 238 of the Railway Act (R. S. 1906, c. 37), for works to protect a railway crossing over a public highway the Board of Railway Commissioners has jurisdiction to order a municipality, as a party interested, to contribute to the cost though the works are not within the bounds of such municipality, nor immediately adjacent thereto.—Appeal dismissed with costs. *Carleton* v. *Ottawa* (1909), 29 C. L. T. 619, 41 S. C. R. 552.

Railway committee — *Appeal to council — Injunction — Notice of intention to lay crossing — Costs.*]—Motion for an injunction restraining the defendants from laying a crossing over the track of the plaintiffs. The defendants had obtained from the Railway Committee of the Privy Council an order permitting them to cross the plaintiffs' track. Pending an appeal by the plaintiffs from the order to the full Cabinet, the defendants proceeded to lay the crossing, and the plaintiffs applied for an injunction:—*Held*, that defendants were not exceeding the terms of the order, which was binding on the Court till reversed on appeal to a competent authority, and therefore an injunction could not be granted. Before laying a crossing, notice should be given of the time at which it is intended to commence the work. Failure by a company to give such notice constitutes good cause for depriving them of the costs of successfully resisting a motion for an injunction. *Can. Pac. Rw. Co.* v. *Vancouver, Westminster, and Yukon Rw. Co.*, 24 C. L. T. 161, 10 B. C. R. 228.

Railway in Quebec — *Sliding gate — Interpretation of statute.*]—A railway company which does not attach fastenings to its sliding gates fails to comply with the provincial law (Art. 6606, par. 143, R. S. Q.). *Rowe* v. *Quebec Central Rw. Co.* (1910), 16 R. de J. 524.

Right to cross streets — *Expropriation or compensation — Extension of municipality — Toll road.*]—Railway companies incorporated by the Dominion Parliament, which have complied with the Railway Act and obtained the approval of the Railway Committee, have, in the construction of their lines of railway, the right to cross over the highways of a city without taking expropriation proceedings under the Railway Act, or without making any compensation to the city therefor. Where under the powers conferred by 51 V. c. 53, s. 9 (O.), for extending the limits of the city of Ottawa, the city acquired, at an agreed price, part of the road of a toll road company within such extended limits, such part thereupon ceased to have its previous character of a toll road, and became the same as the other public streets of the city. *Canada Atlantic Rw. Co.* v. *Ottawa, Montreal and Ottawa Rw. Co.* v. *Ottawa*, 21 C. L. T. 523, 2 O. L. R. 336.

Speed of trains — *Crowded districts—Fencing — Statutory requirements—Negligence — Injury to person crossing track.*]—By s. 259 of the Railway Act, 1888, as amended by 55 & 56 V. c. 27, s. 8, "no locomotive or railway engine shall pass in or through any thickly peopled portion of any city, town, or village, at a speed greater than six miles an hour, unless the track is fenced in the manner prescribed by this Act." Besides the usual railway fences the only fencing required is that provided for by 55 & 56 V. c. 27, s. 6, which is substituted for s. 197 of the Railway Act, 1888, namely: "At every public road crossing at rail level of the railway, the fence on both sides of the crossing and on both sides of the track shall be turned in to the cattle guards, so as to allow of the safe passage of trains." The plaintiff was injured and his wife was killed by a train passing through a thickly peopled portion of the town of Forest, at a speed of at least twenty miles an hour, and on the trial the jury found that such speed was excessive for that place and constituted negligence on the part of the company:—*Held*, reversing the judgment of the Court of Appeal, 5 O. L. R. 313, 23 C. L. T. 136, Geoffrion, J., dissenting, that the company, having complied with the statutory provisions as to fencing, were not liable. *McKay* v. *Grand Trunk Rw. Co.*, 24 C. L. T. 49; *S. C. sub. nom. Grand Trunk Rw. Co.* v. *McKay*, 34 S. C. R. 81.

Streets of town — *Speed of trains — Guards and barriers.*]—A railway company whose railway crosses the streets of a town, not only must not allow its trains to go faster than the speed allowed by the Railway Act, but besides, in order to escape liability for accidents, must put guards and barriers at the places where the railway crosses the streets. *Girard* v. *Quebec and St. John Rw. Co.*, 25 Que. S. C. 245.

Tracks of another company—Application to Railway Committee of Privy Council—Notice — Omission to state lands to be occupied — Order of committee — Application for rehearing — Waiver of want of notice — Order of Board of Railway Commissioners — Appeal to Privy Council — Restoration of order of committee. *Can. Pac. Rw. Co.* v. *Bay of Quinte Rw. Co.*, 3 O. W. R. 542, 658.

See LIMITATION OF ACTIONS.

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10. FENCES.

Absence of fence — *Liability to strangers — Owner of land adjoining railway.*]—Section 179 of the Railway Act of Canada, 51 V. c. 29, obliging railway companies to erect fences on both sides of their railway, is imperative and in the public interest, and the responsibility which it imposes subsists in regard to an animal belonging to a third person which, being lawfully upon a neighbouring lot, is killed by reason of the absence of such fence, in spite of the fact that the company have omitted to erect such fence upon the request of the owner of the neighbouring land. *Quebec Central Rw. Co.* v. *Pellerin*, 12 Que. K. B. 152.

Cattle on track — *Running at large — By-law of municipality — Crown lands.*]—The Act respecting railways, 53 V. c. 28, s. 2 (D.), enacts that if, in consequence of the omission or neglect of a railway company to

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erect, complete, and maintain a fence, "any animal gets upon the railway from an adjoining place where under the circumstances it might properly be, then the company shall be liable to the owner of every such animal for all damages in respect of it caused by any of the company's trains or engines." The plaintiff's cattle running at large in a municipality, under one of the by-laws of which they were permitted so to do, got upon Crown lands, and from the Crown lands on to the railway, and were killed on the track by one of the defendants' trains:—*Held*, Meredith, J., dissenting, that by virtue of the by-law permitting running at large, the cattle were properly on the Crown lands, and hence the defendants were liable under the above enactment. Such a by-law affects all unenclosed lands, and under it cattle may properly depasture and ramble over all open lands, wastes, or commons, even if owned by the Crown if no objection is taken thereto and no barrier or fences be erected against them. Judgment of Britton, J., 2 O. W. R. 479, varied. *Fensom* v. *Can Pac. Rw. Co.*, 24 C. L. T. 87, 391, 7 O. L. R. 254, 8 O. L. R. 688, 3 O. W. R. 227, 4 O. W. R. 373.

Culvert — *Duty to fence — Negligence.*]—A watercourse, which flowed through a culvert under a railway track, became dried up in the summer; and, to prevent cattle from passing through it, the railway company had gates placed in the culvert, but neglected to keep them up. The company were duly notified and required to supply gates, but did not do so, and the plaintiff's cattle, which were pasturing in a field on one side of the track, the watercourse being dried up, got through the culvert into a field on the other side of the track and thence on to the railway track, where they were injured:—*Held*, that the railway company were liable for the damages sustained thereby by the plaintiff.—*James* v. *Grand Trunk Rw. Co.*, 20 C. L. T. 278, 31 O. R. 672.

Culvert — *Negligence—Cattle on track.*]—A railway company are under no obligation to erect and maintain a fence on each side of a culvert across a watercourse. Where cattle went through a culvert into a field and thence to the highway and straying on to the railway track were killed, the company were held, not liable to their owner; Taschereau, J., dissenting. Judgment of Court of Appeal, 1 O. L. R. 127, 21 C. L. T. 110, affirming the decision at the trial, 31 O. R. 672. 20 C. L. T. 278, reversed. *James* v. *Grand Trunk Rw. Co.*, 22 C. L. T. 2, 31 S. C. R. 420.

Defective fencing — *Cattle — Highway—Negligence.*] — The plaintiff was the owner of a field, bounded on the one side by the main line of the defendants' railway, and on the other side by a switch thereof, and abutting on a highway, which was crossed by both tracks. Owing to a defect in the fence between the switch and the field, the plaintiff's cow escaped from the field on to the switch, which she crossed, and, going over the land of a private owner, which was not fenced off from the switch, and then along a lane, she got on to the highway, and then proceeding along the highway she got to the main line, whence by reason of a defective cattle guard she got on to the track and was killed by a passing train:—*Held*, that the defendants were liable therefor. *James* v. *Grand Trunk Rw. Co.*, 31 S. C. R. 420, distinguished. *Davidson* v. *Grand Trunk Rw. Co.*, 23 C. L. T. 185, 5 O. L. R. 574, 2 O. W. R. 185.

Duty to fence — *Breach — Railway Act, R. S. C. 1906, c. 37, ss. 254, 427—Right to damages—Fence ordinance—Pleading—"Not guilty by statute" — "Lawful fence."*]—Where a statutory duty is imposed, neglect of the duty gives the party damnified thereby a right of action, unless the person damnified is excluded from a particular class of persons who are alone intended to be benefited by the statute.—The fences required to be erected by the railway company, under s. 254 of the Railway Act, R. S. C. 1906 c. 37, are for all purposes which they may serve; and consequently, by virtue of s. 427, the company are liable for all damage of whatever kind resulting from the omission to fence:—*Held*, affirming the judgment of Harvey, J., 1 Alta. L. R. 92, 7 W. L. R. 801, that where the railway company had not fenced their right of way adjacent to the plaintiff's lands, and cattle came in on such lands, and caused damage to crops, by reason of the company's neglect to erect fences, the railway company were liable, notwithstanding that the rest of the lands were not enclosed by a "lawful fence." *Per* Stuart, J.:—The Fence Ordinance (N. W. T. 1903, 2nd session, c. 28) has no application to a case where it is the duty of the person charged with damage to maintain that portion of the fence through which animals doing damage have entered. It makes no difference whether the rest of the lands are fenced or not.—History and effects of the pleas of "Not guilty" and "Not guilty by statute" traced and discussed.—The necessity of noting, in the margin of the plea, the statute permitting the plea, and the particular statute relied on, discussed, with remarks as to the argument *ab inconvenienti* in respect of these pleas. *Toll* v. *Can. Pac. Rw. Co.*, 1 Alta. L. R. 244, considered.—*Winterburn* v. *Edmonton Yukon & Pac. Rw. Co.*, 8 W. L. R. 795, 1 Alta. L. R. 298.

Duty to maintain — *Opening in fence —Cattle.*]—As the law obliges railway companies to maintain fences on both sides of the track in a good condition, it follows that they are responsible for damage caused to an animal in consequence of their having in one of such fences left an opening of such a size as to permit of an animal getting through, and that even where such opening is at a spot where there is a ditch used for the purpose of draining the lands on each side of the track. *Huot* v. *Quebec Rw., Light, and Power Co.*, 21 Que. S. C. 427.

Injury to horse.]—The defendants maintained along their line of railway, through a farming country, a barbed wire boundary fence, without any pole, board, or other capping connecting the posts; the plaintiff's horse, picketed in his field adjoining, became frightened from some cause unexplained and ran into the fence and received injuries on account of which it had to be killed:—*Held*, that the fence was not inherently dangerous, and therefore the company were not

liable. The test is whether the fence is dangerous to ordinary stock under ordinary conditions and not whether it is dangerous to a bolting horse. *Plath* v. *Grand Forks and Kettle River Valley Rw. Co.*, 24 C. L. T. 258, 10 B. C. R. 299.

Negligence — *Damages — Remoteness.*]—Under s-s. 3 of s. 194 of the Railway Act (53 V. c. 28, s. 2), a railway company is not liable in damages for the death of an animal which, having got on the track through a defective fence, is frightened by a train and then runs into a barbed wire in another part of the fence and is so cut by the barbs that it dies. The damage to the animal cannot be said to be "caused by any of the company's trains or engines," unless the animal is actually struck by the train or engine. Dicta of the Judges in *James* v. *Grand Trunk Rw. Co.*, 1 O. L. R. 127, 31 S. C. R. 420, and decision in *Winspear* v. *Accident Insurance Co.*, 6 Q. B. D. 42, followed. *McKellar* v. *Can. Pac. Rw. Co.*, 24 C. L. T. 152, 14 Man. L. R. 614.

Negligence — Excessive speed in city—Unfenced track—Findings of jury—Contributory negligence of child—Inference from facts—Rule 817. *Potvin* v. *Can. Pac. Rw. Co.*, 4 O. W. R. 511.

Negligence—*Failure to fence—Contributory negligence.*]—A street ran to the north and to the south from the defendants' tracks in the city of Hamilton, but did not cross them. With the tacit acquiescence of the defendants, however, foot passengers were in the habit of crossing the tracks from one part of the street to the other, and for convenience in doing so part of the fence between the tracks and each part of the street had been removed. A boy of nine, intending to cross from one part of the street to the other, walked through the opening in the fence to one of the tracks. While he was standing and playing upon this track waiting for a train on another track to pass, he was struck by a train running at a speed of about forty miles an hour and was killed: —*Held*, that there was a clear neglect of a statutory duty by the defendants in permitting the tracks to remain unfenced, and at the same time running at such a high rate of speed; that it was for the jury to say whether, upon all the facts, the deceased had displayed such reasonable care as was to have been expected from one of his tender years, and that their verdict in favour of the child's father could not be interfered with. *Tubb* v. *Grand Trunk Rw. Co.*, 24 C. L. T. 304, 8 O. L. R. 203, 3 O. W. R. 885.

"Negligence or wilful act or omission of owner" — "Improved or settled and inclosed"—Railway Act, 3 Edw. VII. c. 58, ss. 199, 237 (D.). *Phair* v. *Canadian Northern Rw. Co.*, 6 O. W. R. 137.

Railway Act, 1903, s. 199 (3)—"*Improved or settled, and inclosed.*]—1. Under s. 199 of the Railway Act, 1903, a railway company is required to erect and maintain fences suitable and sufficient to prevent cattle from getting on the railway from adjoining land which is cultivated and settled on, although not inclosed. 2. The words "not improved or settled, and inclosed," in s-s. 3 of that section, describing lands in respect of which the company is not required to fence, should either be construed to mean "not improved and not inclosed, or not settled and not inclosed," or should be read with the comma put after the word "improved," instead of after the word "settled," thus, "not improved, or settled and inclosed," so that, either way, the obligation to fence exists as to land that is either (1) improved, or (2) settled and inclosed. *Dreger* v. *Can. North. Rw. Co.*, 15 Man. L. R. 386, 1 W. L. R. 126.

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11. Fire from Locomotives.

See Negligence.

Barn near defendants' railway — *Evidence.*]—Plaintiff's barn was destroyed by fire shortly after defendants' engine had passed. There was little or no wind blowing at the time. Trial Judge held defendants liable:—*Held*, on appeal, that there was no evidence that defendants' engine caused the fire. The most that could be said against the defendants was that their engine might have caused the fire, but Judges are not allowed to guess at what might have been. Action dismissed. *Beal* v. *Michigan Central Rw. Co.* (1909), 14 O. W. R. 778, 1 O. W. N. 89, 19 O. L. R. 502.

Damage to property adjoining railway — *Negligence — Evidence — Provincial statutes respecting setting out fire — Intra vires — Application to Canadian Pacific Railway Company.*]—In an action brought by the owner of a lot of woodland adjoining the defendants' line of railway to recover damages alleged to have been caused by a fire negligently started by the defendants' servants, and allowed to extend to the plaintiff's land, it appeared in evidence that N, a section foreman of the defendants' railway, set fires to burn up some piles of sleepers and rubbish on the railway line. The weather had been very dry for a long time, and forest fires were burning all over the country. Witnesses on behalf of the plaintiff testified that they saw fire on the railway line at this time, and traced its course through the fence to the plaintiff's land. N. swore that the fires which he started were all burnt out before the fire was seen on the plaintiff's property, and other evidence was given to the same effect. The jury found that the fire spread from the fire set by N., and that N. negligently and unreasonably allowed it to extend. A verdict was entered for the plaintiff for $500:—*Held*, that there was sufficient evidence to justify the verdict. *Per* Tuck, C.J., and McLeod, J., that 48 V. c. 11 and 49 V. c. 9 (to prevent the destruction of forests and other property by fire) are not *ultra vires* of the local legislature. *Per* McLeod, J., that the defendants, having brought on their land a dangerous element, not naturally there, did so at their peril, and, if it caused injury, they were liable, though no negligence was proved. The provision of the statutes that a person starting a fire, except for certain purposes specified, between the 1st May and the 1st December is guilty of negligence, applied to the defendants, and they were, therefore, liable under the Acts as well as at common law. *Grant* v. *Can. Pac. Rw. Co.*, 36 N. B. R. 528.

Destruction by fire at station of goods left for carriage — *Liability of railway company — Carriers — Implied incorporation of usual shipping terms.*]—Action to recover value of apples destroyed by fire while lying on platform of defendants' railway station, accidentally burned:—*Held*, that defendants are not liable as common carriers, as plaintiff's agent had not finally instructed defendants' agent as to any particular barrels to be forwarded. *Everist* v. *Grand Trunk*, 13 O. W. R. 1063.

Destruction of "crops" — *Sparks — Locomotive — Marsh hay cut and baled — Railway Act, R. S. C. 1906, c. 37, s. 298.*]—The Railway Act, R. S. C. 1906, c. 37, s. 298, enacts that "whenever damage is caused to crops . . . plantations, or buildings and their contents, by a fire, started by a railway locomotive, the company making use of such locomotive, whether guilty of negligence or not, shall be liable for such damage":— *Held*, that the plaintiff was not entitled to recover under the above section in respect to marsh hay cut at some distance from the railway and baled and piled on the property of another person along a siding of the defendants, to which place it had been carried while awaiting shipment, and where it had been destroyed by fire caused by sparks from one of the defendants' locomotives. Judgments of Teetzel, J., and a Divisional Court reversed. *Fraser* v. *Pere Marquette Ry. Co.* (1908), 18 O. L. R. 589, 12 O. W. R. 581, 838, 13 O. W. R. 883, 9 Can. Ry. Cas. 308.

Destruction of property — Verdict against company — Fire insurance—Credit for insurance moneys. *Stratford* v. *Toronto, Hamilton and Buffalo Ry. Co.*, 6 O. W. R. 698.

Destruction of property by spark from locomotive — *Negligence of defendant — Proximate cause.*]—Plaintiff was the owner of a warehouse in close proximity to defendants' railway. Within six feet of the warehouse he piled a quantity of hay, which became ignited by a spark from a locomotive on the railway, and the fire spread to the warehouse, which was totally destroyed. The jury found that the fire originated from the defendants' engine, but that the plaintiff had been guilty of negligence in storing the hay in such close proximity to the railway:— *Held*, that as the jury had found the plaintiff negligent, and as such negligence was the proximate cause of the damage, he could not recover. *Cairns* v. *Can. Nor. Ry. Co.* (1909), 2 Sask. L. R. 19, 9 Can. Ry. Cas. 396, 10 W. L. R. 39.

Injury to property — Cause of fire — Evidence — Conjecture — 14 Geo. III. c. 78 (Imp.) — Precautions — Notice. *Laidlaw* v. *Crow's Nest Pass Ry. Co.* (B.C.), 10 W. L. R. 17.

Negligence — *Destruction of property in neighbourhood — Right of way — Railway Act, 1903, ss. 128, 239 — Evidence — Admissibility of railway map by appellate Court.*]—By s. 239 of the Railway Act, 1903 (3 Edw. VII. c. 58), it is provided that the respondents, a railway company, shall at all times keep their right of way free from combustible matter, s.s. 2 providing that when damage is caused by a fire started by a railway locomotive the company shall be liable whether guilty of negligence or not, in the latter case the liability being limited to a specified amount.—Where ignition occurred by reason of sparks from the respondents' engine at a rocky bluff shewn by a map filed by them in the Department of Railways and Canals under s. 134 of the Railway Act of 1888, repealed by s. 128 of the later Act, to be within the delineated right of way, the respondents were held to be liable for the damages assessed by the jury.—The Supreme Court of Canada, having, on the objection of the respondents, refused to admit the map in evidence, on the ground that it had not been tendered at the trial, ordered a new trial:— *Held*, that, whether or not the Supreme Court was right in refusing to admit the map, their Lordships would admit it, that it was conclusive in favour of the appellants, and that there had been no misdirection. Judgment of the Supreme Court of Canada in *Red Mountain Ry. Co.* v. *Blue*, 39 S. C. R. 390, reversed, and judgment of Supreme Court of British Columbia, *Blue* v. *Red Mountain Ry. Co.*, 12 B. C. R. 409, 5 W. L. R. 233, restored. *Blue* v. *Red Mountain Ry. Co.*, [1909] A. C. 361, 9 Can. Ry. Cas. 149.

Sparks from engine — *Evidence — Verdict.*]—See *Jackson* v. *Grand Trunk Ry. Co.*, 22 C. L. T. 12, 249, 2 O. L. R. 689, 32 S. C. R. 245.

Sparks from engine — *Liability in absence of negligence.*] — The respondent brought suit for damages caused by a fire originating from sparks escaping from a locomotive engine of the company appellant, while the engine was employed in the ordinary use of its railway. The question of negligence on the part of the company was specially withdrawn from the consideration of the tribunal on the present appeal:— *Held*, reversing the judgment in 9 Que. Q. B. 551, that a railway company authorized by statute to carry on its railway undertaking in the place and by the means adopted, is not responsible in damages for injury not caused by negligence, but by the ordinary and normal use of its railway. *Can. Pac. Ry. Co.* v. *Roy*, 12 Que. K. B. 543 [1902] A. C. 220.

Sparks from engine — *Limitation of actions — "By reason of the construction and operation of the railway" — Statutes.*]—In action for damages caused by sparks from a railway engine, the railway company claimed the benefit of s. 27 of the Consolidated Railway Act, 1879, which was incorporated into their charter by Parliament. Section 27 provides, in part, that all suits for indemnity for any damage or injury sustained by reason of the railway shall be instituted within six months next after the time of such supposed damage sustained:— *Held*, on appeal, *per* Hunter C.J., and Clement, J., that by virtue of s. 20 of the Interpretation Act (Dominion), the Railway Act, 1903, applies to the Canadian Pacific Railway.—*Per* Irving, J.: —The general Railway Act of 1879, notwithstanding its repeal by subsequent general legislation, governs the Canadian Pacific Rail-

way. *Northern Counties Investment Trust Limited* v. *Can. Pac. Rw. Co.*, 4 W. L. R. 539, 13 B. C. R. 150.

Sparks from engine — *Negligence, Absence of — Liability.*]—Action for damage for injury to trees caused by fire arising from sparks from a locomotive engine belonging to the defendant company:—*Held*, following *Roy* v. *Can. Pac. Rw. Co.*, 9 Que. Q. B. 551, 20 C. L. T. 441, that, where injury is occasioned by sparks from an engine, the railway company is responsible in damages for the same, without proof of direct negligence in the operation of the road. *Henley* v. *Can. Pac. Rw. Co.*, 21 C. L. T. 394.

Sparks from engine — *Negligence, absence of — Liability.*] — Fire was discovered in two or three places along the defendants' right of way shortly after a train and engine had passed. In spite of efforts to control it, this fire spread and injured the plaintiff's wood lot, and he brought this action for damages. The trial Judge held that the fire was caused either by sparks from the engine or originated in some way from the train—he did not determine which—and that this created a presumption of negligence which the defendants had not rebutted:—*Held*, that the French law, and consequently the law in the Province of Quebec, is that the railway company are responsible, notwithstanding the adoption of every means of precaution known to science. The English authorities are not binding in a case pertaining to civil rights and liabilities: *North Shore Rw. Co.* v. *McWillie*, M. L. R. 5 Q. B. 364, 17 S. C. R. 511. Even in countries where it is generally admitted that the statutory authorisation to use engines has taken away the common law liability, and left the railway companies responsible for negligence alone, the rule thus laid down in *Rex* v. *Pease*, 4 B. & Ad. 30, *Vaughan* v. *Taff Valley Rw. Co.*, 5 H. & N. 59, and similar cases, has sometimes been doubted and evaded: see *per* Bramwell, L.J., in *Powell* v. *Fall*, 5 Que. B. D. 597; *Ball* v. *Grand Trunk Rw. Co.*, 16 C. P. 252. *Roy* v. *Can. Pacific Rw. Co.*, 20 C. L. T. 441, 9 Que. Q. B. 551.

Sparks from engine — *Negligence — Destruction of property in neighbourhood—Right of way—Railway Act, 1903, ss. 118 (j), 239—Charge by Judge — Finding by jury—New trial—New evidence on appeal.*] —The question for the jury was, whether or not the place of the origin of the fire which caused the damage complained of in the action was within the limits of the "right of way" which the defendants were, by the Railway Act, 1903, obliged to keep free from unnecessary combustible matter, and their finding was that it was, but the charge of the Judge was calculated to leave the impression that any space where trees had been cut, under the powers conferred by s. 118 (*j*) of that Act, might be treated as included within the "right of way," and, in effect, made a direction, on issues not raised by the pleadings or at the trial, as to negligent exercise of the privilege conferred by that section:—*Held*, that, in consequence of the want of more explicit directions to the jury on the question of law and the misdirection as to the issues, the defendants were entitled to a new trial.—Judgment in *Blue* v. *Red Mountain Rw. Co.*, 12 B. C. R. 460, 5 W. L. R. 233 reversed.—The Court refused an application by the respondents on the hearing of the appeal, for leave to supplement the appeal case by the production of plans of the right of way which had not been produced at the trial, as being contrary to the established course of the Court. *Red Mountain Rw. Co.* v. *Blue*, 39 S. C. R. 330.

Sparks from engine — Negligence — Spark-arrester — Neglect to adopt latest safety devices—Conflict of expert evidence —Question for jury. *Oatman* v. *Michigan Central Rw. Co.*, 7 O. W. R. 81.

Sparks from engine — *Negligence —Statutory powers — Costs.*]—A railway company authorised by statute to carry on its railway undertaking in the place and by the means adopted is not responsible in damages for injury not caused by negligence, but by the ordinary and normal use of its railway; or, in other words, by the proper execution of the power conferred by the statute. *Geddis* v. *Proprietors of Bann Reservoir*, 3 App. Cas. 430, 438, and *Hammersmith Rw. Co.* v. *Brand*, L. R. 4 H. L. 215, followed. The previous state of the common law imposing liability cannot render imperative the positive enactment of a statute. Neither the Civil Code of Lower Canada, Art. 356, nor the Dominion Railway Act, ss. 92, 288, on their true construction, contemplates the liability of a railway company acting within its statutory powers. So held, where the respondent had suffered damage caused by sparks escaping from one of the appellants' locomotive engines while employed in the ordinary use of its railway. Judgment in 20 C. L. T. 441, 9 Que. Q. B. 551, reversed. Appeal allowed, appellants to pay respondent's costs in accordance with the terms on which special leave to appeal was granted. *Can. Pac. Rw. Co.* v. *Roy*, [1902] A. C. 220.

Sparks from locomotive — *Evidence as to cause of fire — Judge's charge—Section 298 Railway Act (Canada).*]—Action for damages for destruction of plaintiff's mill by fire, said to have been caused by sparks from a locomotive engine of defendants:—*Held*, that the inference drawn by the jury that the sparks came from defendants' locomotive engine was well warranted by the evidence.—*Held*, further that when the trial Judge said in his charge to assess the damages at $5,000, it was a mere inadvertence, which was not objected to at the time. *Caledonia* v. *Grand Trunk* (1900), 14 O. W. R. 394

Sparks from locomotives — *Destruction of "standing bush" — Findings of jury — Dominion Railway Act, R. S. C. 1906, c. 37, s. 298 — "Lands"—"Plantations" — Interpretation of statute.*]—Action for damages for injury to plaintiffs' property by fire caused, as alleged, by sparks from one of defendants' engines. Jury found in favour of plaintiffs:—*Held*, on appeal, there is evidence to support jury's findings and oral answer of foreman.—*Held*, further, that "standing bush" is covered by "lands" in s. 37 above, notwithstanding use of "plantations" in same section. *Campbell* v. *C. P.*

R. (1909), 14 O. W. R. 144, 18 O. L. R. 466, 9 Can. Ry. Cas. 300.

Leave to appeal to Court of Appeal on question of law granted, 14 O. W. R. 349.

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12. Injuries to Persons and Vehicles at Crossings.

See Negligence.

Brakesman — *Death — Negligence — Defects in equipment of train — Pleading.*]—The plaintiff's claim was for damages for the death of his son, an infant, alleged to have been occasioned by the negligence of the defendants, on one of whose freight trains he was working as a brakesman at the time of the accident which resulted in his death. The alleged negligence consisted in the absence of air brakes and bell signal cords from the equipment of the train:—*Held*, that, although the Railway Act in force at the time of the accident required only passenger trains to be equipped with bell signal cords and air brakes, it was still a question depending upon evidence whether the absence of these appliances on freight trains was negligence for the purposes of such an action. The statement of claim should allege that the defendants were aware or should have been aware of the defects. It is not necessary to allege that the deceased was ignorant of the defects. *Makarsky* v. *Can. Pac. Rw. Co.*, 15 Man. L. R. 57.

Brakesman — Negligence of fellow-servants—Turning switch in face of approaching train — Derailment of train—Contributory negligence — Speed of train—Damages —*Quantum*. *Stewart* v. *Père Marquette Rw. Co.*, 6 O. W. R. 724.

Conductor — *Negligence — Proximate cause — Imprudence of person injured — Display of wrong signal — Case of jury — New trial.*]—A railway train was approaching a station in London, and the conductor jumped off before it reached it, intending to cross a track between his train and the station, contrary to the rule forbidding employees to get off a train in motion. A light engine was at the time coming towards him on the track he wished to cross, which struck and killed him. The light engine was moving reversely, and showed a red light at the end nearest the conductor, which would indicate that it was either stationary or going away from him. In an action by the conductor's widow she was nonsuited at the trial, and a new trial was granted by the Court of Appeal, 3 O. W. R. 892:—*Held*, reversing the judgment of the Court of Appeal, Davies and Killam, JJ., dissenting, that, as the light engine had been allowed to pass a semaphore beyond the station, on the assumption which was justified, that it would pass before the train came to a stop at the station, and as, if the deceased had not, contrary to rule, left the train while in motion, he could not have come into contact with the engine, the plaintiff was not entitled to recover. *Per* Davies and Killam, JJ., dissenting, that the act of the deceased in getting off the train when he did was not the proximate cause of the accident, and the plaintiff was entitled to have the opinion of the jury as to whether or not deceased was misled by the red light. *Birkett* v. *Grand Trunk Rw. Co.*, 25 C. L. T. 1; *Grand Trunk Rw. Co.* v. *Birkett*, 35 S. C. R. 296.

Death — *Negligence — Defective engine —Dangerous crossing — Undue speed — "Train of cars" — Crown railway — Direction of minister — Precautionary measures against accident.*]—The husband of the suppliant was killed by being struck by the tender of an engine while he was on a level crossing over the Intercolonial Railway tracks in the city of Halifax. The evidence shewed that the crossing was a dangerous one, and that no special provision has been made for the protection of the public:—*Held*, that the accident was attributable to the negligence of officers and servants of the Crown employed on the railway, both in using a defective engine and in maintaining too high a rate of speed under the circumstances. 2. An engine and tender do not constitute a "train of cars" within the meaning of s. 29 of the Government Railway Act, R. S. C. c. 38. *Hollinger* v. *Can. Pac. Rw. Co.*, 24 O. R. 705, not followed. 3. Where the Minister of Railways, or the Crown's officer under him whose duty it is to decide as to the matter, comes, in his discretion, to the conclusion not to employ a watchman or to set up gates at any level crossing over the Intercolonial Railway, it is not for the Court to say that the Minister or the officer was guilty of negligence because the facts shew that the crossing in question was a very dangerous one. *Harris* v. *The King*, 24 C. L. T. 388.

Death — Negligence — Display of wrong signal — Contributory negligence — More than one possible conclusion from facts not in dispute — Case for jury — Nonsuit — New trial. *Birkett* v. *Grand Trunk Rw. Co.*, 3 O. W. R. 892.

Destruction of carriage crossing track — *Negligence — Engine moving reversely — Highway crossing — Speed of train.*]—A railway company who use a locomotive, rear end foremost, to haul a train, so that the driver cannot see the track immediately ahead, are guilty of negligence and liable to contribute to the loss arising from a carriage being run down at a railway crossing, when the accident might possibly have been averted, had the driver of the locomotive been able to see the carriage approach.—2. There is no statutory obligation to slacken the speed of a railway train at an ordinary railway crossing. *Grand Trunk Rw. Co.* v. *Daoust*, 14 Que. K. B. 548.

Negligence — *Braking apparatus—Notice of defects — Benefit society — Contract indemnifying employer.*] — The "sander" and sand-valves of a railway locomotive, which may be used in connection with the brakes in stopping a train, do not constitute part of the "apparatus and arrangements" for applying the brakes to the wheel required by s. 243 of the Railway Act of 1888. Failure to remedy defects in the sand-valves, upon notice thereof given at the repair shops in conformity with the company's rules, is merely the negligence attributable to the company itself; therefore, the company may validly contract with its employees so as to exonerate itself from liability for such negli-

gence, and such a contract is a good answer to an action under Art. 1056 of the Civil Code of Lower Canada. *The Queen* v. *Grenier*, 30 S. C. R. 42, followed. Girouard, J., dissented on the ground that the negligence found by the jury was negligence of both the company and its employees. Judgment in 12 Que. K. B. 1, affirming judgment in review, 21 Que. S. C. 346, reversed. *Grand Trunk Rw. Co.* v. *Miller*, 24 C. L. T. 77, 34 S. C. R. 45.

Negligence — Conflicting evidence — Findings of jury — Excessive damages — Reduction — New trial. *Hockley* v. *Grand Trunk Rw. Co.*; *Davis* v. *Grand Trunk Rw. Co.*, 5 O. W. R. 572.

Negligence — Crossing not at highway and not sanctioned by Board of Railway Commissioners — Non-compliance with ss. 242 and 243 of Railway Act — Fences at crossing — Invitation to public — Costs. *Bird* v. *Can. Pac. Rw. Co.* (N.W.T.), 6 W. L. R. 393.

Negligence — *Excessive speed — Fencing — Railway Act — Evidence — Reasonable inferences.*]—The provisions of 55 & 56 V. c. 27, s. 6, amending s. 197 of the Railway Act, 1888, and requiring, at every public road crossing at road level of the railway, the fences on both sides of the crossing and of the track to be turned into the cattle guards, apply to all public road crossings, and not to those in townships only, as is the case of the fencing prescribed by s. 194 of the Railway Act, 1888. *Grand Trunk Rw. Co.* v. *McKay*, 34 S. C. R. 81, followed. Three persons were near a public road crossing when a freight train passed, after which they attempted to pass over the track, and were struck by a passenger train coming from the direction opposite to that of the freight train, and killed. The passenger train was running at the rate of 45 miles an hour, and it was snowing slightly at the time. On the trial of actions under Lord Campbell's Act against the railway company, the jury found that the death of the three persons was due to negligence "in violating the statute by running at an excessive rate of speed," and that deceased were not guilty of contributory negligence. A verdict for the plaintiff in each case was maintained by the Court of Appeal:—*Held*, that the defendants were liable; that the deceased had a right to cross the track, and there was no evidence of want of care on their part, as the same could not be presumed; and, though there may not have been precise proof that the negligence of the company was the direct cause of the accident, the jury could reasonably infer it from the facts proved; and their finding was justified. *McArthur* v. *Dominion Cartridge Co.*, [1905] A. C. 72, followed. *Wakelin* v. *London and South Western Rw. Co.*, 12 App. Cas. 41, distinguished.—*Held*, also, that the fact of deceased starting to cross the track two seconds before being struck by the engine was not proof of want of care, that owing to the snowstorm and the escaping steam and noise of the freight train they might well have failed to see the headlight, or hear the approach of the passenger train if they had looked and listened. Judgment of the Court of Appeal affirmed. *Hainer* v. *Grand Trunk Rw. Co.*, 25 C. L. T. 93; *Grand Trunk Rw. Co.* v. *Hainer*, 36 S. C. R. 180.

Negligence — Failure to give warning of approach of train — Findings of jury — Admission of deceased that he ran into train —Contributory negligence — Action by father and administrator — Failure to prove pecuniary loss — Nonsuit. *Moir* v. *Can. Pac. Rw. Co.*, 9 O. W. R. 22, 10 O. W. R. 413.

Negligence — *Failure to look for train —Contributory negligence — Case for jury.*]—In an action under the Fatal Accidents Act to recover damages for the death of a man who was struck by a light engine of the defendants when attempting to cross their track in a waggon with horses, it appeared that the deceased on approaching the track looked both ways, but did not look again just before crossing when he could have seen the engine. The jury found that the whistle was not sounded nor the bell rung, that such neglect was the proximate cause of the injury, and that the deceased could not by the exercise of ordinary care have avoided the injury:—*Held*, that the omission to look again was not such a circumstance as would have justified withdrawing the case from the jury; and a judgment for the plaintiffs upon the findings should not be disturbed. Decision of Meredith, J., affirmed. *Misener* v. *Wabash Rw. Co.*, 12 O. L. R. 71, 7 O. W. R. 951.

Negligence — *Failure to look for train —Contributory negligence — Case for jury.*]—The plaintiff was injured by being run over at a highway crossing by a train moving reversely, and brought this action to recover damages for his injuries. The jury found that the plaintiff's injury was caused by the defendants' negligence in not using sufficient signals to attract his attention, that the conductor was not on the rear end of the car, and that the plaintiff could not by the exercise of ordinary care have avoided the injury. The train was coming from the east, and the plaintiff on approaching the track looked to the east and did not see it, his view being obstructed, and his attention being directed to a train standing at the station to the west, did not again look to the east when, just before attempting to cross, he might have seen the train approaching:—*Held*, that it was not so clearly manifest that the plaintiff was the cause of his own injury that there was nothing to leave to the jury; although the plaintiff might be guilty of some neglect in approaching the track, it was for the jury to say whether the defendants might not still have avoided the accident if they had discharged their statutory duty; the case was properly left to the jury; and their findings were sufficient to support a verdict for the plaintiff. Decision of a Divisional Court, 5 O. W. R. 862, reversed. *Wright* v. *Grand Trunk Rw. Co.*, 12 O. L. R. 114, 7 O. W. R. 636.

Negligence — *Failure to look for train —Contributory negligence — Case for jury —Unsatisfactory verdict — Damages — New trial.*]—The infant plaintiff was injured by being struck by the engine of a train of the defendants while crossing their track at a level highway crossing. Had he looked he could have seen the approach of the train

but he did not look. There was some evidence that the usual statutory signals of the approach of the train were not given. The infant plaintiff sought to recover damages for his injuries, and the adult plaintiff, the infant's father, claimed damages for loss and expense incurred by him in consequence of the injuries:—*Held*, affirming the decision of Street, J., 10 O. L. R. 330, 5 O. W. R. 664, that the case could not have been withdrawn from the jury; but that the findings were opposed to the great weight of evidence, and the damages recovered by the father excessive; and therefore there should be a new trial. *Sims* v. *Grand Trunk Rw. Co.*, 12 O. L. R. 39, 7 O. W. R. 648.

Negligence — *Finding of jury — Evidence.*]—A., as administratrix, brought an action against the defendants to recover compensation for the death of her husband by negligence, and alleged in her declaration that the negligence consisted in running a train at a greater speed than six miles an hour through a thickly peopled district, and in failing to give the statutory warning on approaching the crossing where the accident happened. At the trial questions were submitted to the jury, who found that the train was running at a speed of 25 miles an hour, that such speed was dangerous for the locality, and that the death of the deceased was caused by neglect or omission of the company in failing to reduce speed, as provided by the Railway Act. A verdict was entered for the plaintiff, and, on motion of the Court *en banc* to have it set aside and judgment entered for the defendants, a new trial was ordered, on the ground that questions as to bell having been rung and the whistle sounded should have been submitted to the jury. The plaintiff appealed to the Supreme Court of Canada to have the verdict at the trial restored, and the defendants, by cross-appeal, asked for judgment:—*Held*, Idington, J., dissenting, that by the above findings of the jury the defendants were exonerated from liability on the other grounds of negligence charged, as to which they had been properly directed by the Judge, and the new trial was improperly granted on the ground mentioned:—*Held*, also, that though there was no express finding that the place at which the accident happened was a thickly peopled portion of the district, it was necessarily imported in the findings given above; that this fact had to be proved by the plaintiff, and there was no evidence to support it; and that, as the evidence showed it was not a thickly peopled portion, the plaintiff could not recover, and the defendants should have judgment on their cross-appeal. Judgment in 2 W. L. R. 298 reversed. *Andreas* v. *Can. Pac. Rw. Co.*, 26 C. L. T. 72, 37 S. C. R. 1.

Negligence — *Findings of jury—"Look and listen" — Contributory negligence.*]—M. attempted to drive over a railway track which crossed the highway at an acute angle, where his back was almost turned to a train coming from one direction. On approaching the track he looked both ways, but did not look again just before crossing, when he could have seen an engine approaching, which struck his team, and he was killed. In an action by his widow and children the jury found that the statutory warnings had not been given, and a verdict was given for the plaintiffs and affirmed by the Court of Appeal:—*Held*, affirming the judgment of the Court of Appeal, 12 O. L. R. 71, *Misener* v. *Wabash Rw. Co.*, Fitzpatrick, C.J., *hesitante*, that the findings of the jury were not such as could not have been reached by reasonable men, and the verdict was justified. *Wabash Rw. Co.* v. *Misener*, 27 C. L. T. 154, 38 S. C. R. 94.

Negligence — *Findings of jury—Train "behind time" — Dominion Railway Act, 1903*, s. 215.]—In an action to recover damages for the death of a man who was struck by a train of the defendants at a highway crossing, the evidence as to whether the statutory signals were given was conflicting, and, while it was shewn that the train was about ten minutes late, there was no evidence as to the cause of the delay, nor was it shewn that the deceased was misled thereby. The jury found that the defendants were guilty of negligence, which consisted in the train being "behind time;" but they did not answer a question put to them as to whether the bell was ringing:—*Held*, that no actionable negligence was shewn or found, and the action should be dismissed; it was not a case for a new trial.—Section 215 of the Dominion Railway Act, 1903, which requires that all regular trains shall be started as nearly as practicable at regular hours, fixed by public notice, did not aid the plaintiffs. *Hasely* v. *Michigan Central Rw. Co.*, 9 O. W. R. 229, 13 O. L. R. 509.

Negligence — *Neglect of statutory warning — Collision at crossing — Contributory negligence — Nonsuit.*]—The deceased, who was well acquainted with the locality, while driving along a highway running in the same direction as and crossing a railway, was killed at the crossing by a locomotive, running alone, coming from a direction behind him. The trial Judge left it to the jury to say whether there was negligence on the part of the defendants, and whether the deceased could with ordinary diligence have seen the engine in time to avoid the collision, and whether he was guilty of any want of ordinary care and diligence which contributed to the accident. The jury found that the engine was going unusually fast; that the whistle was sounded at a crossing three-fifths of a mile off, but was not continued at the other crossings, and that the deceased was not guilty of contributory negligence:—*Held*, that the case had been properly left to the jury, and that the verdict not being against the weight of evidence ought not to be disturbed. *Peart* v. *Grand Trunk Rw. Co.*, 10 O. L. R. 753 (Privy Council).

Negligence — Omission to give warning of approach — Sidewalk — Way of access to station — Highway — Jury — Misdirection — New trial. *Hanson* v. *Can. Pac. Rw. Co.* (N.W.T.), 4 W. L. R. 385.

Negligence — Speed of train — Failure to give statutory warning — Fences — Thickly populated part of town — Contributory negligence — Findings of jury — New trial. *Andreas* v. *Can. Pac. Rw. Co.* (N.W.T.), 2 W. L. R. 249.

Negligence — *Speed of train — Fences —Watchman or gates at highway crossing.*] —A railway company is under no legal obligation to slacken the speed of its trains through a town, if its track is properly fenced.—2. The failure of a railway company to have a guardian, or gates, or some equivalent form of protection, at a street crossing, however dangerous from the lay of the land making it impossible to see approaching trains, it is not a fault that will make the company liable for accidents by collision with its passing trains. *Quebec and Lake St. John Rw. Co.* v. *Girard*, 15 Que. K. B. 48.

Negligence — Statutory signals — Excessive speed — Findings of jury — Contributory negligence — Failure to look for approaching train — Dangerous crossing— Evidence — Previous accident — Inflammatory address to jury — Absence of prejudice. *Sims* v. *Grand Trunk Rw. Co.*, 9 O. W. R. 469.

Negligence — *Warning of approach of train — Failure to give — Reasonable excuse for omission to look for train before crossing — Question for jury — Nonsuit set aside —New trial.*]—Plaintiff was driving in a southerly direction, at night, along a road called the Luzon road, which crosses defendants' line at a right angle. The carriage in which he was driving was struck at the crossing by an express train of defendants' from the east. Plaintiff was thrown out and injured, and his carriage was damaged. Evidence shewed that the plaintiff neither saw nor heard the train approaching until he found himself actually crossing the track, immediately before he was struck, when it was too late to avoid it. He said that the night was so dark that he could not even see the fences at the side of the road, and that he mistook his position in consequence, and supposed that he was still some 400 feet away from the railway track when he found himself upon it. It seemed plain, however, that he must have seen the train had he been at all on the alert. There was some evidence that the cover of the carriage in which he was sitting was up, and this would have prevented his seeing the train. *Wakelin* v. *London and South Western Rw. Co.*, 12 App. Cas. 41, and *Vallée* v. *Grand Trunk Rw. Co.*, 1 O. L. R. 224, considered: —*Held*, that where the railway company fails to give the statutory warning of the approach of a train, and an accident happens, plaintiff is entitled to have the opinion of the jury upon any reasonable excuse given for the omission to look out for the approach of the train, and the Judge cannot himself pass upon the sufficiency of the excuse. The excuses offered by plaintiff in the present case for his omission to see the approach of the train in time to avoid the accident, should not, in accordance with the authorities, have been withdrawn from the jury. Nonsuit set aside and new trial ordered. *Champagne* v. *Grand Trunk Rw. Co.*, 5 O. W. R. 218, 9 O. L. R. 589.

Negligence—Workmen in grain elevator —Tracks in elevator — Shunting engine — Warning — Findings of jury — New trial. *Mott* v. *Grand Trunk Rw. Co.*, 5 O. W. R. 42.

Passenger — *Alighting from moving car —Negligence — Contributory negligence — Findings of jury — Damages.*]—A railway company which has undertaken to carry a passenger to a station on its line must stop its train at that station long enough to give the passenger a reasonable opportunity of getting off. If the train stops, and the passenger, after making reasonable efforts to do so, is unable to get off before it starts again, and jumps off and is injured, the company is liable in damages; provided, however, that, when the passenger jumps off, the train is not moving at such a rate of speed as to make the danger of jumping obvious to a person of reasonable intelligence. The fact of a passenger getting off a train while it is in motion is not in itself evidence of negligence. In every case it is a question to be decided by the jury whether the passenger acted as a reasonable man would do under the circumstances. Where a train scheduled to stop at a named station, did not, on arriving there, stop a sufficient length of time to enable the passengers to get off, and a passenger in attempting to do so, after the train had started, stumbled and fell and was injured, and it was found by the jury on the evidence that he acted as a reasonable man would do under the circumstances, the Court refused to interfere with their finding, or to reduce the damages awarded, $1,000. *Keith* v. *Ottawa and New York Rw. Co.*, 1 O. W. R. 104, 749, 22 C. L. T. 114, 3 O. L. R. 265, 23 C. L. T. 85, 5 O. L. R. 116.

Passenger — *Mere licensee — Duty of company — Negligence.*]—N. had a contract with the defendants to repair a bridge, and, while riding on the locomotive of the company's coal train on his way to the work he was killed by reason of the train falling through the bridge. The engine driver in charge of the train (there being no conductor) had no authority to take passengers, and had instructions not to allow persons to travel on the engine without permission from some competent authority, but the company's officers and servants and other persons authorised by the manager and master mechanic used to ride on the coal train. A few days before the accident N. and the defendants' manager had gone down to the bridge on the engine of a coal train and returned the same way the same day. In an action by N.'s representatives to recover damages from the company for his death, the jury found that the company had undertaken to carry N. as a passenger:—*Held*, that there was no evidence to support such a finding, and that N. was a "mere licensee." The relation of common carrier and passenger does not exist when a person travels on the locomotive of a train without the permission of some officer who has authority to give such permission, and, if injured, such a person has no right to action unless injured through the *dolus* as distinguished from the *culpa* of the carrier. *Nicholson* v. *Union Colliery Co. of British Columbia*, 23 C. L. T. 206, 9 B. C. R. 453.

Passenger in sleeping berth — *Negligence.*]—The plaintiff was a passenger by a night train on the defendants' railway. After retiring to the berth assigned to her—an upper one—she endeavoured to make some change in the manner in which the berth was

made up. She next tried to reach the other end of the berth from the inside, but, just as she leaned to the inside of the car, there was a violent lurch and jerk which threw her into the middle of the passage way, on her back, inflicting severe injuries:—*Held*, that there was evidence of negligence to go to the jury; and a nonsuit was set aside, and a new trial directed. *Smith* v. *Can. Pac. Rw. Co.*, 34 N. S. Reps. 22. Reversed and nonsuit restored: *S. C.*, 21 C. L. T. 427, 31 S. C. R. 367.

Person crossing track — *Highway crossing—Neglect to give statutory warning — Contributory negligence.*]—Persons lawfully using a highway are entitled to assume that the statutory warning will be given by a train crossing the highway, and are not guilty of contributory negligence because while driving a restive horse they approach, in the absence of warning, so close to the crossing as to be unable to control the horse when the train crosses, and are injured, even though they probably, by looking or listening, would have learned of the approach of the train in time to stop far enough away to be in safety. The question of contributory negligence in such a case is for the jury to determine. *Morrow* v. *Can. Pac. Rw. Co.*, 21 A. R. 149, follow ed. *Vallee* v. *Grand Trunk Rw. Co.*, 21 C. L. T. 109, 1 O. W. R. 224.

Person crossing track — Negligence—Contributory negligence — Findings of jury. *Lennox* v. *Grand Trunk Rw. Co.*, 1 O. W. R. 771.

Person crossing track — Negligence—Operating train on line of other company—Subsequent amalgamation — Name—Revivor —Damages — Reduction on appeal. *Brewer* v. *Lake Erie and Detroit River Rw. Co.*, 2 O. W. R. 125.

Person crossing track — Negligence—Proximate cause — Right to lay tracks. *Bonneville* v. *Grand Trunk Rw. Co.*, 1 O. W. R. 304.

Person crossing track — Negligence—Train running reversely — Speed in city — Statutes — Warning — Contributory negligence—Jury. *Mower* v. *Grand Trunk Rw. Co.*, 2 O. W. R. 83.

Person crossing track — Negligence of servants — Non-repair of highway. *Holden* v. *Yarmouth*, 5 O. L. R. 579, 1 O. W. R. 557, 2 O. W. R. 139.

Person crossing track — *Speed — Contributory negligence — Damages — Remoteness—Succession — Debts of.*]—When a railway train approaches a station at the ordinary speed (twelve miles an hour) of a train about to stop at a station—in a place where the Railway Committee has not ordered a barrier to be placed and which is not shewn to be a populous part of a city, town, or village—and when all the warnings required by law have been given, the railway company are not responsible for an accident happening from the engine striking a vehicle driven in an imprudent manner and at an immoderate speed; and so even where freight cars placed upon a switch have prevented the approach of the train from being seen, the company having the right to use their switch in that way. 2. Even if the company were liable, the plaintiffs could not recover damages for the loss of the labour and society of their mother, aged 76, who was killed in the accident, or for the nervous shock sustained by one of the plaintiffs owing to her mother's death, such damages being problematical, indirect, and remote; nor could the plaintiffs—having accepted the succession of their mother—recover as damages the funeral expenses of their mother and the price of their own mourning garments, they having in paying such expenses but discharged debts properly due by the succession, which would be presumed to be more profitable than onerous, as the plaintiffs had accepted it. *Filiatrault* v. *Can. Pac. Rw. Co.*, 18 Que. S. C. 491.

Person crossing track — Speed of train in town—Fences—Warnings—Statutory provisions—Jury. *McKay* v. *Grand Trunk Rw. Co.*, 5 O. L. R. 313, 2 O. W. R. 57.

Person crossing under railway bridge — *Height — Injury to person — Railway Acts — Volens.*]—The plaintiff was driving a load of hay on a public highway within the limits of a village, sitting on top of his load. A railway, at a point within the village, was carried over the highway by an iron bridge, and the plaintiff, while driving along the highway under the bridge, was struck on the head by the girders and knocked off the load and injured. The bridge was built in 1856 at a height greater than that required by s. 185 of the Railway Act, 51 V. c. 29, but the municipality and their predecessors, owners of the road subsequently so raised its level as to leave less than the statutory space between the road and the bridge:—*Held*, that the section must be construed as compelling the railway company to construct their bridges in the first place so as to leave the required space below them to the highway and to maintain them at, at least, that height from the original surface of the highway, and not as obliging them to conform from time to time to new conditions created by the persons having control of the highway. *Gray* v. *Danbury*, 54 Conn. 574, specially referred to. *Quære*, whether the plaintiff could have succeeded in any event against the railway company, he having deliberately incurred the risk of the squeeze, which he foresaw, instead of stopping his horses and putting himself into a place free from danger, as he might easily have done. *Carson* v. *Weston*, 21 C. L. T. 145, 1 O. L. R. 15.

Person lawfully in station yard — *Proximate cause — Negligence—Contributory negligence.*]—The plaintiff was walking between the rails of the defendants' tracks in a station yard, and was run down and injured by a reversed engine and tender:—*Held*, that, even if the defendants were guilty of negligence in not giving notice that the engine and tender were in motion, as there was a space between the tracks in the yard where the plaintiff would have been safe, he was guilty of negligence in walking between the rails, and could not recover. *Callendar* v. *Carleton Iron Co.*, 9 Times

L. R. 646, 10 Times L. R. 366, followed. *Phillips* v. *Grand Trunk Rw. Co.*, 21 C. L. T. 103, 1 O. L. R. 28.

Person loading car — Train running into car — Negligence — Appliances — Evidence—Misdirection—*Res ipsa loquitur*—Evidence as to cause. *Mernie* v. *Tilsonburg, Lake Erie, and Pacific Rw. Co.*, 5 O. W. R. 69, 6 O. W. R. 286, 955.

Pleading — *Declaration — Irrelevant allegations.*]—In an action against a railway company to recover damages for the death of the plaintiff's husband from injuries received by being struck by a train at a crossing, allegations in the declaration that at the time of the casualty it was dark and there was much smoke caused by passing trains, and that it was notorious that the defendants ran their trains upon the line in question at an excessive rate of speed, were struck out as irrelevant. *Desjardins* v. *Grand Trunk Rw. Co.*, 8 Que. P. R. 35.

Precautions — *Negligence.*]—From the moment that a railway company, by itself or its servants, has taken all possible and reasonable precautions, it is thereby relieved from all responsibility which might rest upon it in consequence of accidents happening under such circumstances as are mentioned in the report of this case. *Villeneuve* v. *Can. Pac. Rw. Co.*, 21 Que. S. C. 422.

Servant — *Limitation of Actions* — "*By reason of the railway*"—*Amendment—Vested right.*]—The provisions of the Railway Act, 1888, s. 287 (*a*), as to limitations of actions for damages or injury sustained by reason of the railway) apply to actions founded on the commission of acts, not to those founded on the omission of acts, which it was the company's duty to perform. *Kelly* v. *Ottawa Rw. Co.*, 3 A. R. 616, *McWillie* v. *North Shore Rw. Co.*, 17 S. C. R. 571, and *Zimmer* v. *Grand Trunk Rw. Co.*, 19 A. R. 623, considered. If, in an action against a railway company, an amendment of the statement of claim is asked for, it should not be allowed if s. 287 applies, and the amendment sets up a new cause of action. *Findlay* v. *Can. Pac. Rw. Co.*, 21 C. L. T. 461, 5 Terr. L. R. 143.

Servant — *Overhead bridge — Car of another company — "Used" on the railway.*]—When a car of a foreign railway company forms part of a train of a Canadian railway company, it is "used" by the latter company within the meaning of s. 192 of the Railway Act, 51 V. c. 29 (D.), so as to make that company liable in damages for the death of a brakesman caused by the car being so high as not to leave the prescribed headway between it and an overhead bridge. *Atcheson* v. *Grand Trunk Rw. Co.*, 21 C. L. T. 108, 1 O. L. R. 168.

Shunting cars — *Warning — Proof of negligence—Jury.*]—B., in driving towards his home on a night in September, had to cross a railway track between 9 and 10 o'clock, on a level crossing near a station. Shortly before this a train had arrived from the west which had to be turned for a trip back in the same direction, and also to pick up a passenger car on a siding. After some switching the train was made up, and, just before coming to the level crossing, the engine and tender were uncoupled from the cars to proceed to the round house. B. saw the engine pass, but apparently failed to perceive the cars, and started to cross, when he was struck by the latter and killed. There was no warning of the approach of the cars which struck him. In an action by his widow under Lord Campbell's Act the jury found that the railway company were guilty of negligence, and that a man should have been on the crossing when making the switch to warn the public:—*Held*, Gwynne, J., dissenting, that it was properly left to the jury to determine whether or not, under the special circumstances, it was necessary for the company to take greater precautions than they did, and to be much more careful than in ordinary cases where these conditions did not exist; and that the case did not raise the question of the jury's right to determine whether or not a railway company could be compelled to place watchmen upon level highway crossings to warn persons about to cross the line. *Barclay* v. *Lake Erie and Detroit River Rw. Co.*, 23 C. L. T. 293, 30 S. C. R. 309.

Yardsman — Negligence — Contributory negligence—Shunting cars—Failure to look —Functions of Judge and jury — Nonsuit. *London and Western Trusts Co.* v. *Pere Marquette Rw. Co.*, 6 O. W. R. 321, 329.

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13. Injuries to Servants.

See Negligence.

Action under Lord Campbell's Act—*Limitation clause in Act of incorporation—Time for bringing action—Construction of statutes.*] — The deceased, a workman employed by the defendant Cook on a contract work for the defendant company, was instantly killed by coming in contact with a live wire. The accident occurred on the 6th August, 1904, and the writ in the action, brought under the provisions of Lord Campbell's Act, was issued on the 15th July, 1905. The defendant company set up, as a bar to the action as against them, s. 60 of their Act of incorporation, which limits the time to six months within which an action may be brought against them for any damage or injury sustained by reason of the tramway or railway, or works or operations of the company:—*Held*, that Lord Campbell's Act is a special Act, creating a special cause of action; and this special cause of action, so specially provided for, does not come within the scope of a general limitation clause in a private Act, passed for the benefit of a private corporation. — Effect of the Public Authorities Protection Act, 1893, discussed. *Green* v. *British Columbia Electric Rw. Co.*, 12 B. C. R. 199, 4 W. L. R. 273.

Brakesman — Negligence — Bad condition of brakes—Excessive speed — Absence of fault on part of servant. *Robert* v. *Brique*, 5 E. L. R. 231.

Brakesman — *Negligence — Nonsuit set aside and new trial ordered.*]—Action for damages by a brakesman whose left arm was cut off by the wheel of an engine tender

The trial Judge held that there was no evidence of negligence on the part of the defendants and a nonsuit was directed to be entered. The Manitoba Court of Appeal granted a new trial. *Scott* v. *Can. Pac.*, 11 W. L. R. 120.

Brakesman — *Negligence of fellow servant.*]—Plaintiff was injured while coupling cars so that he lost his left arm below the elbow. Judgment was given at the trial in his favour for $4,500. On appeal held that approximate cause of injury was the negligence of his fellow servant, the engineer, in backing his engine, and not defective coupling. Judgment was reduced under the Workmen's Compensation Act to three years' wages, that is $2,000. This was an action under Ontario Fatal Accidents Act to recover damages for death of a brakesman in employ of the Grand Trunk Railway Company, there having been a collision between a train of this company and the Wabash Railway Company. Both companies were defendants. The action was dismissed against the Grand Trunk, the jury finding the servants of the Wabash negligent. The Court of Appeal reduced the damages from $3,500 to $2,500 and gave the option of a new trial limited to the question of damages. It was not improper for the plaintiff to ask the conductor of the latter company when giving his evidence if criminal proceedings had been instituted against him in connection with the accident. *Craig* v. *Wabash R. R. Co. and Grand Trunk Ry. Co.*, 15 O. W. R. 141.

Brakesman — Railway Act, s. 264 — Breach of statutory duty—Cause of injury—Liability at common law—Damages. *Darrant* v. *Can. Pac. Ry. Co.*, 12 O. W. R. 294.

Conductor — Shunting car — Injury to conductor crossing track in yard — Consequent death—Proximate cause of injury—Accident—Conjecture—Findings of jury—Motion for nonsuit. *Burley* v. *Grand Trunk Ry. Co.*, O. W. R. 857.

Construction foreman — *Work train—Rule as to protecting by flagmen—Other precautions — Absence of continuous air brake—Absence of liability at common law—Liability under Workmen's Compensation Act.*]—The deceased, who was in charge of a gang of labourers employed in removing earth from a cutting on the defendants' railway, acting, as he believed, in the defendants' interests, to prevent the loss to them of the labourers' time, by the work train engaged in the work being kept at a siding, induced the conductor in charge of the train to move it on the main track, and to proceed to the cutting, by backing the train slowly. By one of the defendants' rules, the train should not have been moved—unless other sufficient precautions were taken—until flagmen were placed at stated intervals in front and rear of the train. Flagmen were not placed; but the conductor took the precaution of standing himself, as a look-out, on the top of the van, and for a like purpose placed the deceased in the cupola, while it was the duty of the engine-driver to keep a strict look-out towards the conductor, so as to observe his signals and to act upon them. When the train was distant some 600 yards from another work train approaching them, also moving slowly, the conductor signalled the engine-driver to stop, and, had he done so, a collision which occurred, whereby the deceased was killed, would have been avoided: —*Held*, that the defendants were liable, under the Workmen's Compensation for Injuries Act, for the deceased's death through the neglect of the engine-driver. *Dyer* v. *Kingston and Pembroke Ry. Co.*, S. O. L. R. 538, distinguished.—Liability was asserted at common law by reason of the train not being furnished throughout with air brakes, as required by the Railway Act, 3 Edw. VII. c. 58, s. 211 (f).—*Held*, that no such liability existed, for the train was not a passenger train, and the accident did not occur through the want of brakes, but by reason of the engine-driver's failure to see and act on the conductor's signal. *Munn* v. *Can. Pac. Ry. Co.*, 9 O. W. R. 475, 14 O. L. R. 147.

Destruction of horses by engine at crossing — *Negligence — Contributory negligence — Dominion Railway Act, 1903, s. 241 — Conflicting evidence as to blowing whistle — Failure to ring bell — Occurrence of accident within city limits.*]—The plaintiff's team was struck by an engine of defendants, the horses killed and the waggon smashed. On appeal, new trial ordered, action having been dismissed at trial. Trial Judge should have allowed plaintiff to prove by affidavit that there was no by-law passed as provided by s. 221 above. *Pedlar* v. *Can. Nor.*, 10 W. L. R. 503.

Engine-driver — *Collision — Negligence — Rules of railway company — Construction — Functions of jury.*]—In an action for damages for the death of an engine-driver of the Grand Trunk Railway Co., whose train came into collision with a train of the defendants, it was contended by the defendants that the accident happened through the negligence of the deceased in disobeying certain rules of his employers. Questions were put to the jury as to the negligence of the defendants and contributory negligence of the deceased: —*Held*, that there must be a new trial, because the jury should also have been asked whether the deceased had obeyed the rules of his employers applicable to the circumstances under which he was placed at the time of the accident, and whether but for that disobedience the accident would have happened.—It is for the trial Judge to interpret such written rules of railway companies, subject to this, that it is for the jury to determine the meaning of technical terms used in them, on the explanatory evidence offered. *Walker* v. *Wabash Ry. Co.*, 18 O. L. R. 21, 13 O. W. R. 250, 8 Can. Ry. Cas. 487.

Engine-driver — *Collision — Stop at crossing — Statutory rule — Company's rule — Contributory negligence — R. S. C. 1906 c. 37, s. 278.*]—A train of the Wabash Railroad Co. and one of the Canadian Pacific Railway Co. approached a highway crossing at obtuse angles. The former did not, as required by s. 278 of the Railway Act, come to a full stop; the latter did so at a semaphore nearly 900 feet from the crossing, and, receiving the proper signal, proceeded without stopping again at a "stop post" some 400 feet nearer, where a rule of the company required trains to stop. The trains

collided, and the engine-driver of the Canadian Pacific Railway train was killed. In an action by his widow:—*Held*, that the failure of the driver to stop the second time was not contributory negligence which prevented the plaintiff from recovering damages for his death caused by the admitted negligence of the defendants. Judgment of the Court of Appeal, 10 O. W. R. 416, affirmed. *Wabash Rw. Co.* v. *McKay*, 40 S. C. R. 251.

Engine-driver — *Collision of trains — Negligence — Death of yard foreman — Shunting train — Signal — Negligence of engine-driver — Defective system.*]—Action for damages for death of plaintiff's husband, resulting, as alleged, from defendants' negligence:—*Held*, on appeal, that there was no evidence reasonably to justify the jury's finding of negligence, nor was there any defective system of shunting. Appeal allowed. *McDonald* v. *Grand Trunk* (1900), 14 O. W. R. 393.

Engine-driver — Collision of trains — Negligence — Rules of company — Disobedience of deceased — Cause of death — Action by widow — Findings of jury. *Maycock* v. *Wabash Rw. Co. & Grand Trunk Rw. Co.*, 9 O. W. R. 546, 10 O. W. R. 127.

Engine-driver — Derailing of train — Disobedience of signals — Master and servant — Negligence — Contributory negligence. *Fanning* v. *Can. Pac. Rw. Co.*, 11 O. W. R. 461.

Engine-driver — Intersecting railway lines — Collision of trains — Negligence of servants of railway company — Disregard of rules — Signals — Findings of jury — Judge's charge — Contributory negligence — Action under Fatal Accidents Act—Damages. *McKay* v. *Wabash Rw. Co.*, 10 O. W. R. 416.

Engine-driver — Neglect to keep bridge in repair — Fault of railway company or officer — Criminal responsibility — Suggested intervention of Attorney-General — Civil action by widow of servant to recover damages for death — Fatal Accidents Act—Consent judgment — Civil remedy not suspended — Approval of Court — Apportionment of damages. *Villeneuve* v. *Can. Pac. Rw. Co.*, 10 O. W. R. 287.

Negligence — *Condition of road bed.*]—W., an employee of the defendants, in British Columbia, a part of whose duty it was to couple and uncouple cars, was between two cars on a side track, uncoupling, when the train backed, and in attempting to get out of the way his feet were caught in the long grass and weeds which had accumulated on the road bed, whereby he was struck by the train and seriously injured. In an action to recover damages for such injury:—*Held*, affirming the judgment in 6 Brit. Col. L. R. 561, that permitting the grass and weeds to accumulate on the side track was not such negligence on the part of the company as would render them liable in damages to W. Wood v. *Can. Pac. Rw. Co.*, 29 C. L. T. 39, 39 S. C. R. 119.

Negligence — *Defective construction of road-bed — Dangerous way — Vis major — Evidence — Onus of proof — Latent defect.*]—The road-bed of the appellants' railway was constructed, in 1893, at a place where it followed a curve round the side of a hill, a cutting being made into the slope and an embankment formed to carry the rails, the grade being one and one-half per cent. or 78.2 feet to the mile. The whole of the embankment was built on the natural surface, which consisted, as afterwards discovered, of a layer of sandy loam of three or four feet in depth, resting upon clay subsoil. No borings or other examinations were made in order to ascertain the nature of the sub-soil, and the road-bed remained for a number of years without shewing any subsidence except such as was considered to be due to natural causes and required only occasional repairs; the necessity for such repairs had become more frequent, however, for a couple of months immediately prior to the accident which occasioned the injury complained of. Water, coming either from the berm-ditch, or from a natural spring formed beneath the sandy loam, had gradually run down the slope, lubricated the surface of the clay, and, finally caused the entire embankment and sandy layer to slide away about the time a train was approaching, on the evening of the 20th September, 1904. The train was derailed and wrecked and the engine-driver was killed. In an action by his widow for the recovery of damages:—*Held*, that in constructing the road-bed, without sufficient examination, upon treacherous soil, and failing to maintain it in a safe and proper condition, the railway company were, *prima facie*, guilty of negligence which cast upon them the onus of shewing that the accident was due to some undiscoverable cause; that this onus was not discharged by the evidence adduced, from which inferences merely could be drawn, and which failed to negative the possibility of the accident having been occasioned by other causes which might have been foreseen and guarded against, and that, consequently, the company were liable in damages. *Great Western Rw. Co. of Canada* v. *Braid*, 1 Moo. P. C. N. S. 101, followed. *Quebec and Lake St. John Rw. Co.* v. *Julien*, 37 S. C. R. 632.

Negligence — *Defective construction of road-bed — Rails giving way — Action of water under road-bed — Onus.*] — The crumbling away of the earth under a railway and the sinking down of the rails is presumptive evidence of fault in construction at the place where it happens, and if an accident results from it, the burden is on the railway company to shew some cause which frees them of responsibility. Where in the course of railway construction work a cut is made upon a slope where beds of earth are likely to slide the one upon the other, or to be disintegrated by the action of water, the persons responsible for the construction should ascertain, by drilling or otherwise, whether there are hidden springs or veins of water, and if so do what is necessary to prevent their deleterious action. Neglect to do so is a fault which renders the company responsible for the injuries which ensue. In this case the company were held liable for the death of an engine-driver. *Quebec and Lake St. John Rw. Co.* v. *Duquet*, 14 Que. K. B. 482.

Person crossing track — *Highway crossing in city — Engine shunting reversely —Absence of statutory warning — Evidence —Negligence — Contributory negligence — Finding of jury.*]—At the trial the jury found defendants guilty of negligence and awarded damages in favour of plaintiff. Deceased was killed at one of defendants' crossings by one of their trains while backing up. There was no watchman on rear of car as required by s. 276, c. 37, R. S. C. 1906:—*Held*, there was sufficient evidence if believed by the jury upon which they might reasonably have found defendants were negligent, as they did, and appeal was dismissed. *Hobley* v. *Grand Trunk Rw. Co.*, 13 O. W. R. 204.

Person crossing track — *Highway crossing near city — Injury done by engine of another railway company using tracks under agreement with defendants — Negligence by latter company — Station agent servant of both companies — Fatal Accidents Act.*]—Action for damages for death of plaintiff's son, killed by a train of C. P. R. Co., which had running rights over the Hamilton to Toronto section of defendants' road. The particular act of negligence was in a station agent, in the joint employ of the two railway companies, leaving some cars standing on a siding:—*Held*, that defendants were not liable. *Hansford* v. *Grand Trunk Rw. Co.*, 13 O. W. R. 1184.

Quebec Civil Code, Art. 1056 — *Construction — Widow's right of action—Benefit society — Indemnity — Contract that deceased shall have no claim — "Satisfaction" —Real and tangible indemnity.*]—The right of action conferred by Art. 1056 of the Civil Code of Quebec on the widow and relatives of a deceased employee, whose death has been caused by the fault of his employer, is an independent and personal right, and not derived from the deceased or his representatives —*Robinson* v. *Can. Pac. Rw. Co.*, [1892] A. C. 481, followed:—*Held*, that the deceased could not be said to have "obtained satisfaction" from the respondent company, within the meaning of that article, unless he had obtained a real and tangible indemnity for the fault in question.—Where the deceased, as a condition of his employment, became a member of an insurance and provident society, a by-law of which provided that in consideration of the respondents' subscription there...o no member thereof or his representatives shall have any claim against respondents for compensation on account of injury or death from accident; and it appeared from the society's provisions for sick allowance and insurance, that the respondents contributed only to the former, the latter being a scheme for mutual life insurance:—*Held*, that, assuming this by-law to be valid, the deceased had not obtained satisfaction, within the meaning of Art. 1056. The insurance money did not proceed from the respondents, had no relation to their offence, and was equally payable in case of natural death. *Regina* v. *Grenier*, 30 S. C. R. 42, overruled. Judgment in *Grand Trunk Rw. Co.* v. *Miller*, 24 C. L. T. 77, 34 S. C. R. 45, reversed. *Miller* v. *Grand Trunk Rw. Co.*, [1906] A. C. 187, 15 Que. K. B. 118.

Railways of two companies — *Neglect of servant in joint service — Liability—Crown — Private company.*] — When the trains of two railways run over a section of the line of one of them, under an agreement which provides, *inter alia*, that the servants employed on the section in common use, shall be considered, and shall be in fact, in the joint employ of the owners of the two railways, the latter are both jointly and severally liable for the death of a servant of one caused by a collision of two trains belonging to one of them, by the fault or neglect of a servant so employed. If, therefore, one of the railways is the property of the Crown, and the other of a private company, the latter is liable in damages as sole *tort-feasor*. *Atkinson* v. *Grand Trunk Rw. Co.* (1906), 27 Que. S. C. 227. Affirmed (1906), 26 C. L. T. 71, 36 S. C. R. 655.

Section foreman — *Negligence — Contributory negligence — Death of section foreman run over on track — Crew of engine—Dominion Railway Act, 1903, s. 224—Statutory warnings.*] — The plaintiff's husband, while in the actual discharge of his duty as section foreman on the defendants' railway, examining the track, was struck by a yard engine running backwards. No look-out was on the tail board or rear of the engine, and no signal of any kind was given to warn the deceased of the approach of the engine:—*Held*, that there was ample evidence to support the findings of the jury that the deceased came to his death in consequence of the negligence of the engine crew in neither blowing the whistle, ringing the bell, nor keeping a proper look-out; and that the deceased could not, by the exercise of reasonable care, under the circumstances, have avoided the accident, and that the appeal from the verdict in favour of the plaintiff should be dismissed.—Although the deceased, if he had looked around, would have seen the approaching engine and stepped out of the way, yet he was engaged at the time in the discharge of a duty of an absorbing character which would naturally take his whole attention, and, under the circumstances, a jury might properly infer that there was no absence of reasonable care on the part of the deceased. Moreover, even if the deceased had been guilty of negligence, the defendants would still be liable if the engine crew could, by the exercise of reasonable care, have avoided the accident. *Coyle* v. *Great Northern Rw. Co.*, L. R. 20 Ir. 409, *The Bernina*, 12 P. D. 89, *Kelly* v. *Union Rw. Co.*, 8 S. W. R. 20, *Canada Southern Rw. Co.* v. *Jackson*, 17 S. C. R. 316, and *London and Western Trusts Co.* v. *Lake Erie, &c., Rw. Co.*, 7 O. W. R. 577, followed.—The omission of a common law duty is actionable negligence, equally with the omission of a statutory duty, and the common law requires the defendants' servants, when running through the yard, to take the obvious precaution of watching for workmen lawfully on the track and giving them timely warning.—*Held*, also, that the jury would have been justified if they had drawn inferences unfavourable to the defence from the fact that neither the engine-driver nor the fireman in charge of the engine was called to give evidence for the defence.—*Quære*, whether, the accident having occurred within twenty feet of a public

highway crossing, s. 224 of the Railway Act, 1903 (D.), requiring that the whistle should be sounded when approaching a highway crossing, and that the bell should be continuously rung until the highway is crossed, can be invoked on behalf of any persons except those using the highway crossing. *Wallman* v. *Can. Pac. Rw. Co.*, 16 Man. L. R. 83.

Section foreman — *Negligence—Neglect of fellow workman — Defence of contributory negligence — Defective system — Lord Campbell's Act.*] — The deceased, while engaged in discharging the duties of section foreman for the defendants in their railway yard, was run over by a train and killed. There was a high wind blowing at the time, accompanied by considerable snow, and the deceased was occupied in keeping the points of a switch clear of snow. This required constant attention, and, under the conditions prevailing at the time, prevented him from observing the approach of the train. The train was being moved in a reverse direction, and the accident was shewn to have been wholly due to the neglect of the proper persons, employed in connection with the running of the train, to ring the bell or blow the whistle or to stand on the forward end of the car for the purpose of giving the necessary warning. The plaintiffs, the widow and children of the deceased, sued for damages under the common law, as aided by Lord Campbell's Act: — *Held*, that the deceased was not guilty of contributory negligence, but that, as all the negligent omissions were those of fellow workmen, and there was no proof of a system on the part of the defendant company of running their trains without these precautions being taken, the defendants were not liable. *McMullin* v. *Nova Scotia Steel and Coal Co.*, 41 N. S. R. 514. Reversed by the Supreme Court of Canada, 39 S. C. R. 593. (See Digest for 1907.)

Section foreman in railway yard injured by engine — Consequent death — Negligence — Contributory negligence — Jury. *Wallman* v. *Can. Pac. Rw. Co.* (Man.), 3 W. L. R 526.

Trackman — *Negligence — Breach of statutory duty — Master and servant — Common employment — Nova Scotia Railway Act, R. S. N. S. 1900 c. 99, s. 251 — Employers' Liability Act — Fatal Accidents Act.*]—Section 251 of the Railway Act of Nova Scotia provides that when a train is moving reversely in a city, town, or village, the company shall station a person on the last car to warn persons standing on or crossing the track, of its approach, and provides a penalty for violation of such provision:—*Held*, that this enactment is for the protection of servants of the company standing on or crossing the track, as well as of other persons.—M. was killed by a train, consisting of an engine and coal car, which was moving reversely in North Sydney. No person was stationed on the last car to give warning of its approach, and, as the bell was encrusted with snow and ice, it could not be heard.—Evidence was given that on a train of the kind the conductor was supposed to act as brakesman, and would have to be on the rear of the coal-car to work the brakes, but when the car struck M., who was engaged at the time in keeping the track clear of snow, the conductor was in the cab of the engine.—*Held*, Idington, J., dissenting, that an absolute duty was cast on the company by the statute to station a person on the last car to warn workmen, as well as other persons, on the track, which, under the facts proved, they had neglected to discharge. The defence under the doctrine of common employment was, therefore, not open to them. *Groves* v. *Wimborne*, [1898] 2 Q. B. 402, followed.—*Held, per* Idington, J., that the evidence shewed the only failure of the company to comply with the statutory provision to have been through the acts and omissions of the fellow servants of deceased; that the company, therefore, could not be held liable for the consequences under the Fatal Injuries Act; that it was, therefore, unnecessary to determine the applicability of s. 251 of the Railway Act, as the fellow-servants were guilty of common law negligence, which rendered the company liable, but only by virtue of and within the limits of the Employers' Liability Act. *McMullin* v. *Nova Scotia Steel and Coal Co.*, 39 S. C. R. 593.

Trackwalker's negligence — *Train moving reversely — Absence of warning — Questions not put to jury — General verdict —New trial.*]—Appeal from order of a Divisional Court allowing a new trial, dismissed. Action for damages for personal injuries by being struck by defendants' train. No questions having been given to the jury by the trial Judge, the jury prepared questions of their own and answered them. While this memorandum is no part of the evidence it cannot be disregarded on the question of a new trial. *Gilchrist* v. *Grand Trunk* (1909), 14 O. W. R. 9.

Watchman at crossing — *Backing train — Negligence — Liability — Railway Act, R. S. C. 1906 c. 37, s. 276.*]—A watchman of the defendant company at a certain crossing in a city was killed by two cars being "kicked off" in the usual way from a train which was backing in an easterly direction for that purpose. A brakesman with a lamp was on top of the westernmost of the two cars, but was not keeping a look-out, and gave no warning that the cars were moving. There was no light on the crossing, nor was anyone stationed on the cars "kicked off" to warn people, and the engine bell was ringing: — *Held*, that the defendants were guilty of negligence and were liable for his death, not having complied with s. 726 of the Railway Act R. S. C. 1906 c. 37, by stationing a person on the front car to warn people.—Although the deceased was an employee of the defendants, and it was his duty to protect persons crossing the track from the cars, he had a right to rely, so far as his own safety was concerned, on nothing being done to expose him to unnecessary danger, and on the above section being complied with. *Can. Pac. Rw. Co.* v. *Boisseau*, 32 S. C. R. 424, followed. *Lamond* v. *Grand* Trunk Rw. Co., 16 O. L. R. 365, 11 O. W. R. 442.

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14. Injuries to Other Persons.

See Negligence.

Collision of trains — *Negligence — Traffic agreement—Negligence of employee—*

Joint employment—Crown—Master and servant.]—Where injuries resulted from a collision between two Intercolonial Railway trains negligently permitted to run in opposite directions on a single track of a portion of the Grand Trunk Railway, operated under the joint traffic agreement ratified by 62 & 63 V. c. 8 (D.), the railway company were held liable for the carelessness of the train despatcher engaged by the company and under their control and directions, notwithstanding that he was declared by the agreement to be in the joint employment of the Crown and the railway company, and that the Crown was thereby obliged to pay a portion of his salary; Taschereau, C.J.C., *dubitante*.—Judgment in *Atkinson* v. *Grand Trunk Rw. Co.*, 27 Que. S. C. 227 (*ante* VIII. 51) affirmed, *Grand Trunk Rw. Co.* v. *Goudie*, *Grand Trunk Rw. Co.* v. *Huard*, 26 C. L. T. 71, 36 S. C. R. 655.

Crossing not at highway and not sanctioned by Board of Railway Commissioners — Non-compliance with ss. 242 and 243 of Railway Act — Fences at crossing — Invitation to public — Condition of crossing — Danger — Common law negligence. *Bird* v. *Can. Pac. Rw. Co.*, 7 W. L. R. 868.

Injury to child playing in yard — *Negligence—Unfenced premises—Trespasser — Evidence — Onus.*]—A boy, over eight years of age, entered from the adjoining highway the unfenced freight yard of the defendants, for the purpose of gathering pieces of coal dropped from the cars, and in doing so got under or alongside the wheels of a car, which, in being shunted, ran over and killed him, at a place over 400 feet from where he entered the yard:—*Held*, that he was wrongfully trespassing where he had no business or invitation to be.—*Held*, also, that the plaintiffs had not satisfied the onus cast upon them to establish by evidence circumstances from which it might fairly be inferred that there was reasonable probability that the accident resulted from the absence of a fence at the place where the boy entered. *Williams* v. *Great Western Rw. Co.*, L. R. 9 Ex. 157, and *Daniel* v. *Metropolitan Rw. Co.*, L. R. 3 C. P. 216, L. R. 5 H. L. 45, followed. *Newell* v. *Can. Pac. Rw. Co.*, 12 O. L. R. 21, 7 O. W. R. 771.

Level highway crossing — Negligence —Absence of signal man and gates at crossing — Failure to give statutory warnings— Excessive speed of train — Contributory negligence — Findings of jury — Damages —Cause of injury — Nonsuit. *Hanna* v. *Can. Pac. Rw. Co.*, 11 O. W. R. 1069.

Negligence — Car leaving track — Passenger jumping from car — Contributory negligence. *Shea* v. *Halifax & S. W. Rw. Co.*, 3 E. L. R. 431.

Negligence — Unlocked turntable — Child injured. *Can. Pac. Rw. Co.* v. *Coley*, 3 E. L. R. 126.

Station yard — *Negligence — Omission to give warning of approach — Sidewalk — Way of access to station — Highway—Jury —Misdirection — Request of counsel — Contributory negligence.*]—The judgment of the Supreme Court of the North-West Territories, *Hanson* v. *Can. Pac. Rw. Co.*, 4 W. L. R. 385, affirmed; Davies, J., *dubitante*:—*Held*, that the evidence did not so conclusively establish a case of contributory negligence as to justify the withdrawal of the case from the jury.—*Held*, also, that a litigant is bound by the way in which he conducts his case at trial; and where his counsel makes a specific objection to the Judge's charge, and the Judge corrects his charge in accordance with the objection, the litigant cannot on appeal be heard to complain that the direction so given was erroneous. *Can. Pac. Rw. Co.* v. *Hanson*, 40 S. C. R. 194.

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15. Lands, Expropriation, Etc.

Abandonment — *Costs. Re Oliver and Bay of Quinte Rw. Co.*, 6 O. L. R. 543, 2 O. W. R. 953.

Admission of irrelevant evidence by the arbitrators, if not shewn to have affected amount of award, is no ground of appeal therefrom. *Que., Montreal & Southern Rw. Co.* v. *Landry*, 19 Que. K. B. 82.

Agreement to purchase — Requisitions on title — Application by vendor under Vendors and Purchasers Act — Railway company obtaining leave to pay purchase money into Court under Railway Act — Costs. *Re Rousseaux & Toronto, Hamilton, and Buffalo Rw. Co.*, 3 O. W. R. 824.

Agreement with owner — *Possession — Compensation — Damages — Arbitration — Action — Municipal corporation.*] — In carrying out the agreement provided for in 63 V. c. 77 (O.), the purchasing agents of a town corporation agreed with the plaintiff for the purchase of and possession by a railway company, of the portion of the plaintiff's land required by the company, but without fixing the price. The company, having, pursuant to s. 131 of the Railway Act, 51 V. c. 29 (D.), deposited a plan, profile, and book of reference of the land in the county registry office, which were approved by the Railway Committee of the Privy Council, entered and completed the work. The purchase money not having been agreed upon or paid, the plaintiff brought an action against the town corporation and railway company for damages to the land and for interference with his business:—*Held*, that the defendants the town corporation were not liable, and that the plaintiff's remedy against the railway company was by arbitration proceedings under the Railway Act, and not by action. *Per* Falconbridge, C.J., at the trial:—Expected increased profits from enlargement of plaintiff's buildings and plant are too speculative and uncertain to form a true measure of damage. *Todd* v. *Montford*, 23 C. L. T. 323, 6 O. L. R. 469, 2 O. W. R. 12, 779.

Appeal — *Court bound to examine evidence.*]—The Court, adjudicating on an appeal under s. 209 of Dom. Rw. Act, is bound to go through all the evidence and examine into the justice of the award, paying due regard to the finding of arbitrators whose con-

clusion, however, is not binding, even though they be not shewn to have erred in principle or to have abused their authority. *Que., Montreal & Southern Rw. Co.* v. *Landry*, 19 Que. K. B. 82.

Appeal — *Estoppel.*]—A party who appeals from an award is estopped from attacking it, on the ground that it was not served. *Que., Montreal & Southern Rw. Co.* v. *Landry*, 19 Que. K. B. 82.

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

Appeal from award.]—The Dominion Railway Act (1906) s. 168, gives an appeal from a railway award exceeding $600 to a "Superior Court." The Interpretation Act, R. S. C. 1906, defines a Superior Court to be, in Ontario, the Court of Appeal for Ontario and the High Court of Justice for Ontario, therefore an appellant may appeal to either Court, but in case of an appeal to the H. C. J. no appeal lies therefrom to the Supreme Court of Canada, as it is not the Court of last resort having jurisdiction in the Province, as required by the Supreme and Exchequer Courts Act (1886) c. 135, s. 26. Judgments of Supreme Court of Can., 38 S. C. R. 511, and Meredith, C.J.C.P., at trial, 7 O. W. R. 713, 12 O. L. R. 137, affirmed. *James Bay Rw. Co.* v. *Armstrong*, C. R. [1909] A. C. 285, [1909] A. C. 624, 79 L. J. P. C. 11.

Appeal from award under Rw. Act of Can., c. 37, s. 209, may be instituted by direct action.]—The right to request all papers except award to be filed in Court, under s. 209 of Rw. Act, is not a condition precedent to the exercise of the right of appeal under s. 209 of said Act; and when such an order is prayed for, the arbitrators need not necessarily be made parties, though such an omission may be an objection which the defendant might invoke. In proceedings in appeal under s. 209 of said Rw. Act, it is not essential to allege affirmatively that such appeal has been taken within one month after receiving the written notice, mentioned in s. 209. *Bickendike* v. *Montreal Park & Island Rw. Co.*, 16 R. de J. 55.

Appeal from the decision of arbitrators — *Delays — Affidavit — C. P. 8; R. S. C., c. 37, s. 209; C. C. 17 (13), 2240.*]—In a railway expropriation, every party to the arbitration may appeal within one month after receiving a written notice of the making of the award.—If such notice has been given on the 9th of December, the appeal may be presented on the 10th of January next, if the 9th is a Sunday.—The petition to appeal of the award of arbitrators in a railway expropriation is not in the nature of an application for *certiorari* and does not need to be supported by affidavit. *Montreal Park & Island Rw. Co.* v. *Bickendike* (1910), 11 Que. P. R. 261.

Appointment of arbitrator—"*Opposite party*"—*Notice—Evidence.*]—The railway company having served on both the owner of the land and the mortgagee the notice and certificate prescribed by ss. 146 and 147 of the Railway Act, 51 V. (D.) c. 29, the owner refused the sum offered, and notified the company of the name of her arbitrator, but the mortgagee gave no such notice:—*Held*, that under s. 150 of the Act, the company were entitled to apply to have a sole arbitrator appointed, as the mortgagee should be treated as an "opposite party" within the meaning of that section. After giving notice to the company of the name of her arbitrator, the owner sold and conveyed the property to another person. The land had been brought under the Real Property Act, and on the certificate of title issued to the purchaser there was indorsed a memorandum of the deposit in the Land Titles office of the Minister's certificate and the plan and book of reference.—*Held*, that the purchaser must be deemed, under s. 145 of the Act, to have had notice of the expropriation proceedings, and was bound by them. Evidence in support of an application under s. 150 of the Act may be by affidavit. *In re Can. Pac. Rw. Co. & Batter*, 20 C. L. T. 317, 13 Man. L. R. 200.

Arbitration and award — *Appeal from award — Forum — Petition — Modifying award.*]—In an expropriation matter, pursuant to the Railway Act of Canada, a single Judge of the Superior Court has jurisdiction to hear an appeal from the award, in spite of the fact that such appeal is taken not by way of an action but by way of a simple petition, and that even in the absence of special rules of practice to that effect, seeing that such rules of practice are not necessary to give him jurisdiction. Thus it follows that such appeal may be taken without an action and by means of a petition. 2. The appeal in such case comes on as a case of original jurisdiction upon all questions of law or of fact and upon the evidence taken before the arbitrators. 3. The Judge cannot modify the award except when it is clear that it is the result of a gross error upon the part of the arbitrators in law or in appreciation of the facts. *Nelson* v. *Quebec Bridge Co.*, 21 Que. S. C. 320.

Award — *Appeal — Evidence—Reasons for award — Value of lands taken—Injury to other lands.*]—1. Written reasons for an award of compensation for land expropriated under the Railway Act of Canada are admissible as evidence upon appeal therefrom. 2. The Court upon the appeal is to review the judgment of the arbitrators as it would that of a subordinate Court. 3. In this case the principle adopted by the arbitrators was approved, but a mistake in the acreage was corrected, and also a mistake in the amount settled as the original cost of the land, which increased the amount of the award from $2,856 to $5,681. 4. To estimate the injury to the portion of the claimants' lands not taken, the original price paid by them for the whole property was taken, interest thereon from the time of purchase to the date of the award added, and the value of the portion left after the severance, according to the evidence, deducted from the total. 5. It makes no difference as to the principle upon which compensation is to be awarded for lands to

juriously affected that such lands have or have not been laid out in building lots; and therefore evidence of the condition of the real estate market in the locality is of much importance. *In re Brennan & Ottawa Electric Ry. Co.*, 21 C. L. T. 208.

Award — *Extension of time for making.*]—Arbitrators appointed to ascertain the compensation to be paid for lands expropriated under the Railway Act of Canada had, at their first meeting, fixed the 6th July, 1897, as the day for making their award. On the 28th June, 1897, after the claimant had closed his case, they adjourned till the 8th July, without having formally extended the time for making their award. At the time of the adjournment the solicitors for the parties were present and made no objection: —*Held*, reversing the judgment in 16 Que. S. C. 105, and restoring that in 14 Que. S. C. 469, that the adjournment itself was a sufficient extension of the time for making the award. *In re Wynnes and Montreal Park & Island Ry. Co.*, 9 Que. Q. B. 483.

Award — *Nullity — Dominion railway —Provincial statute—Application of — Compensation — Set-off — Increased value.*]—Article 5164, R. S. Q., continues to apply to the expropriation of land by a railway company incorporated by an Act of the Quebec Legislature, notwithstanding that the railway has been declared by Dominion statute to be a work for the general advantage of Canada; therefore, by the terms of this Article, an award may be moved against *pour cause de nullité*.—2. The increase in value which arbitrators are authorised to set off against the inconvenience, loss, or damage resulting from the fact that the company has taken possession or made use of lands, is an immediate and special increase in value resulting to the lands from advantages derived by the performance of work by the company, and not future, and therefore eventual and uncertain, advantages. The arbitrators, accordingly, cannot take into account the general improvement in the condition of the locality where the works are going on, but only the improvement to the particular property affected by the expropriation, placing the portion of that property which is left to the owner in a better condition than it was before relatively to other lands in that locality. *Dickson v. La Compagnie de Chemin de Fer de Chateauguay et Nord*, 17 Que. S. C. 170.

Award — Valuation — Interest of arbitrator — Extension of time for making award —Provisions of award—Letter by landowner to arbitrators — Compensation — Amount—Reducing on appeal. *Re Can. Pac. Ry. Co. & Du Caillaud*, 3 O. W. R. 33.

Award is validly made by arbitrators at a meeting of which the arbitrator, named by the expropriating party, has due notice, and it need not be served upon such party. *Que., Montreal & Southern Ry. Co. v. Landry*, 19 Que. K. B. 82.

Award of compensation — *Appeal — Damages — New evidence — Discretion — Costs — Injurious affection.*]—On an appeal from an award of arbitrators, under the Railway Act of Canada, so far as the appreciation of damages is concerned no new evidence can be adduced, and no objection based upon the admission of illegal evidence, or the exclusion of legal evidence, can be considered, unless the illegalities complained of appear of record. 2. The award cannot be explained or varied by extrinsic evidence of the intention of the party making it. Error of law or fact on the part of the arbitrators, or excess of jurisdiction, must appear on the face of the award, or from the evidence or documents of record. 3. The Court will not interfere with the discretion of the arbitrators as to the amount of the award, unless it be as a check upon possible fraud, accidental error, or gross incompetence. 4. The award of costs by the arbitrators does not invalidate the award, where it simply follows the rule established by the Railway Act itself, for in such case the party has no grievance. 5. The award of a block sum is valid, the law not requiring the arbitrators to distinguish between the amount awarded for value of land taken, and that awarded for damages to other lands. *Pontiac Pac. Junc. Ry. Co.* v. *Sisters of Charity at Ottawa*, 20 Que. S. C. 567.

Breach of contract — *Interim injunction.*]—Where a petitioner for an injunction shews that his rights under the terms of a contract made by him with the respondents, and under a servitude granted by them over the property acquired, are violated by them, and another railway company under agreement with them, an interlocutory order of injunction will be granted to restrain the respondents from the performance of any acts in violation of the contract and servitude. 2. Where a railway company, by expropriation proceeding, obtain land for one object and make use of it for another, causing additional damage to the expropriated party, particularly when the railway company have declared that they so expropriated for the former object in order to save the greater damage resulting from the other object, the expropriated party is entitled to an interlocutory order of injunction, irrespective of his right to recover damages, the object of the law being that all damages must be paid before expropriation. *Hampson v. Chateauguay & North. Ry. Co.*, 6 Que. P. R. 283.

Compensation — Benefit derivable from the railway that can be set off against damage caused by expropriation, may be such as is "beyond the increased value, common to all lands in the locality." If the property be a mill site, with a water power available, it cannot be urged that its only value is given it by the railway, inasmuch as the owner of a rival mill-site in the locality, not touched by the railway, would presumably derive same benefit from it. *Que., Montreal & Southern Ry. Co.* v. *Landry*, 19 Que. K. B. 82.

Compensation — *Damage to other lands affected.*] — The contestants, in exercise of their powers under the Railway Act of Canada, expropriated about 4½ acres of claimant's high classed farm. Being unable to agree upon the compensation to be paid, an arbitration was had. The questions involved were the usual ones, viz.: The value of the land taken and the amount to be paid by

contestants as and for compensation for damages to other parts of claimant's lands, injuriously affected by reason of the expropriation. The arbitrators awarded the claimant $30,607. On appeal to Court of Appeal, the amount was reduced to $20,000. No costs of appeal. *Davies* v. *James Bay Rw. Co.* (1910), 15 O. W. R. 625, 20 O. L. R. 534.

Compensation — *Set-off — Increased value.*]—If, by reason of advantages, however problematical or uncertain, the value of a parcel of land (part of which has been expropriated for the construction of a railway) has been increased by reason of the railway, the arbitrators may take into consideration such increase in value as a set-off to the damages resulting from the expropriation of a part. *Chateauguay & North. Rw. Co.* v. *Trenholme*, 11 Que. K. B. 45.

Compensation — *Value of land taken—Conflicting testimony — View by arbitrators —Award based on opinion of arbitrators set aside — Order of Court based on opinions of witnesses.*]—As it appeared that arbitrators in ascertaining the value of expropriated lands had acted after a view on their own opinions instead of on the evidence of the witnesses, the award was set aside. The Court then fixed the amount of the compensation. *Re Calgary and McKinnon* (1909), 12 W. L. R. 554.

Compensation for severance of lands.]—Petitioner excepted to the report of commissioners appointed by the Court to ascertain the amount of compensation due him in respect of lands taken for railway purposes, on the ground that the amount awarded was too small. The land taken severed his remaining lands. The Railway Act provided for a fence being built along the railway and maintained by Government, but made no provision for permitting the person whose lands were severed a crossing from land on one side of the road to the other, nor for making gates, etc., and it appeared that the commissioners had not taken this into consideration in making their report. For the Crown it was contended that the road was dedicated to the public, and therefore everyone, the original owner included, had a right to cross it when and where he pleased:—*Held*, (Peters, M.R.) that the petitioner was entitled to compensation for being deprived of communication, to be estimated at the cost of providing and maintaining a crossing, gates, etc. — That though the land was dedicated to the public it was for a specific purpose, *i.e.*, a railroad, and the right of the public to use it was restricted to its use as a railway. *DeBlois* v. *R.* (1873), 1 P. E. I. R. 434.

Contract for sale of land to company —*Highway — User — Dedication — Way of necessity — Misrepresentation — Board of Railway Commissioners—Land Titles Act—Railway Act, s. 188.*]—Action for specific performance of an agreement for sale of land and cancellation of a plan. Relief claimed granted. Son of defendant to get compensation out of purchase money for loss of easement. *Grand Trunk Pacific* v. *Vincent* (1909), 12 W. L. R. 433.

Costs — *Counsel fees — C. P. 549; R. S. C., c. 37, s. 2, s-s. 5, s. 199.*]—The costs of an owner who succeeds in an arbitration under the Railway Act shall be taxed as between solicitor and client.—The tariff of costs prescribed for ordinary litigation may be accepted as a general guide for taxing the costs of such an arbitration. *Canadian Northern Quebec Rw. Co.* v. *Paquin*, 11 Que. P. R. 237.

Costs — *Dominion Railway Act, s. 199— Reference for taxation — Fees of arbitrator —Procedure for recovery — Forum.*]—The railway company, for the purposes of their railway, took a portion of land belonging to B. They could not agree as to the compensation, and the matter was referred to a board of arbitrators, who awarded the sum offered by the railway company:—*Held*, that the company were entitled, under sec. 199 of the Dominion Railway Act, to deduct the amount of their costs of the arbitration from the compensation awarded.—An order was made referring the company's bill of costs to a taxing officer for taxation, pursuant to the practice adopted in Ontario and followed in *Re Canadian Northern Rw. Co. and Robinson*, 17 Man. L. R. 573, 8 W. L. R. 137.—The arbitrators originally appointed could not agree upon the terms of an award, and, at the request of both parties, J., who was third arbitrator, resigned, and M. was appointed (in assumed compliance with sec. 206 of the Act) third arbitrator to continue the arbitration. The award was made by a majority of the board composed of M. and the other two original members. After the award was made, the fees of all four arbitrators were endorsed upon it. B. paid the fees of all the arbitrators except J., and the award was given up to B. Upon the company's application to refer their bill for taxation, J. intervened and asked that his fees be paid:—*Held*, that, as the company had not paid J.'s fees, they could not be taxed as part of the company's bill, and it was doubtful whether the company would now have the right to pay these fees and add them to their own costs; it did not appear that J. had any claim against the company; his right, if any, was a statutory one against B. In taxing the costs of the arbitration, the Judge cannot decide anything as to the right to costs. If J. had a right to recover his fees by action from B., he would be at liberty to proceed without first having the amount fixed by taxation. The question of J.'s right to be paid could not be determined upon this application. *Re Blackwood & Can. Nor. Rw. Co.* (1910), 15 W. L. R. 110.

Damage — *Trespass — Construction of railway — Compensation.*]—The foundation of proceedings under s. 146 *et seq.* of the Railway Act, 1888, 51 V. c. 29 (D.), to determine the compensation to be paid a landowner for lands taken or injuriously affected by a railway company in the exercise of their statutory powers, is the notice to be served on the landowner thereunder; and in the absence thereof the railway company are, as to the lands damaged by the construction of the railway, trespassers, and like any other trespasser responsible to the person injured in damages to be recovered in the ordinary Courts of the country.—Where, therefore, without taking any proceedings under those sections, the defendants, a railway

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company, for the purposes of their railway, made a cutting, adjoining the plaintiff's lands, which caused a subsidence thereof, whereupon the plaintiff brought an action to compel the defendants to support his lands and prevent further subsidence, and recovered damages for the actual loss then sustained:—*Held*, that the plaintiff was entitled to a mandatory order and to the damages recovered; but, as he would be entitled to maintain actions for the recovery of damages as further loss was sustained, leave was given to the defendants to take proceedings under the above sections for the assessment of compensation so as to have future damages settled, the judgment being stayed for a limited time. *Hanley* v. *Toronto, Hamilton and Buffalo Rw. Co.*, 11 O. L. R. 91, 6 O. W. R. 841.

Damages from operation of railway —*Prescription—R. S. C. c. 37, s. 306.*]—1. Damages resulting from the operation of a railway are of three kinds:—1. Damages resulting from one particular and isolated fact; prescription commences to run only from the day upon which the damages were caused; 2. Repeated and renewed damages resulting from the same cause, prescription runs from the day upon which the damages cease. 3. Damages resulting from the same cause, and which cease by the extinction of the cause, prescription commences to run from the day upon which the damages ceased, or upon which the cause of the damages became extinct. — 2. In the present case, plaintiff's claim for repeated and renewed damages, the last of which was suffered during March, 1907, is extinguished and extinct in view of the fact that the action was instituted only in July, 1908, although the company defendant only put an end to the direct cause of the damages in August, 1907. *Rochon* v. *Can. North. Rw. Co.*, 11 Que. P. R. 19.

Decision of arbitrators — *Appeal to Superior Court—Filing of the award — Delays—Inscription in law—C. P. 191; R. S. C., c. 37, ss. 203, 209 (Railway Act).*]—In a railway expropriation, an appeal to the Superior Court from the decision of the arbitrators may be instituted before the award is deposited with the records of said Court. — It is not essential that plaintiff should allege affirmatively that the appeal is taken within a month after the reception of the notice of said award. *Bickendike* v. *Montreal Park & Island Rw. Co.* (1910), 11 Que. P. R. 260.

Deed — *Construction — Fencing — Boundaries — Estoppel — Registry laws — Riparian rights — Prescription — Tenant by sufferance — Damages — Emphyteusis—Alienation — Parties.*] — The plaintiffs, a railway company, purchased land from P. bounded by a non-navigable river, as "selected and laid out" for their permanent way. Stakes were planted to shew the side lines, and the railway fencing was placed here and there above the water line, although the company could not have had the quantity of land conveyed unless they took possession to the edge of the river. P. remained in possession of the strip between the fence and the water's edge and of the bed of the stream *ad medium*, and, after the registration of the deed to the company, sold the rest of his property, including water rights, to the defendant's grantor, describing the property sold as "including that part of the river which is not included in the right of way," etc. The company never operated their line of railway, but leased it for 999 years to another company, by whom it was operated:—*Held*, that the description in the deed to the railway company included, *ex jure naturæ*, the river *ad medium*, as an incident of the grant. 2. That the possession by the vendor and his assigns of the strip and the bed of the river *ad medium* was not the possession *animo domini* required for the acquisitive prescription of ten years under Art. 2251, C. C., but merely an occupation as tenant by sufferance. 3. That the failure of the vendor to deliver the full quantity of land sold and the company's abstention from troubling him in his possession, could not be construed as conduct placing a different construction upon the deed. 4. That the terms of the description in the conveyance to the defendant's grantor, were a limitation equivalent to an express reservation of the part previously conveyed to the company, the defendant having also notice through the registration of the deed to the company. 5. That the acquisitive prescription of thirty years under Art. 2242, C. C., could not run in favour of the vendor. 6. That the lease to the company which held and operated the railway amounted to an emphyteutic lease assigning the *domaine utile* and all the company's right in respect of the railway, reserving, however, the *domaine* direct, and consequently the lessor company had the right of action *au petitoire*, although the lessees would have the right of action for damages, and might be added as plaintiffs if there were any valid claim for damages. *Massawippi Valley Rw. Co.* v. *Reed*, 33 S. C. R. 457.

Dominion Railway Act, s. 217—*Motion for warrant for immediate possession—Hardship—Order granted—No judicial discretion.*]—Railway company moved under s. 217 of the Dominion Railway Act for a warrant for immediate possession.—Middleton, J., *held*, that although it was a case of hardship on the land-owner there was no discretion left to the Judge under the statute. Order granted. *McCarthy* v. *Tillsonburg, &c. Rw.* (1910), 16 O. W. R. 964, 2 O. W. N. 34.

Entry without expropriation — *Trespass — Injunction — Resolution of county council—Town within county.*]—By the defendants' Act of incorporation (60 V. c. 82, N. S.), the lands required by them for track or station or like purposes "shall be a county charge and be payable by the county through which the line of railway passes, subject, however, to resolution of the municipal council of the said county authorising the acquisition of said lands." The proposed line lay wholly within the county of A. A town, B., within the county, was incorporated in 1897, after the defendants' Act was passed, and lay in the proposed course of the railway. On the 23rd October, 1900, the county council passed a resolution that "a free right of way and lands necessary for railway purposes from V. B. to M., in the county of A., be granted" to the defendants, "said right of way to be paid for on the completion of said line of railway."

In 1902, at the instance of the council of the town of B., an Act was passed, 2 Edw. VII. c. 62 (N.S.), authorising the town to expropriate the necessary lands, and providing for entry thereon upon payment or tender of the compensation awarded by arbitrators. The Nova Scotia Railway Act, R. S. N. S. c. 99, provides (s. 164) that where the charter makes the cost of the right of way a charge upon any municipality, it shall not be necessary for the company to expropriate, and there is no provision authorising the company to enter before the municipality has expropriated.—*Held*, that the plaintiff was entitled to have the defendants enjoined as trespassers from entering upon his lands in the town of B. until such lands had been expropriated and the compensation paid. *Calder* v. *Middleton & Victoria Beach Rw. Co.*, 23 C. L. T. 18.

Expropriation — Agreement with remainderman — Action by life tenant for trespass — Plans — Date of deposit — Remedy — Arbitration — Injunction—Possession — Damages. *Burns* v. *James Bay Rw. Co.*, 11 O. W. R. 570.

Expropriation — *Arbitration and award —Choice of third arbitrator—Disagreement —Submission—Evidence — Witnesses — Increased value of lands not taken—Intercst— Compensation—Privileges.*]—The choice of a third arbitrator, left in the submission to the two arbitrators named by the parties, may be made, although there has been no disagreement between them, the Act not requiring a disagreement as a condition precedent.—A stipulation by the parties to a submission renouncing the right to call witnesses is no obstacle to the arbitrators calling witnesses of their own motion, if they think proper.—In fixing the compensation for land expropriated by virtue of the Dominion Railway Act, 1903, the arbitrators must take into account, not the increased value which the construction of the railway gives to land in the locality, generally, but the increased value, if any, which the claimant's land, part of which has been taken, acquires above that given to the neighbouring lands.—Where the arbitrators are constituted *amiables compositeurs*, they may allow interest upon the compensation money from the date of taking possession of the land expropriated, and may also impose upon the railway company the obligation of doing certain things to reduce the amount of the compensation which he must pay. *Quebec Improvement Co.* v. *Quebec Bridge and Rw. Co.*, 29 Que. S. C. 328.

Expropriation — *Arbitration and award —Costs—Execution—Taxation — Action for costs.*]—The award made by the arbitrators does not constitute a judgment for costs, and therefore the latter cannot be recovered against the losing party by way of execution.—By s. 162 of the Railway Act, the Judge in taxing the costs is exercising a function merely ministerial; and such taxation has not the effect of giving to the party in favour of whom the costs have thus been taxed, a judgment upon which he might proceed to recover his costs.—The only means to recover the costs under the Railway Act would be by way of an ordinary action. *Can. North. Quebec Rw. Co.* v. *Touchette*, 9 Q. P. R. 125.

Expropriation — *Award — Appeal — Barrister — Arbitrator — Affidavit — Examination on motion—Evidence of arbitrator —Hotel property—Right of company to fence off railway premises—Effect of—Goodwill—License, value of—Interest.*]—There is no objection to an arbitrator, who is a barrister and probably also a solicitor, making an affidavit shewing how the amount found by the arbitrators was made up for use on an appeal from an award under the Dominion Railway Act, 1903; and it is therefore properly receivable on such appeal, as is also the evidence of an arbitrator given on his examination as a witness on a pending motion.—Where the land taken consisted of an hotel property, an allowance was properly made for the loss sustained by the owner for the disturbance of his business and anticipated profits by reason of the expropriation, notwithstanding by the fencing off of the railway property therefrom, which the company had the right to do, the hotel property might have been rendered valueless as such, but which right the company had never attempted to exercise and presumably never would have exercised.—The value of the license of an hotel is also a proper subject of allowance, though merely a personal right, and the renewal thereof, though reasonably probable, is not absolutely certain.—Interest on the amount of compensation awarded is properly allowable from the date of the taking of the land, which in this case was the filing of the plan shewing the land expropriated, and the order of the Railway Commission authorising the taking. *In re Cavendish and Canadian Atlantic Rw. Co.*, 9 O. W. R. 842, 14 O. L. R. 523.

Expropriation — Award of damages — Review by *certiorari*—Error in principle — Allowance of value of improvements made by company. *In re Maritime Coal and Rw. Co. & Elderkin*, 2 E. L. R. 284.

Expropriation — Compensation—Arbitration and award—Railway Act — Appeal from award—Principal of decision—Actual value of land—Interest—Percentage for compulsory taking. *Re Can. North. Rw. Co. and Robinson*, 7 W. L. R. 593, 17 Man. L. R. 396, 8 Can. Ry. Cas. 226.

Expropriation — *Compensation—Award —Increase on appeal—Damages from severance of farm—Access of cattle to springs— Farm crossing — Offer to provide — Statutory right—Railway Act, 1903, s. 198—Costs of arbitration.*]—The railway company took for the purposes of their railway 3.09 acres of a grain and dairy farm of about 195 acres. The railway crossed the farm, severing from the front part of it about 24 acres, including a field of 18 acres which contained springs affording a supply of water for the cattle and horses on the farm. Upon an arbitration to ascertain the compensation to be paid for the land taken and the damages sustained by reason of the exercise of the railway company's powers of expropriation, the owner of the farm claimed damages *inter alia* for the loss or serious impairment of the convenient use for the purpose of the farm of the springs in the field mentioned. The company contended that the loss would be minimized by the construction of a farm crossing across the railway, and offered to

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appear before the Board of Railway Commissioners and consent to an order directing that such a crossing be constructed and maintained by them:—*Held*, applying *Vezina v. The Queen*, 17 S. C. R. 1, that the owner of the farm had no statutory right under s. 198 of the Railway Act, 1903, to a farm crossing sufficient to provide a satisfactory means of access for his cattle to and from the springs, and was entitled to damages in respect of this claim.—Construction of s.-ss. 1 and 2 of that section of the Railway Act.—*Held*, upon the evidence, that the sum of $1,170 awarded by the majority of the arbitrators was not adequate compensation for the land taken and the injury done, and the amount was increased upon appeal to $2,250.—Remarks upon the large costs and expenses incurred in arbitrations under the Railway Act and the harshness of the rule which throws them upon the land owner if the amount awarded is less than that offered by the company. *Re Armstrong and James Bay Rw. Co.*, 12 O. L. R. 137, 7 O. W. R. 713.

Expropriation — *Compensation—Award—Petition for ratification—Costs — Money paid into Court—Costs of distribution.*]—A petition for ratification of an award of compensation for an expropriation of land by a railway company for the construction of its line, is presented solely in the interests of the railway company, who must, therefore, pay the costs of the land-owner of appearing upon the petition, as well as the costs of the attorney for the land-owner upon such petition, but not the costs of an answer to the petition.—2. The costs incurred in respect of the distribution of the sum deposited in Court by the company will be paid out of that sum, according to the usual practice. *Chateauguay and North. Rw. Co. v. Laurier*, 9 Que. P. R. 245.

Expropriation — Compensation—Award — Principle upon which compensation or damages estimated — Land injuriously affected—Smoke, noise, and vibration from railway—Station yard — Peculiar adaptability of land taken for purpose—Elements of compensation—Award set aside—Judge on appeal disposing by consent of question of amount — Costs. *Re Canadian Pacific Rw. Co. and Gordon*, 11 O. W. R. 876, 12 O. W. R. 2; 8 Can. Ry. Cas. 53.

Expropriation — *Compensation awarded for lands taken—Interest — Jurisdiction of arbitrators — Possession taken by company under warrants of possession—Payment of money into Court—Payment out — Rate of interest.*]—The power conferred on arbitrators appointed under the Railway Act, R. S. C. 1906, c. 37, to award compensation for lands taken by a railway company is limited to determining the amount of such compensation merely; and, therefore, they exceeded their jurisdiction in awarding interest on the amounts allowed as compensation from the date with reference to which the same were ascertained, namely, the date of the filing of the plan, etc. *Re Canadian Northern Rw. Co. and Robinson* (1908), 17 Man. L. R. 396, approved of; *Re Cavanagh and Canada Atlantic Rw. Co.*, (1907) 14 O. L. R. 523, dissented from. Cases decided under the arbitration sections of the Municipal Act distinguished. Prior to the making of the awards, possession of the lands were taken by the railway company under warrants of possession issued by a Judge, payment into Court being then made by the company of sums deemed sufficient to satisfy the compensation to be awarded: — *Held*, that the owners were entitled to have paid to them out of the moneys in Court, not only the amounts of the compensation awarded, but also interest thereon, not limited to such interest as, according to the practice of the Court, is payable on moneys in Court, but at the legal rate of interest, namely, five per cent., payable from the date of the warrants of possession until the date of the payment out. *Re Lea and Ontario & Quebec Rw. Co.* (1885), 21 C. L. J. 154; *Re Taylor and Ontario & Quebec Rw. Co.* (1886), 11 P. R. 371, and *Re Philbrick and Ontario & Quebec Rw. Co.* (1886), 11 P. R. 372, referred to and discussed. *In re Clark and Toronto, Grey & Bruce Rw. Co.* (1909), 18 O. L. R. 628, 13 O. W. R. 699, 9 Can. Ry. Cas. 290.

Expropriation — *Compensation — Damages—Arbitration and award—Payment into Court—Costs.*]—In an action for damages for lands taken for railway purposes, part of the plaintiff's claim had been the subject of arbitration and award, but it appeared that part of the work of construction preceded the filing of the expropriation plans: —*Held*, that the plaintiff was entitled to recover for all damages which could have been legitimately excluded from the consideration of the arbitrators, and that the plaintiff's claim could not be deemed to have been satisfied by an award for injuries which would not have formed a legitimate subject for the consideration of the arbitrators.—The defendants paid into Court a sum of money which the trial Judge held insufficient, but which the Court, upon the evidence, thought excessive, if not the extreme limit of any damage of which there was reasonable evidence:—*Held*, in respect to this portion of the judgment appealed from, that the defendants' appeal must be allowed with costs. *Beaton v. Mabou and Gulf Rw. Co.*, 3 E. L. R. 54, 41 N. S. R. 429; 8 Can Ry. Cas. 251.

Expropriation — *Compensation—Loss of water supply—Absence of water record—Water Clauses Consolidation Act—Arbitration and award—Appeal.*]—In an arbitration to determine the amount to be paid to the owner of land expropriated by a railway company, the arbitrators found for the owner as compensation for the land $2,950, and for loss of water supply from a spring, obstructed in consequence of such expropriation, two of the arbitrators awarded the sum of $1,200. The third arbitrator returned a finding against any compensation for deprivation of the water in the absence of a water record:—*Held*, that the owner was entitled.—Where the three arbitrators agreed on the amount of compensation for land taken, and the third returned a separate finding, dissenting, on the construction of a statute, from giving compensation for deprivation of a water supply, and an appeal was taken:—*Held*, on objection raised to the appeal as being based on an insufficient amount in dispute, under s. 209 of the Railway Act (provincial), that there was only one award given, and the appeal was properly brought.—The owner of land on which

there is a spring or stream has rights therein to the exclusion of all other persons not holding records under the Water Clauses Consolidation Act, 1897. *In re Milsted*, 13 B. C. R. 364.

Expropriation — *Compensation to landowner — Arbitration and award — Railway Act—Appeal from award—Principle of decision—Actual value of land—Interest—Percentage for compulsory taking.*] — 1. Upon an appeal, under s. 209 of the Railway Act, R. S. C. 1906 c. 37, from an award of arbitrators determining the compensation to be paid to an owner for the compulsory taking of his lands by a railway company, the Court will not assume the function of the arbitrators and make an independent award, but will rather treat the matter as it would an appeal from the decision or verdict of a Judge, and the award will not be disturbed, unless the arbitrators manifestly erred in some principle in arriving at their conclusion.—2. Interest on the amount awarded should not be added by the arbitrators, especially in a case where the claimant remains in possession of the property until after the date of the award.—3. It is proper that the claimant should be allowed the actual value of the property to him, and not merely the market value as on a sale.—4. The arbitrators are not bound to allow ten per cent. extra on the amount of the compensation for the compulsory taking, although that is frequently done, and the Court will not interfere with their refusal to allow such percentage. *Re Canadian Northern Ry. Co. and Robinson*, 7 W. L. R. 593, 17 Man. L. R. 396.

Expropriation—Costs—Counsel fees—C. P. 554. See *Can. Pac. Ry. Co.* v. *Oligny* (1910), 12 Que. P. R. 11.

Expropriation — *Costs of application for warrant for possession—Railway Act.*] —Where a railway company, under their power to expropriate land, obtain a warrant for possession, and the amount awarded the owner in subsequent arbitration proceedings is less than the amount at first offered by the company, the costs of obtaining the warrant for possession shall be borne by the owner. *In re Vancouver, Victoria, and Eastern Ry. and Navigation Co. and Milsted*, 13 B. C. R. 187.

Expropriation—*Dominion Railway Act—Order appointing arbitrators to assess compensation — Application to rescind — Jurisdiction — Persons designata — Plan, profile, and book of reference not in accordance with Act.*]—In making an order under s. 196 of the Dominion Railway Act, 1906, appointing arbitrators to assess compensation to a land-owner for land taken by a railway company for right-of-way, under the compulsory powers contained in the Act, the Judge acts as *persona designata*, and when he has made the order he is *functus officio;* therefore, he cannot afterwards rescind the order, even though in making it he acted without jurisdiction; and an application to rescind such an order, upon the ground that the foundation of the arbitration proceedings was lacking, because the plan, profile, and book of reference were not in strict accordance with the Act, was dismissed. *Re Chambers & Can. Pac. Ry. Co.* (1910), 15 W. L. R. 694, Man. L. R.

Expropriation — Immediate possession —Necessity for—Station site — Plans not prepared *Re Williams and Grand Trunk Ry. Co.* 8 O. W. R. 277.

Expropriation — Land owned by city corporation—Right of lessee to compensation —Possession after expiration of lease—Provision in lease for new lease—Interest in land—Date of ascertaining compensation—Deposit of plan—Damages—Costs. *Canadian Pacific Ry. Co.* v. *Brown Co.*, 11 O. W. R. 919.

Expropriation — *Lands injuriously affected—Rights of tenant—Compensation — Action.*] — Plaintiff was lessee of a hotel. The defendant in constructing their railway required the hotel property from the owner, but took no proceedings to acquire the plaintiff's lease or right:—*Held*, plaintiff is entitled to an order directing the defendants to acquire the right of way for their railway through and over said lands, and to pay plaintiff compensation therefor. *McDonald* v. *Vancouver*, 11 W. L. R. 121.

Expropriation — Obstruction of water supply from spring — Compensation for — Award—Absence of water record — Water Clauses Consolidation Act. *Re Vancouver Victoria and Eastern Ry. Co. and Milsted*, 7 W. L. R. 384.

Expropriation — *Owner — Trustee — —Notice.*]—A bare trustee of land is not "the owner of the land or the person empowered to convey the land, or interested in the land sought to be taken," within the meaning of s. 71 of the Dominion Railway Act, 1903; and notice under that section must be served upon all the *cestuis que trust*. *Re James Bay Ry. Co. and Worrell*, 10 O. L. R. 740, 6 O. W. R. 473.

Expropriation — *Railway Act, 1903, ss. 152-171—Right of action where land entered upon by railway company before expropriation proceedings begun.*] — The filing of a plan, profile, and book of reference under the Railway Act, 1903, shewing the land required for the railway, does not warrant the company in taking possession of it before proceedings for expropriation are commenced, unless by agreement with the owner; and, if such possession is taken, the company are trespassers, and the owner is not limited to the remedy by arbitration provided by the Act, but may proceed by an ordinary action at law against the company. *Wicher* v. *Canadian Pacific Ry. Co.*, 5 W. L. R. 44, 16 Man. L. R. 343.

Expropriation — *Renewable lease — Occupation after expiration of term without renewal—Tenancy at will—Compensation—"Persons interested" in the land—Railway Act.*]—Lessees under a renewable lease, or their assignees, when the lessors have an option to renew or to pay for improvements, who remain in possession after expiration of the term, but to whom no renewal lease is granted, although demanded, are in occupation as tenants at will merely, and are not "persons interested" in the land within the

meaning of s. 155 of the Railway Act, R. S. C. 1906, c. 37, and therefore are not entitled to compensation for expropriation of any part of the lands demised. Judgment of Riddell, J., 11 O. W. R. 919, reversed. *Canadian Pacific Rw. Co.* v. *Alexander Gow Milling and Elevator Co.*, 18 O. L. R. 85, 13 O. W. R. 301, 9 Can. Ry. Cas. 56

Expropriation — *Requirements of plans, profiles and books of reference.*]—While a substantial compliance only is needed with the provisions of s. 158 of the Railway Act with respect to plans, profiles and books of reference to be filed prior to expropriation proceedings being taken, it must clearly appear from the plans, profiles and books of reference filed, exactly what portion of the land of each separate owner the Rw. Co. requires and the mere indication of the centre line of the proposed railway is not sufficient; the book of the reference is a necessary part of the filings to substantially comply with the provisions; if the first definite information of the owner as to the quantity of land to be taken is obtainable only from the notice served, there has not been substantial compliance with the Act. In the absence of evidence that the company has been oppressive or high-handed, an injunction will not be granted to restrain the railway company from proceeding with the railway even if there has not been substantial compliance with the Act, provided the railway company will enter into an undertaking to comply forthwith with the requirements of the Act and to facilitate the proceedings for determining the amount of compensation to be paid—following *Corporation of Parkdale* v. *West*, L. R. 12 A. C. 602, 56 L. J. P. C. 66, and *Hendrie* v *Toronto, Hamilton & Buffalo Rw. Co.*, 26 O. R. 667, affirmed, 27 O. R. 46. But the Court will reserve to the plaintiff the right to apply to a single Judge for an injunction to prevent any unnecessary delay in proceeding to comply with the Act and pay compensation. Warrants of possession improperly granted to a railway company which has not complied with the provisions of the Act will not prevent or render invalid the registration of a plan subdividing the lands required by the railway company. *Marsan* v. *G. T. P. Rw. Co.* (1909), 2 Alta. L. R. 43, 10 W. L. R. 465, 9 Can. Ry. Cas. 341.

Expropriation — *Special Act—General Act—Easement or interest—Sufficiency of notice—Immediate possession.*]—The defendants had, under their special Act, power to acquire "any privilege of easement required by the company . . . over and along any land, without the necessity of acquiring a title in fee simple thereto;" and the Act defined "land" as including any such privilege or easement, etc. In giving notice of expropriation the defendants did not state whether it was the fee simple, or merely some easement or privilege over the land, which they sought to acquire, but only that they proposed to acquire the land "to the extent required for the corporate purposes of the company:"—*Held*, that such notice was too uncertain a foundation for expropriation proceedings, and the defendants were not entitled to a warrant for immediate possession under s. 170 of the Railway Act of 1903, 3 Edw. VII. c. 58 (D.) *Lees* v. *Toronto and Niagara Power Co.*, 12 O. L. R. 505, 8 O. W. R. 294.

Expropriation — *Submission to arbitration — Award—Notice—Entry on land—Trespass.*]—By statute in Nova Scotia the recompense for land taken for railway purposes and for earth, gravel, etc., removed, must be determined by arbitration. A railway company proposed to expropriate, and their engineer wrote to M., who had acted for them in similar matters before, instructing him to ascertain if the owners had arranged their title so that the arbitrators could proceed, and if so to act for the company and request the owners to appoint their man, the two to appoint a third if they could not agree. The engineer added in his letter: "I will send an agreement of arbitration, which each one can subscribe to, or, if they have one already drafted, you can forward it here for approval." No agreement was sent or received by the engineer, but the three arbitrators were appointed and met and investigated the damages, making an award, which the company refused to pay, and the owner sued:—*Held*, reversing the judgment in *McIsaac* v. *Inverness Ry. and Coal Co.*, 38 N. S. R. 80, that, as the company had not taken the preliminary steps required for expropriation, the award was not made under the statute, and was void for want of a proper submission.—Under the statute the company could enter upon the land prior to expropriation, on giving notice to the owner of their intention and stating the quantity of land they intended to take. Without giving such notice the company entered and cut down trees and removed gravel. The owner sued on the award and added an alternative claim for trespass. The trial Judge held the award bad, and dismissed the claim for trespass on the ground that the owner's sole remedy was by arbitration: —*Held*, that the entry on the land was not under the statute, and the remedy by action was not taken away, and the owner was entitled to a new trial on his claim for trespass. *Inverness Rw. and Coal Co.* v. *McIsaac*, 26 C. L. T. 189, 37 S. C. R. 134.

Expropriation — *Trespass — Nominal damages.*]—The defendant applied for warrant of possession under the Railway Act regarding expropriations of lands, and the Judge, sitting in Court, granted the warrant of possession on facts which the Court *en banc*, in *Marsan* v. *Grand Trunk Pacific*, 2 Alta. L. R. 43, *held*, were not sufficient to give the Judge jurisdiction, and the order was therefore invalid. The plaintiff instead of taking an appeal from the order, brought an action against the railway company claiming injunction and damages: — *Held*, that plaintiff could maintain action, for reason that, even if an appeal would lie from the order, the plaintiff was entitled to additional relief by way of an injunction and damages which could not be given on appeal.—*Held*, also, the principle of *res judicata* would not apply, as the order granting the warrant of possession was made without jurisdiction. *Attorney-General for Trinidad* v. *Enriche*, 63 L. J. P. C. 6, [1893] A. C. 518, referred to.—*Held*, also, that the railway company, having acted under the invalid warrant of possession, had committed a technical trespass and was liable for nominal damages which carried costs. *Marsan* v. *G. T. P.*

Rw. Co., 2 Alta. L. R. 43, 9 Can. Ry. Cas. 341. 10 W. L. R. 465, distinguished. *Girouard* v. *G. T. P. Rw. Co.* (1909), 2 Alta. L. R. 54, 9 Can. Ry. Cas. 354, 10 W. L. R. 531.

Expropriation — *Valuation by arbitrators—Improvements — Fixtures placed on land by company before filing plan—Compensation for — Irregular entry — Railway Act.*]—A railway company in 1909 entered upon lands and made valuable improvements, intending to take and use the lands for the purpose of their railway. In 1905 they obtained authority to take the lands, and filed their plan under the Railway Act on the 23rd March, 1905. Arbitrators, in awarding compensation to be paid by the company for the lands, allowed to the claimants a sum for the improvements actually made by the company:—*Held*, that the company did not stand in the same position as an ordinary trespasser going upon lands; they had a statutory right to acquire a title, and entered after negotiation with the true owners, and with the permission of one who claimed to be, but turned out not to be, the true owner; although the improvements were fixtures, dedication to the land owners was not to be presumed, but the contrary; and the amount of the award should be reduced by the sum allowed for the improvements.—Section 153 of the Railway Act, which provides that the date of the deposit of the plan shall be the date with reference to which the compensation or damages shall be ascertained, does not mean that all the company's improvements made before depositing the plan go to the land owner; the lands dealt with in this section are the lands as the company obtained them, in the condition they were at the time they entered, valued as of the date of filing the plan; the claimants' right to compensation accrued at the date the lands were taken, and stood "in the stead of the lands by virtue of s. 173;" and so the improvements were not put upon the lands of the claimants at all. *Re Hutton and Dreifus and Canadian Northern Rw. Co.*, 12 O. L. R. 187, 7 O. W. R. 568.

Expropriation — Warrant of possession—Railway Act — Jurisdiction of Judge as *persona designata*—Conditions precedent—Deposit of plan, etc., with Board of Railway Commissioners—Deposit in land titles office — Publication of notice of deposit — Notice to treat — Service — Persons to be served—Affidavit of necessity for immediate possession—Notice of application—Security—Right of deviation—Costs — Branch line less than six miles in length—Special authorisation by board. *Re Grand Trunk Pacific Rw. Co. and Marsan*, 9 W. L. R. 211.

Fixing compensation.]—Regard should be had to the prospective capabilities of the property, arising from its character and situation, when fixing compensation. *Que., Montreal & Southern Rw. Co.* v. *Landry*, 19 Que. K. B. 82.

Form of award — *Evidence — View of property—Proceeding on wrong principle — Disregarding evidence.*] — In expropriation proceedings, under Railway Act, arbitrators in making their award stated that they had not found the expert evidence a valuable factor in assisting them in their conclusions, and that, after viewing the property in question, they had reached their conclusions by "reasoning from their own judgment and a few actual facts submitted in evidence." On appeal from judgment of Supreme Court of Alberta setting aside the award and increasing the damages:—*Held*, that it did not appear from the language used that the arbitrators had proceeded without proper consideration of evidence adduced, or upon what was not properly evidence, and, therefore, award should not have been interfered with. *Calgary & Edmonton Rw. Co.* v. *MacKinnon* (1910), 30 C. L. T. 742, 43 S. C. R. 379.

Immediate possession — Security — Compensation and costs — *Quantum*. *Re Davies & James Bay Rw. Co.*, 6 O. W. R. 388.

Indemnity — *Damages.*]—A Rw. Co. which gives a notice that a certain piece of land will be expropriated for purpose of building an electric railway upon it, and which pays the indemnity awarded to proprietor may, nevertheless, be condemned to pay further damages if it operates a steam railway. In such a case there is *res judicata* simply as to the damages awarded by arbitrators and as to their notice of expropriation. Under this head, plaintiff has right to recover direct, determined and actual damages, but not probable damages, that is to say, the additional costs and expenses which the construction of a steam railroad has put him to, but he cannot demand a lump sum for past, present and future damages. *Lapointe* v. *Chateauguay & Northern Rw. Co.*, 16 R. L., n. s. 109.

Infant remainderman — *Tenant for life—Order authorizing conveyance—Costs—Railway Act, R. S. C. 1906 c. 37, ss. 183, 184.*]—Where a widow was entitled to a life estate in certain lands and her infant children to the remainder in fee, and she had made an agreement with a railway company to sell them such part of the lands as they required for their right of way at a reasonable price, approved by the official guardian on behalf of the infants, an order was made by a Judge under s. 184 of the Railway Act, R. S. C. 1906 c. 37, giving the power to sell the lands and the rights of the infants therein, which power, joined to her legal power as tenant for life, would enable her to sell and convey the fee: the purchase money to be paid into Court, and the company to pay the costs. *Re Dolsen*, 13 P. R. 84, followed, the sections of the Act as it now stands being substantially the same as in the Act of 1888. *Re Canadian Pacific Rw. Co. and Byrne*, 10 O. W. R. 273, 15 O. L. R. 45.

Injury — Subsidence — Remedy — Action — Damages—Mandatory order—Continuing damages—Compensation — Stay of proceedings. *Hanley* v. *Toronto, Hamilton, and Buffalo Rw. Co.*, 6 O. W. R. 841, 11 O. L. R. 91.

Injury by laying double tracks — Action for damages—Remedy by arbitration under Railway Act — Farm crossing — Blocking by heaping up snow—Actionable wrong—Limitation of time for bringing ac-

tion — Blocking of drains — Assessment of damages—Costs. *Knill* v. *Grand Trunk Rw. Co.*, 8 O. W. R. 870.

Injury to land — Flooding — Ditches—Severance of farm—Gates — Guy-posts — Fencing — Damages — Costs. *Bowers* v. *Windsor Essex and Lake Shore Rapid Rw. Co.*, 11 O. W. R. 432.

Inspection by arbitrators.]—When the evidence is deficient on an element of damage (*e.g.*, the severance of the property into two blocks by the railway), which the arbitrators were enabled to appreciate by inspection, their finding in that regard will not be disturbed in appeal. *Que., Montreal & Southern Rw. Co.* v. *Landry*, 19 Que. K. B. 82.

Intervention by an interested party —*Jurisdiction of the Superior Court—C. P. 48; R. S. C. c. 37.*]—A person who claims the ownership of a lot of land may intervene in the proceedings taken by a railway company to expropriate it, but such intervention will not affect such proceedings as were taken previously against the registered proprietor.—The Supreme Court is the tribunal which has jurisdiction to receive such intervention. *Montreal & South. Counties Rw.* v. *Woodrow & Cameron*, 11 Que. P. R. 230.

Irregular proceedings.] — When arbitrators in expropriation proceedings under Dom. Rw. Act, have allowed one of the parties to proceed irregularly in the production of his evidence, if the other party, though objecting, afterwards puts in his evidence, he cannot set up the irregularity as a ground of appeal from award. It comes within the class of technical objections which are provided against in s. 205 of the Act. *Que., Montreal & Southern Rw. Co.* v. *Landry*, 19 Que. K. B. 82.

Land required for right of way — Negotiations with owner—Written statement by owner of terms of sale—Oral intimation that taking possession would mean acceptance of terms—Railway company taking possession without filing plans and book of reference—Presumption that terms accepted—Completed contract — Statute of Frauds—Part performance—Specific performance—Mandamus—Level crossing. *Carr* v. *Canadian Northern Rw. Co.* (Man.), 6 W. L. R. 720.

Lands were expropriated by the Commissioners for purposes of the National Transcontinental Railway. Cassels, J., *held*, that the Exchequer Court has no jurisdiction to assess compensation for lands taken and vested in the Crown under the provisions of s. 13 of 3 Edw. VII. c. 71, because by s. 15 of that Act the provisions of the Railway Act, R. S. 1906, c. 37, for assessing compensation in such cases by a reference to arbitration, are invoked as a special remedy, which must be strictly pursued. *Scott* v. *Avery*, 5 H. L. C. 811; *Williams* v. *Corporation of Raleigh*, 14 P. R. 50, 21 S. C. R. 104, L. R. H. C. 540; *London Water Commissioners* v. *Saunby*, 34 S. C. R. 650, followed. *R.* v. *Jones* (Ex. C. 1910), 9 E. L. R. 1.

Leasehold interest — Sublease—Covenant—Payment of rent — Acquisition of fee —Compensation — Interest — Agreement— Reference — Costs. *Can. Pac. Rw. Co.* v. *Grand Trunk Rw. Co.*, 8 O. W. R. 299.

Leasehold interest in land — Sublease — Covenant — Payment of rent — Acquisition of fee—Surrender — Compensation —Indemnity — Interest — Agreements — Construction. *Can. Pac. Rw. Co.* v. *Grand Trunk Rw. Co.*, 9 O. W. R. 703.

Natural flow of water—*Action to compel owner of land to receive.*]—The determination by the Railway Commission of the works to be done and its approval of the plans and list of charges, the whole as provided by R. S. C. (1906), c. 37, is a condition precedent to institution of a confessory action by owner of dominant land against a railway company under jurisdiction of Parliament of Canada, owner of the servient land, to oblige it to receive a natural flow of water and to recover damages for its refusal so to do. *Blais* v. *Grand Trunk Rw. Co.* (1910), 39 Que. S. C. 236.

Notaries engaged by a railway company to obtain a right of way for it over the lands of different proprietors, their services constitute one contract, and their mandate, in order to permit of prescription running against them for professional services and disbursements, only comes to an end when their negotiations with the last proprietor are completed. *Morin* v. *Montreal Terminal Rw. Co.*, 16 R. L., n.s., 17.

Notice — *Withdrawal after possession—New notice—Increase in compensation money — Arbitrator — Costs.*] — A railway company, having given notice of requiring certain land for their railway, and having taken possession of it, cannot abandon their notice and give a new notice for the same land. *Can. Pac. Rw. Co.* v. *Little Seminary of Ste. Therèse*, 16 S. C. R. 606, applied. Where the company named in their new notice a larger sum of compensation money than in their original one, and a different arbitrator:—*Held*, upon a motion by the land owner to compel the company to proceed with the arbitration, that, although the new notice was ineffective, and the arbitration could proceed only under the original notice, the appointment of the new arbitrator should be confirmed (the land owner not objecting), and the company should be allowed to increase their offer, but not so as to prejudice the owner as to anything that might have occurred before the new notice, and the offer of the increased sum might be taken into consideration upon the question of costs. *In re Haskill & Grand Trunk Rw. Co.*, 24 C. L. T. 232, 7 O. L. R. 429, 3 O. W. R. 377.

Notice of expropriation — Easement —Railway Act — "Lands" — Amendment. *Re James Bay Rw. Co. & Worrell*, 6 O. W. R. 512.

Notice to treat—*Abandonment—Service of new trial—Continuance of former proceedings — Costs of abandoned proceedings — Dominion Railway Act, ss. 193, 194, 196, 199, 207 — Evidence—Res judicata—Taxation of*

Costs—Delegation by Judge.]—The defendants, desiring to take land of the plaintiff for the purposes of their railway, served notice to treat under s. 193 of the Dominion Railway Act, but the plaintiff and defendants could not agree upon the price, whereupon the defendants applied to a Judge, pursuant to s. 196, for the appointment of an arbitrator, and also, pursuant to ss. 217 and 218 of the Act, for a warrant of possession. This was refused, because the notice to treat was not accompanied by a proper certificate under s. 194. The defendants then served another notice to treat, accompanied by the proper certificate; and also, at the same time, viz., on the 3rd October, 1907, a notice desisting from and abandoning the first notice to treat and all subsequent proceedings. The plaintiff treated this last notice as given in pursuance of s. 207, and proceeded to tax costs as of an abandonment under that section and s. 199; the costs were brought before a Judge, who directed a taxation by an officer, and adopted the result. This action was brought to recover the costs so taxed: — *Held*, Martin, J., *haesitante*, that the "abandonment" contemplated by s. 207 of the Act is one with the intention of taking no further action; the new notice must be regarded as a continuation of the old proceedings; and the notice of the 3rd October did not come within s. 207, and the plaintiff was not entitled to costs under s. 199.—In considering the question, the Court was not restricted to the notice, but could consider other relevant evidence.—*Held*, also, that the subject-matter of the action was not *res judicata* by reason of the taxation of the costs by the Judge or at his instance.—*Semble*, also, *per* Galliher, J.A., that the Judge taxing the costs had power to refer as he did, adopting the taxation of the officer. *Atwood v. Kettle River Rw. Co.* (1910), 14 W. L. R. 429.

Obligation to fence right of way — *Railway Act, R. S. C. 1906 c. 37, ss. 254, 427—Injury to crops caused by cattle straying from railway line not fenced.*]—The duty of a railway company to provide, under s. 254 of the Railway Act, R. S. C. 1906 c. 37, fences and cattle guards suitable and sufficient to prevent cattle and other animals from getting on the railway, is prescribed only to protect the adjoining land owners from loss caused by their animals being killed or injured on the tracks; and, notwithstanding the general language of s. 427 of the Act, which gives a right of action to any one who suffers damages caused by the breach of any duty prescribed by the Act, an adjoining owner whose crops are injured by cattle straying on to his land from the railway track, in consequence of the absence of fences and cattle guards, has no right of action against the railway company in respect of such injury. *James v. Grand Trunk Rw. Co.*, 31 S. C. R. 420, *Gorrie v. Scott*, L. R. 9 Ex. 125, and *McKellar v. Can. Pac. Rw. Co.*, 14 Man. L. R. 614, followed. *Winterburn v. Edmonton Rw. Co.*, 8 W. L. R. 815, not followed. Richards, J.A., dissented. *Hunt v. Grand Trunk Pacific Rw. Co.*, 18 Man. L. R. 603, 10 W. L. R. 581.

Offer of price — *Acceptance — Time—Railway Act, 1903, s. 159—Contract—Action—Arbitration.*]—Under s. 159 of the Railway Act, 1903, if the owner of land sought to be expropriated by the railway company does not accept the offer of the railway company within ten days, the company may at once proceed to have the amount of the compensation payable determined by arbitration; but the owner may accept the offer at any time after the expiration of ten days, if in the meantime the company have taken no further proceedings, and such offer and acceptance will constitute a binding contract between the parties upon which the owner may proceed in an action to recover the amount offered. *Bennetto v. Can. Pac. Rw. Co.*, 8 W. L. R. 197, 18 Man. L. R. 13, 8 Can. Ry. Cas. 223.

Orders in council — Board of railway commissioners — Railway Act — Rights of placer miners—Open mines — Deposit of waste — Licenses — Renewal — Plan of line — Omission to file — Injunction — Compensation — Jurisdiction of Territorial Court—Remedy—Arbitration. *Day v. Klondike Mines Rw. Co.* (Y.T.), 2 W. L. R. 295.

Petition of right — *Railway Act—Land damages—Reasonable time—Reference to independent parties when Masters disqualified.*]—The Railway Act empowered commissioners to deprive private persons of property required for railway purposes. If dissatisfied with the compensation awarded, such persons could apply to a board of appraisers to be appointed for the whole Island to assess the damages, who were to give notice of the time when they would examine the land and assess the damages, and s. 14 enacted that they should "transmit the assessment to the Lieutenant-Governor in Council, who should direct payment to be immediately made." The Government, instead of appointing one board for the whole Island, had appointed three, one for each county, and it was not until two days before the hearing that one general board was appointed. On 6th October, 1871, the commissioners entered upon part of petitioner's land, and it became vested, under the provisions of the Act, in the public for railway purposes. On 8th February, 1872, petitioner made his claim on the commissioners for compensation, who, on 9th April, awarded him $259.55. Being dissatisfied he, on the 17th April, 1872, applied to the appraisers to ascertain the amount of compensation according to the Act, but they failed to give the required notice, and he commenced this suit on 6th May, 1872. The Government sent in their resignation on 18th April, which was accepted on 22nd April, and on the same day the resignation of the appraisers was accepted, and no new ones appointed until 8th May. For the Crown it was contended that under the peculiar circumstances there had been no unreasonable delay in giving the notice, and that petitioner was too hasty in bringing his suit and that his petition should be dismissed, and that he ought to revert to the assessors to assess his damages. Petitioner's counsel objected that there was no legal board of appraisers in existence when the action was brought, the Government having appointed three boards instead of one, and that as the appraisers were appointed by the Government itself it was not equitable to send the case back to them. All the Masters were disqualified to act, and there-

fore no reference could be made to them, and the question arose as to how the amount of compensation could be ascertained if the matter was not referred to the board of appraisers:—*Held*, (Peters, M.R.): That there had been unreasonable delay, and that at the time the action was commenced there was no legal board of appraisers.—2. That a commission under the seal of the Court of Chancery should issue to five independent persons to assess the amount of compensation, and to return their proceedings to this Court, when it would be open to either party to take exception to the return in the same manner as to a Master's report. *De Blois* v. *R.* (1872), 1 P. E. I. R. 398.

Possessory actions — *Complaint — Trouble arising from the works of a railway company outside the limit it has a right to expropriate.*]—Independently of the right to the indemnity to be fixed by arbitration for the value of their land, the owners expropriated for the purpose of constructing a railway have recourse to the action for damages against the company, for the trouble arising from their works outside the limit of a hundred feet that the law gives them the right to expropriate. *Germain* v. *C. N. O. Ry. Co.*, Q. R. 36 S. C. 10.

Principal and agent — *Agency generally — Rights and liabilities of principal and agent — Delegation of authority.*] — When the power given by one party to another by an instrument in writing is of such a nature as to require its execution by a deputy, by the law in force in Lower Canada, the party originally authorized as the agent may appoint a deputy. By an Act of the Canadian Legislature, 13th & 14th Vict. c. 116, a company were incorporated for the purpose of making a railway, with power to purchase and take land required for the railway, either by agreeing with the owners of the land for the price and compensation to be given, or, if the matter could not be settled, by referring to arbitration. A contract was afterwards entered into between the company and certain contractors for completion of the railroad; by this contract it was agreed that the contractors were to complete the railroad at their own expense and charges, and pay any claim which might be made against the company, including the purchase of lands required, and the company were to exercise or permit the contractors to exercise, as the case might be, any powers vested in them by the Act of Incorporation, as fully, amply and effectually, as if the company itself had exercised such powers and performed the works; and, in the exercise of such powers, the contractors were to use the name of the company, if deemed necessary. The contractors who resided in England, afterwards, by a power of attorney which recited the above contract, deputed R. as their agent, with full power, on their behalf, to construct the railroad and to enter into contracts for the purchase of land, and to settle and claim for land or other damages, and generally to execute and perform all such acts and things in reference to the purchase of land as fully and effectually as the contractors might do. The company required part of Q.'s land, and before the contract for the completion of the railroad, had been in treaty with him for the taking such land, but could not agree upon the terms. Q. had, in consideration of the company's compulsory power of purchase under the Act, let them into possession. An agreement, or bond of arbitration, was afterwards entered into by R. and Q. to refer the matter to arbitrators, "*amiables compositeurs*," to ascertain the amount that the company should pay to Q. for the land. In this agreement R. was described as the agent, and attorney of the contractors for the works upon the railroad, "acting in this behalf in the name of the company under authority to that effect contained in the contract between the company and the contractors." The arbitrators awarded a certain sum for land and for damages sustained by Q. to be paid by the contractors. Q. applied to the company for payment, who referred him to the contractors, who refused to pay the amount. Q. then brought an action against the company in the Superior Court in Lower Canada to recover such amount. The company pleaded in defence that the contractors by the contract, were alone liable, and that R. had no authority either from them, or the contractors, to refer the matter to arbitration of "*amiables compositeurs*." Upon appeal *held*, (affirming the judgments of the Courts below). First, that the contractors, both by the express language and the necessary effect of the contracts with the company, were to be considered as agent of the company, with authority to exercise the powers vested in the company, by the Act of Incorporation, in the name of the company, and to buy lands, and to make the company liable to third parties with whom they had contracted in the name of the company, to the performance of any engagement entered into on their behalf, although, as between the contractors and the company, the former were bound to supply the necessary funds. Second, that the contractors under the contract had power to delegate to an agent, powers similar to those vested in them by the company, and that under the power of attorney executed by the contractors, R. possessed the same powers of acting and rendering the company liable, as the contractors themselves had under the contract. Third, that the company had no power to transfer their rights created by the Canadian Act, 13 and 14 Vict. c. 116, to the contractors, so as to relieve themselves from the responsibility which the Legislature had attached to the exercise of their powers. Fourth, that the action was properly brought against the company upon the award, as the contract with the contractors in no degree, altered the position of the company with third parties, and that the agreement with R. was made on the company's behalf, for although the company had a right, as between themselves and the contractors, to require the contractors to make payment, yet, as the contractors' agent, R., had entered into no personal engagement with Q., the contract with the company was *res inter alios acta*, with which Q. had nothing to do. Fifth, that the submission to arbitration of "*amiables compositeurs*" was the proper course to pursue. *Quebec & Richmond Ry. Co.* v. *Quinn* (1858), C. R. 2 A. C. 431.

Proceedings under Railway Act of Canada.]—The fact that the Railway Commission has authorised the expropriation of certain lands, and has approved the plans in respect thereof, for the construction of a rail-

way, does not deprive the Superior Court of its jurisdiction nor of its power to receive an intervention, before such Court, on the part of a third party who alleges that he was, when the notices were given, and still is, the owner of the property in question even though his title has not been registered. The mere approval of the plans and the authorisation which the Railway Commission gives that the expropriation should be proceeded with do not under such circumstances, create *res judicata*, to the extent of removing from the power of interested third parties all legal remedy by means of intervention to protect their rights.—There is concurrent jurisdiction over such subjects, and the Superior Court, as well as the Railway Commission, may receive such intervention.—Such an intervention, and under such circumstances, will have the effect of allowing the intervenant to protect his interests under all pending or subsequent proceedings. *Montreal Southern Counties Ry. Co. and Woodrow* (1910), 16 R. de J. 453.

Railway Act, R. S. C. (1906), c. 37 —*Arbitration—Appeal from the findings of the arbitrators—Irregularities and nullities —Finding invalid in part and valid in part— A lump sum for several heads of indemnity— Damages for which indemnity may be claimed —Riparian rights on public canals—Invalidity of the finding based on illegal proof— Power of the Court to fix the indemnity.*]— An appeal to the Superior Court from the finding of the arbitrators in an expropriation for a railway given by s. 209, c. 37, R. S. C. 1906, and an action to set aside by common law in this province recognised in s.-s. 4 of the same section, are different recourses which may be resorted to in one and the same action. A difference between the finding of the arbitrators, such as giving under their hand and seal and such a finding as the final conclusion of the arbitrators, is an irregularity but is not a nullity in every case. The nullity of a part of their finding involves the nullity of the rest only when the finding forms an indivisible whole or if there is prejudice in favour of one of the parties. Hence a finding adjudging the costs of an arbitration when the law fixes on whom it must fall is null for that part and may be valid for the rest. When the indemnity covers several objects, *e.g.*, the land expropriated, the buildings and inconveniences resulting from the expropriation, etc., it is not necessary that the findings specify how much is given for each of these headings; it may fix a lump sum for all. The party indemnified has a right only to the damages resulting directly and exclusively from the expropriation. The arbitrators can not take into account inconveniences he may suffer in common with the rest of the public, such as are caused by the noise and the smoke and the greater difficulty of reaching the highway. A farm separated from a canal by a public road has not riparian rights as to the canal. The riparian owners of public canals cannot be owners of the banks nor of the water; in consequence they are excluded from all riparian rights whether by way of ownership or servitude. When it appears from the deliberations of the arbitrators that they have taken into consideration in fixing the amount of their award the proof that was offered them as to the value of the losses or inconveniences for which the law grants them to indemnity, the award is void; it cannot be shewn by proof or by examination with the purpose of reducing what proportion the arbitrators have made for these illegal causes. The Superior Court in deciding the appeal must fix in accordance with the evidence taken before the arbitrators the indemnity due for the expropriation. *The O. & Q. R. Co.* v. *Vallieres*, 1909, 36 Que. S. C. 349.

Railway siding given in reduction of damages in expropriation—*Non-construction of—Damages.*]—The Government expropriated certain lands belonging to supplicant's father, now deceased. In mitigation of damages the Government undertook to construct a railway siding to the lands now owned by the supplicant and to allow said father, his heirs, etc., to use said siding for any lawful business to be carried on or done on said lands and premises. Supplicant claimed that the Government had wholly failed, neglected and refused to lay and maintain said siding and sought to recover $10,000 damages. Cassels, J., *held*, that a siding had been constructed in front of or adjoining said premises; that the claim was grossly exorbitant in view of supplicant's evidence in a former action regarding same property, that no work had been done on the property requiring a siding and no reasonable ground of complaint existed. Petition dismissed with costs. *Hart* v. *Rex* (1910), 8 E. L. R. 548.

Remedy of owner — *Litigious rights —Registration of title.*]—If a railway company incorporated by a provincial charter refuses to recognise the rights of one who claims compensation for land taken by the company, the legal remedy is an *action petitoire*.—2. If land has been purchased in good faith and the price paid, unless it is established that at the time of the sale the purchaser knew that an action was pending, it cannot be regarded as the purchase of a litigious right, even if later a judicial contest arises on the subject of the title.—3. By virtue of the Railway Act, R. S. Q., Art. 2128 *et seq.*, the registration of sales and transfers of property by way of expropriation is not necessary.—*Semble*, that a railway company is not obliged to register its titles. *Quebec, Montmorency & Charlevoix Ry. Co.* v. *Gibsone*, 9 Que. Q. B. 175.

Right of way — Agreement with land owner — Construction — Trespass. *Matheson* v. *Grand Trunk Ry. Co.*, 3 O. W. R. 213.

Right of way — *Expropriation—Delay in notice to treat — Property injuriously affected — Compensation — Mandamus.*] — The approval and registration of plans, etc., of the located area of the right-of-way, under the provisions of the Railway Act, and the subsequent construction and operation of the line of the railway along such area, do not render the railway company liable to mandamus ordering the expropriation of a portion of the lands shewn within such area which have not been physically occupied by the permanent way as constructed. Appeal allowed with costs. Fitzpatrick, C.J., and Davies, J., dissenting. Judgment in 15 B. C. R. 315 reversed. *Vancouver, Victoria &*

Eastern Ry. Co. v. *McDonald* (1910), 31 C. L. T. 257, 44 S. C. R. 65.

Right of way over lands occupied by another railway—Order of Railway Committee—Expropriation — Notice — Defects in—Injunction. *Grand Trunk Ry. Co.* v. *Lindsay, Bobcaygeon, & Pontypool Ry. Co.*, 3 O. W. R. 54.

Right of way through farm—Construction of drain — Injury by flooding to lands adjoining right of way—Evidence—Railway Act, R. S. C. 1906 c. 37, s. 250—Right to apply to Board of Railway Commissioners—Right to damages—Assessment of damages. *Woods* v. *Can. Pac. Ry. Co.*, 13 O. W. R. 49.

Right to compensation — Operation of railway — Alterations in street — Interference with access — Injury from smoke, etc. *Re Macdonald and Toronto, Hamilton and Buffalo Ry. Co.*, 2 O. W. R. 721, 723.

Statute — *Construction — Tramway for transportation of materials.*] — The place where materials are found referred to in s. 114 of the Railway Act means the spot where the stone, gravel, earth, sand, or water required for the construction or maintenance of the railway are naturally situated, and not any other place to which they have been subsequently transported. *Per* Taschereau and Girouard, JJ.:—The provisions of s. 114 confer upon railway companies a servitude consisting merely in the right of passage, and do not confer any right to expropriate lands required for laying the tracks of a tramway for the transportation of materials to be used for the purposes of construction. *Quebec Bridge Co.* v. *Roy*, 23 C. L. T. 39, 32 S. C. R. 572.

Subsidy — *Grant — Construction of statute—Mines and minerals — Reservation — Dominion Lands Act.*]—*Held*, that the appellant railway company, being entitled under 53 V. c. 4 (D.), and an order in council made in pursuance thereof, to grants of Dominion lands as a subsidy in aid of the construction of their railway, were entitled to them without any reservation by the Crown of mines and minerals except gold and silver. The Dominion Lands Act, 1886, and the Regulations of 1889 thereunder, which prescribe a reservation to that effect, do not apply. They relate only to the sale of Dominion lands and to the settlement, use, and occupation thereof. The grants in question were not by way of sale. Judgments in 8 Ex. C. 83, S. C. R. 673, reversed. *Calgary & Edmonton Ry. Co.* v. *The King*, [1904] A. C. 765.

Taking gravel from land adjoining right of way — *Trespass — Maintenance of road—Railway Acts—Rights of homesteader—Dominion Lands Act — Damages.*] —The defendants constructed a line of railway across Government land and opened a gravel pit thereon, from which large quantities of gravel were removed. The plaintiff made an entry for the land as a homestead. In an action for trespass:—*Held*, that a homesteader on Dominion lands has the exclusive right to the possession thereof, and may maintain an action for trespass.—The defendants endeavoured to justify their action under s. 19, schedule A., of 44 V. c. 1, which authorises a company to take from adjacent public lands gravel for the construction of the railway. The evidence shewed that the gravel was used for maintenance of the right of way:—*Held*, that the statute referred to did not authorise the taking except for the purpose of construction, which did not include maintenance of the right of way. *Smyth* v. *Can. Pac. Ry. Co.*, 8 W. L. R. 709, 1 Sask. L. R. 165, 8 Can. Ry. Cas., 265.

Taking possession — *Possessory title of occupant—Continuing trespass—Limitation of actions — Acquiescence.*]—The defendants, in 1890, took possession of a piece of land claimed by the plaintiff and built their line of railway across it, and fenced it on both sides of the track, and immediately thereafter began running their trains over the track, and had continued to do so ever since. The plaintiff saw what was going on and assisted in the building of the railway, but made no objection to its construction or the running of the trains until 1905, when this action was brought:—*Held*, *per* Hannington, Landry, and Gregory, JJ., that the defendants in running their trains across the land were committing a continuing trespass, and the plaintiff was entitled to recover for the damage sustained for the six years preceding the commencement of the action.—*Per* McLeod, J., that the trespass, if any, was not a continuing trespass, but was completed when the road was built in 1890, when and within six years the plaintiff might have recovered all the damages incident to the trespass, the right to which was now barred by the Statute of Limitations.—*Per* Tuck, C.J., that the evidence shewed no possession in the plaintiff, or, if it did, the plaintiff was bound by his acquiescence and could not maintain trespass. *Clair* v. *Temiscouata Ry. Co.*, 1 E. L. R. 524, 37 N. B. R. 608.

Taking possession of land—Possessory title of occupant—Continuing trespass—Limitation of actions. *Clair* v. *Temiscouata Ry. Co.*, 1 E. L. R. 524.

Telegraph company — *Exclusive right to erect poles on railways.*]—The plaintiffs under an agreement made in 1888 obtained from the Newfoundland Rw. Co. the exclusive right for 27½ years to maintain and operate lines of telegraph along the roadway of the said railway company from St. John's to Harbour Grace. The defendants subsequently became the assignees to a *mesne* assignment from the Government of the said railway, and at a later date erected a line of telegraph along the said railway. In an action to restrain the defendants from the operation of the said line of telegraph and for other purposes, *held*, that the agreement made in 1888 is binding on the defendants, and that the plaintiffs are entitled to an injunction to restrain the defendants from operating the telegraph erected by them. *Anglo-Am. Tel. Co.* v. *Reid*. Royal Gazette, Newfoundland, 15th Feb., 1910.

Warrant for immediate possession—Notice to lare trustee—Necessity for notice to beneficial owners. *Re James Bay Ry. Co. & Worrell*, 6 O. W. R. 473, 10 O. L. R. 740.

Written offer to sell—*Acceptance by taking possession — Contract — Statute of Frauds—Part performance — Alternative relief—Railway Act — Mandamus—Rule 879.*]—1. A written offer to sell land on certain terms, accompanied by an intimation that if the purchaser takes possession the vendor would treat that act as an acceptance of the offer, and the subsequent taking of such possession, without further communication with the vendor, together constitute a binding contract of purchase and sale of the land, which is taken out of the Statute of Frauds by that act of taking possession, such act being in itself a part performance of the contract, as well as an essential in the making of it. *Carlill* v. *Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 256, followed.—2. If there had been no contract between the parties respecting the land taken by the defendants for their right of way, the plaintiff would have been entitled to the alternative relief claimed by way of *mandamus* to compel the defendants to proceed to have the compensation determined under the provisions of the Railway Act.—3. Relief by way of *mandamus* may now, under Rule 879 of the King's Bench Act, be obtained by an action. *Morgan* v. *Metropolitan Rw. Co.*, L. R. 4 C. P. 97, followed. *Carr* v. *Canadian Northern Rw. Co.*, 6 W. L. R. 720, 17 Man. L. R. 178.

See ARBITRATION AND AWARD—COSTS—LAND TITLES ACT—LIMITATION OF ACTIONS —PARTITION.

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16. LEASE OF RAILWAY.

Passenger train service — *Contract with Government — Breach by lessee — Waiver—Damages—Mandatory injunction.*]—By an agreement the plaintiffs were to lease their line of railway to the defendants, upon the condition, *inter alia*, that the defendants would run a passenger train each way each day between stations A. and B. The lease was not executed, but the defendants went into possession of and operated the line. The plaintiffs alleged in their bill that at the time of the agreement, as was known to the defendants, they were under contract with the Government of New Brunswick to run a passenger train each way each day between A. and B.:—*Held*, that no case was made out for relief by mandatory injunction, which will only be granted where necessary for the prevention of serious damage, and that the question raised was merely one of pecuniary damages between the plaintiffs and defendants, for which the defendants were well able to account to the plaintiffs, and which by the lease the plaintiffs had agreed to accept in event of their liability, if any, to the Government, and that it did not appear that such liability had arisen. *Tobique Valley Rw. Co.* v. *Can. Pac. Rw. Co.*, 21 C. L. T. 148, 2 N. B. Eq. Reps. 195.

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17. PASSENGERS.

Action — *Limitation clause in Act of incorporation — "By reason of the railway" —"Works or operations of the company."*]—The plaintiff, on the 26th December, 1903, was injured on the defendants' tramway in Vancouver, in stepping off a movable platform provided by the defendants for the accommodation of passengers transferring at one of the junctions. The platform was necessary to enable passengers to alight, owing to the height of the car steps above the surface of the street, and was so placed that there was very close to it, and not easily observable by passengers leaving the car, a large hole, into which the plaintiff stepped, severely injuring her knee. On the 24th December, 1904, she brought an action to recover damages for her injuries. The defendants set up, *inter alia*, s. 69 of their Act of incorporation, c. 55 of the statutes of British Columbia, 1896, which enacted that "all actions or suits for indemnity sustained by reason of the tramway or railway, or the works or operations of the company, shall be commenced within six months next after the time when such supposed damage was sustained:" — *Held*, that the words "by reason of the tramway or railway or the works or operations of the company," should be read *separatim*, as describing different branches of the company's undertaking, and that the section did not apply to a case like that at bar, which was based on the defendants' duty to carry the plaintiff safely. *Sayers* v. *British Columbia Electric Rw. Co.*, 12 B. C. R. 102, 3 W. L. R. 44.

Collision — Shock — Neurasthenia — Evidence to connect condition with shock. *Johnson* v. *Can. Pac. Rw. Co.*, 12 O. W. R. 162.

Commercial samples — Delay of travelling agent — Damages — Climatic conditions—Loss of profits—Costs—Appeal — Divided success—Notice of appeal—Ground not taken. *Chapman* v. *Can. North. Rw. Co.*, 12 O. W. R. 1025.

Contract for special passenger rates for delegates to convention — Breach—Validity of contract — Standard passenger tariff not filed and approved—Railway Act—Construction—Recovery of amount overpaid. *Grand Lodge of Knights of Pythias* v. *Great Northern Rw. Co.*, 7 W. L. R. 425.

Death—Action by widow — Evidence—Res gestæ—Statements of deceased and of defendants' agent — Discrediting witness. *Henry* v. *Grand Trunk Rw. Co.*, 4 O. W. R. 23.

Derailment of train — Rail breaking from impact of engine — *Res ipsa loquitur* —Negligence — Findings of jury—Evidence —Perverse findings — Dismissal of action—Costs. *Ferguson* v. *Can. Pac. Rw. Co.*, 11 O. W. R. 470, 12 O. W. R. 943.

Drunken passenger.]—A railway company which undertakes to carry a passenger who is dead drunk, owes him protection, and, consequently, it is fault on the part of the employees to start the train when they know that a person, in the condition mentioned, is upon the platform of a car. In assessing the damages, the Court will take into consideration the drunken condition of the plaintiff. *Ducharme* v. *Can. Pac. Rw. Co.*, 16 R. de J., 27.

Duty of company — *Negligence of servants—Loss by passengers—Liability.*]—Besides the obligations which arise from their contracts of carriage, to protect the persons and preserve the property of their passengers, carriers of passengers are also responsible for losses caused by the faults of their

servants. Where the employees of a railway company in the course of a journey, detach a car from a train, giving notice only in the car itself and not in the other cars in which a passenger concerned may be for the moment, there is a fault on the part of the employees for which the company are liable. *Great North. Rw. Co.* v. *Fainar*, 18 Que. K. B. 72.

Expulsion of passenger — *Indian — Passenger rates—Special contract—Custom —Withdrawal of privilege—Absence of notice —Accommodation — Jury—Damages.*] — A passenger holding a second class ticket on a railway cannot be compelled to travel in a smoking car. He is entitled to the accommodation usually furnished such passengers. Judgment of Britton, J., 3 O. W. R. 705, affirmed. Garrow and Osler, JJ.A., dissenting as to the conclusions of fact. *Jones* v. *Grand Trunk Rw. Co.*, 5 O. W. R. 611, 9 O. L. R. 723.

Free pass — *Conditions — Construction —Liability for negligence — Misdirection — Damages—New trial.*]—See *Central Vermont Rw. Co.* v. *Franchere*, 35 S. C. R. 68.

Grand Trunk Railway of Canada — *Passenger tolls — Third-class fares — Construction of statutes—Repeal.*]—Section 3 of 16 V. c. 37 (Province of Canada) is not inconsistent with or impliedly repealed by the Dominion Railway Act, 1906 (6 Edw. VII. c. 42).—Accordingly the appellants are bound to carry third-class passengers for the fare of a penny per mile, and to provide one train every day with third-class carriages between Toronto and Montreal. Judgment in 39 S. C. R. 506 affirmed. *Grand Trunk Rw. Co.* v. *Robertson*, [1909] A. C. 325, 9 Can. Ry. Cas. 149.

Gratuitous passenger — *Gross negligence—Action—Limitation clause—"By reason of the railway"—Release—Invalidity.*]—Defendants furnished plaintiff with an unconditional free pass upon their railway. Plaintiff, while a passenger on defendants' railway, received injuries, the result of a head-on collision between two cars of the defendants, managed by the defendants' servants:—*Held*, there was *prima facie* evidence of negligence and plaintiff was entitled to recover.—2. The action was not barred under the limitation clause of the General Railway Act, R. S. O. 1897, c. 207, s. 42, which was incorporated in the defendants' special Act, although the action was brought later than six months after the accident occurred, because the action was based on the breach of the common law duty of the defendants, and not on injury sustained by reason of their railway. 3. R. S. O. 1897, c. 207, s. 42 (1) "may prove that the same was done in pursuance of and by authority of this Act and the special Act," mean only that "may prove that the damage or injury resulted by reason of the railway" as in the earlier part of same section. *Ruckman* v. *Hamilton, Grimsby & Beamsville Electric Rw. Co.*, 6 O. W. R. 271, 10 O. L. R. 419.

Injury to passenger — Action—Limitation clause—"By reason of the railway"—"Works or operations of the company." *Sayers* v. *British Columbia Electric Rw. Co.* (B.C.), 2 W. L. R. 152.

Injury to passenger—*Evidence for jury —Negligence—Railway mail clerk—Contractor — Principal and agent — Master and servant — Independent contractor—Respondeat superior — Misfeasance and nonfeasance.*]—The action for damages for injury caused by negligence of a common carrier of passengers is in tort. A duty is imposed by law upon a common carrier of passengers to carry them safely and securely so that no damage or injury shall happen to them by the negligence or default of the carrier. A breach of this duty is one for which an action lies which is founded on the common law, and requires not the aid of contract to support it. Corporations are liable for negligence whether they derive any ultimate pecuniary benefit or not from the performance of the duty imposed on them. If the passenger be carried in performance of a contract, it is immaterial whether he himself negotiated the contract or paid the fare, or whether any fare was paid, or if paid whether it went into the pocket of the defendants. The C. & E. R. Co. were the owners of a line of railway between the city of Calgary and the town of Edmonton, but owned no rolling stock and employed no staff for the operation of the road. They entered into an agreement with the C. P. R. Co., the defendants, "for the regulation and interchange of traffic and the working of traffic over the railways of the said companies, and for the division and apportionment of tolls, rates, and charges, and generally in relation to the management and working of the railways" of the two companies, whereby the defendant company agreed to operate the railway line on behalf of the C. & E. R. Co. "with a staff and organization appointed by the C. P. R. Co. (the defendants), and to provide a service of such efficiency and speed and operate the property of the C. & E. R. Co. as agents for and on account of the C. & E. R. Co., as may be required or directed by that company or its officer." The contract also provided that the defendant company should not be required to maintain the road "below a point of efficiency necessary to the safe and proper handling of such train service, as may be required for the proper operation of the railway." All the expenses of operating the road were to be paid in the first instance by the defendant company, but were to be charged against the C. & E. R. Co., under a special clause in the agreement for the apportionment of the tolls and receipts. The rolling stock used in operating the road bore the name of the defendant company. The officials employed in operating it wore caps indicating that they were servants of the defendant company. The defendant company sold tickets entitling the holder to travel over the C. & E. line and issued a "time bill" giving the time tables of the western division of the defendant company, in which the line between Calgary and Edmonton was referred to as the "Edmonton section," and this time bill was indorsed with the names of the leading officials of the defendant company. The plaintiff was a railway mail clerk in the employ of the government of Canada, whose duty it was to handle and attend to the government mail matter being carried on the C. & E. line between Calgary and Edmonton. This mail matter and the plaintiff were both carried under a contract between the Postmaster-General of Canada and the C. & E. Co., and the C. & E. Co. received from the government of Canada the moneys paid for carrying the

mail matter, and no part of such money was received by the defendant company. While being carried on a train on the C. & E. line towards Edmonton, the plaintiff was injured by the derailment of the train, which fell into a ravine, and he brought action for damages against the defendants:—*Held*, that the plaintiff being lawfully in the mail car with the knowledge and consent of the defendants, and a passenger under the charge and care of the defendants, of which there was evidence to go to the jury, a duty was imposed upon the defendants to carry him safely and securely, so that by their negligence or default no injury should happen to him; that for a breach of this duty an action would lie independently of any contract; and that the question whether or not the defendant company received a reward for carrying the plaintiff did not affect the rights of the parties.—*Held*, also, against the contention that the defendant company were merely agents for the C. & E. Co., and that the officials and workmen operating the road were the servants, not of the defendants, but of the C. & E. Co., and that the latter company, if any one, were responsible; that there was evidence to shew that the officials and workmen were the servants of the defendant company, and that the defendant company were not merely agents but were independent contractors. — *Held*, also, against the contention that the defendants were the agents of the C. & E. Co. in operating the road, and were, therefore, liable only for a misfeasance but not for a nonfeasance; that the omission to take proper care in respect of the condition of the bridge, and the track, and the running a train over the track and bridge while in an unsafe condition, would be a misfeasance and not a nonfeasance, and that, therefore, even if the defendants were merely agents of the C. & E. Co., they would still be liable. *Kenny* v. *Can. Pac. Rw. Co.*, 5 Terr. L. R. 420.

Injury to passenger — *Negligence — Overcrowding train—Proximate cause.*]—The plaintiff, when travelling by an excursion train belonging to the defendants' system, was constrained, by reason of the overcrowding of the cars, to resort to the platform outside one of the cars, and for better protection sat down on the second step of the outside platform, and while so sitting was thrust out by a swerve of the train, which made the persons standing on the platform press up against him suddenly. This caused him to lose his balance, and one of his legs protruding was struck by some fixture on the track and he sustained injuries:—*Held*, that the defendants were liable. *Burriss* v. *Pere Marquette Rw. Co.*, 25 C. L. T. 13, 9 O. L. R. 259, 4 O. W. R. 519.

Injury to passenger — *Res ipsa loquitur.*]—Action for damages for injury received in railway accident. The jury found the defendants were negligent in having a passenger train drawn by a Mogul engine at an excessive rate of speed, thereby causing the rail to break and the train to be derailed:—*Held*, on appeal that there was no evidence to justify the finding of excessive speed or that it was negligent to use a Mogul engine. *Res ipsa loquitur* does not apply. *Ferguson* v. *Canadian*, 12 O. W. R. 943.

Loss—Liability of company for unchecked goods—Negligence of conductor—English law. *Great North. Rw. Co.* v. *Fainer*, 5 E. L. R. 310.

Loss of baggage — *Liability of railway company—Reasonable time under regulations of Railway Commissioners, June (1908), Rule 9—Whether status of carrier or warehouseman.*]—Plaintiff, a holder of a baggage check on the defendant's railway, brought an action to recover the value of a trunk alleged to have been lost or so injured as to be of no use.—Judgment at trial was given for $156.05.—Divisional Court *held*, that the status of a railroad as to the custody of baggage may be changed from that of a carrier into that of a warehouseman so as to relieve them from liability as custodians by depositing the same in their custody for an undue period after it has reached its destination, but under the circumstances of the case such status had not been changed. Appeal dismissed with costs.—*Penton* v. *G. T. Rw.*, 28 U. C. R. 376, followed. *Hamel* v. *Grand Trunk Rw. Co.* (1911), 19 O. W. R. 733, 2 O. W. N. 1286.

Loss of baggage — *Responsibility of railway companies.*]—R. S. C. 1906, c. 37, ss. 283, 284.—Under the provisions of ss. 283 and 284 of the Railway Act of Canada, requiring at the junction of a railway with other railways and at all stopping places, established for such purposes, adequate and suitable accommodation for the receiving and loading of all traffic offered for carriage upon the railway and, further, that such accommodation shall include "reasonable facilities, etc.," a railway company is bound to have, at such stopping places, an agent for affixing checks to suitable baggage offered by passengers, and, if there is no such agent, the company will be held responsible for the loss of such baggage when duly entrusted to the care of its employees.—No negligence can be charged against a passenger who leaves his baggage in a station, either checked or in the care of the railway company's employees when no check can be obtained, from the arrival of a train until the departure of the next train upon which the passenger could proceed to his destination. *Routhier* v. *Can. Pac. Rw. Co.*, 16 R. de J. 215, 16 R. L. N. S. 285.

Luggage—Destruction—Contract or tort—Carriage of Chinamen—Joint contract—Action by one—Damages — Personal effects and household goods. *Chan Dy Chea* v. *Alberta Railway & Irrigation Co.* (N.W.T.), 1 W. L. R. 371.

Negligence—Action — Subsequent death of plaintiff—Continuation of action by executors—New action by executors—Evidence as to cause of death—Damages—Apportionment. *Speers* v. *Grand Trunk Rw. Co.*-*Craig* v. *Grand Trunk Rw. Co.*, 3 O. W. R. 69, 4 O. W. R. 490.

Negligence — Invitation to alight — Calling out name of station — Findings of jury — New trial. *Buck* v. *Can. Pac. Rw. Co.*, 7 O. W. R. 71.

Negligence — *Invitation to jump off moving train.*]—If there is a platform at a railway station, the railway company are bound to bring the passenger car of a train stopping there up to the platform to permit passengers to step down on it in alighting.

or to provide some other safe means for passengers to alight, and the omission to do so will, if damage result, render the company liable, and there is no duty imposed by the law upon a passenger to disclose to an officer of the company who offered to assist her to alight at an improper and dangerous place, anything in her condition which rendered special care necessary. *Guay* v. *Canadian Northern Rw. Co.*, 24 C. L. T. 277, 15 Man. L. R. 275.

Negligence—*Assault on passenger—Duty of conductor—Damages—Reduction — New trial.*]—The plaintiff, a passenger on a railway train, was assaulted shortly after beginning his trip by an intoxicated fellow-passenger. He complained to the conductor, who promised to get a policeman at the next station, but failed to do so. The assailant having become more quiet, the plaintiff did not anticipate a further attack, but was assaulted a second time, which was also reported to the conductor, who took no action, and a third assault having been made, the plaintiff left the train and completed his journey on the following day. In an action against the railway company the plaintiff obtained a verdict for $3,500, which was sustained by the Court of Appeal:—*Held*, affirming the judgment of the Court of Appeal, 5 O. L. R. 334, 23 C. L. T. 65, that the defendants were liable; that it was the duty of the conductor, on being informed of the first assault, to take precautions to prevent a renewal, and his failure to do so gave the plaintiff a right of action. *Pounder* v. *North Eastern Rw. Co.*, [1892] 1 Q. B. 385, dissented from.—*Held*, also, that, as the plaintiff did not anticipate the second assault, the conductor could not be assumed to have foreseen it, and the jury having evidently given damages for that as well as the third, the amount recovered should be reduced to $1,000, and a new trial had if this sum were not accepted. *Blain* v. *Can. Pac. Rw. Co.*, 5 O. L. R. 334, 2 O. W. R. 76, 24 C. L. T. 49; *S. C., sub nom. Can. Pac. Rw. Co.* v. *Blain*, 34 S. C. R. 75.

Negligence—*Defective bridge — Gratuitous passenger.*]—In the absence of evidence of gross negligence, a carrier is not liable for injuries sustained by a gratuitous passenger. *Moffett* v. *Bateman*, L. R. 3 C. P. 115, followed. *Harris* v. *Perry*, [1903] 2 K. B. 219, distinguished. Although a railway company may have failed to properly maintain a bridge under their control so as to ensure the safety of persons traveling upon their trains, the mere fact of such omission of duty does not constitute evidence of the gross negligence necessary to maintain an action in damages for the death of a gratuitous passenger. Judgment in 9 B. C. R. 453 affirmed. *Nightingale* v. *Union Colliery Co. of British Columbia*, 35 S. C. R. 65.

Negligence—*Ejection of drunken passenger—Fatal Injuries Act—Damages—Remoteness.*]—The deceased was a passenger on the defendants' train from Detroit to Buffalo. Between Detroit and Bridgeburg he drank heavily, and when near Bridgeburg began to annoy passengers, and the conductor compelled him to leave the train at the latter station. This was 700 feet from the northerly end of the international railway bridge over the Niagara river, and the deceased, who was not given into the charge of the station agent or any other person, being intoxicated, strayed after the train, on which his luggage remained, and fell over the bridge and was drowned. There would have been no difficulty in taking care of the deceased and preventing him interfering with the passengers. Bridgeburg was only 5 minutes distant from the city of Black Rock and only 20 minutes from Buffalo:—*Held*, that the defendants were not liable for damages, as they were not obliged to carry him to Buffalo, nor to place him in charge of any one at Bridgeburg. Judgment in 24 C. L. T. 293, 7 O. L. R. 630, 3 O. W. R. 788, reversed. *Delabanty* v. *Michigan Central Rw. Co.*, 6 O. W. R. 252, 10 O. L. R. 388.

Negligence — *Invitation to jump off moving train.*] — In February, 1902, the plaintiff and her husband travelled by the defendant's line from Winnipeg to Eustace; when the train stopped at Eustace, the baggage car was at the station platform. The rear passenger car, in which the plaintiff travelled, was some distance from the end of the platform. When the train stopped the plaintiff and her companions went to the front platform of the car; her companions jumped down; when they were off, the defendants' conductor in charge of the train, who was standing on the ground, put up his hand to assist the plaintiff to get off; she took his hand and jumped down from the lowest step of the car to the ground; the distance was too great for her to step down. The ground sloped downwards away from the track and was slippery from ice on it. The train began to move either as she jumped or just before or just after. Immediately after jumping down, the plaintiff, who was pregnant, felt great pain; for several days she was confined to her bed; and on the 16th February, 1902, had a miscarriage. The trial Judge found that her sufferings from the time of her journey till the miscarriage on the 16th February, and the miscarriage itself, and her suffering, were the result of her being obliged to jump down as she did in order to leave the train at her journey's end. It was contended for the defendants that they were not compellable to have a platform at so unimportant a station as Eustace:—*Held*, that, as they had one there, they were bound to bring their passenger cars up to it to permit a passenger to step down on it in alighting. The conductor's act was an invitation to the plaintiff to get off when she did; she was justified in assuming that there was no safer or better way of getting off. There was a platform at which the plaintiff could have descended in safety. Instead of that, she was invited by the defendants' servant to alight at a place which was patently not safe. Judgment for the plaintiff for $200 damages and costs. *Guay* v. *Can. North. Rw. Co.*, 24 C. L. T. 277.

Negligence—Overcrowding train—Proximate cause. *Burriss* v. *Pere Marquette Rw. Co.*, 4 O. W. R. 510.

Negligence of servant of Pullman Car Company — Liability of both companies. *Decue* v. *Wabash R. R. Co.*, 3 O. W. R. 102.

Passenger—Right to particular seat—Authority of conductor — Smoking car — Removal of passenger from seat taken by

another and temporarily vacated—Assault —Right of passengers—Damages—Costs. *Brazeau* v. *Can. Pac. Rw. Co.*, 11 O. W. R. 136.

Passenger tolls on International Railway.]—The Ont. Rw. and Municipal Board made an order requiring defendant Rw. Co. to accept 5 cents cash as full fare for carrying passengers on their cars to and from certain points. The Court of Appeal reversed the order on the ground that the defendant company came within the very words of s. 171 (5) of the Ont. Rw. Act, therefore s. 171 (1) did not apply and the Board had no jurisdiction to make above order. *Niagara Falls* v. *International Rw. Co.* (1909), 15 O. W. R. 119; *Re Niagara Falls Board of Trade & International Rw. Co.*, 20 O. L. R. 197.

Person injured while travelling on pass in charge of horses — *Order for directions for trial.*]—Plaintiff was injured while travelling on defendant railway on a pass. Defendants submitted that they were not liable under a clause in their contract to the effect that they should not be held liable for death or injury to passengers not paying full fare:—*Held*, that it was a case to be tried out. *Robinson* v. *Can. Pac. Rw.* (1909), 14 O. W. R. 706, 1 O. W. N. 50.

Person "stealing ride" on freight train — *Order from conductor to get off while train moving — Injuries—New trial.*] —Action for damages for injuries sustained by plaintiff who, stealing a ride, was ordered by a conductor to get off a moving train. At the trial the jury found for plaintiff. On appeal new trial ordered as an answer to one question submitted to jury was uncertain and verdict against weight of evidence. *Brown* v. *Can. Pac.*, 13 O. W. R. 879.

Personal baggage — *Liability for — Contract.*]—The plaintiff was one of fifty-four Chinamen travelling over the defendants' railway on one ticket purchased on their behalf by an employment agent, who received the price of his passage from each of the Chinamen, out of the wages earned by him after reaching his destination. The plaintiffs' baggage, consisting of personal effects and bedding, was destroyed by the burning of the baggage car, the cause of the fire being unknown.—*Held*, that the contract was with each Chinaman, to carry him and his baggage safely, and that the defendants were liable in damages.—*Held*, also, that the defendants having accepted the bedding as personal baggage were liable for it as such, and *semble*, that it would have been held under the circumstances to be personal baggage, even without such acceptance. *Chan Dy Chea* v. *Alta. Rw. & Irrigation Co.* (1905), 6 Terr. L. R. 175.

Regular station — *Alighting at—Negligence.*]—Special tickets at reduced rates were issued by the defendant company to persons living along the line, and one was held by W., limited to the use of himself and the members of his family, between Vancouver and Central Park station. The plaintiff, who lived in Vancouver, went to visit W., travelling, as was her custom, on W.'s ticket, although not a member of the family. W. lived beyond Central Park station, and the company gratuitously and for her own convenience carried the plaintiff some four hundred yards farther on, where she was allowed to alight. At this place the ground was not level, and a person living along the line had been permitted for his own convenience to lay down on the right of way a platform, one end of which rested on the ground and the other upon a plank. The plaintiff descended safely to the platform, but in passing from it she fell and was injured, owing, as alleged, to some defect in the condition of the plank supporting it:—*Held*, in an action for damages that the company were not liable. *Burke* v. *British Columbia Electric Rw. Co.*, 7 Brit. Col. L. R. 85.

Return ticket—*Conditions of identification—Neglect to comply with—Removal from train.*]—The plaintiff purchased an excursion ticket from Indian Head to Toronto and return, one of the conditions (which he signed) being that he should identify himself to an agent in Toronto before he set out on his return journey and obtain the agent's signature. On production of his ticket at Toronto, he secured his sleeping berth, had his luggage checked, was admitted to the train, and started on his return journey, but neglected to identify himself, and was put off the train by the conductor after he had refused to pay his fare, although he offered to identify himself to the conductor. In an action for damages:—*Held*, that he could not recover. *Taylor* v. *Grand Trunk Rw. Co.*, 22 C. L. T. 361, 4 O. L. R. 357, 2 O. W. R. 447.

Right of passenger to particular seat — Authority of conductor — Smoking car—Removal of passenger from seat taken by another and temporarily vacated—Assault —Rights of passengers — Damages—Costs. *Brazeau* v. *Can. Pac. Rw. Co.*, 11 O. W. R. 136, 8 Can. Ry. Cas. 477.

Right to ferry passengers and cargo — *Statute—Restrictions.*]—The Dominion statute incorporating the Algoma Central and Hudson Bay Railway Company authorises them, for the purpose of their undertaking, to acquire and run steam and other vessels for cargo and passengers upon any navigable waters which their railway may connect with:—*Held*, that under the very large and general words of this clause the railway company were not bound to restrict the passengers and cargo transported by their vessels to persons and goods intended to be carried on their railway line. *Perry* v. *Clergue*, 23 C. L. T. 91, 5 O. L. R. 357, 2 O. W. R. 89.

Station — Permission to alight at point beyond — Neglect to give warning of danger —Negligence — Evidence — Finding at coroner's inquest — Inadmissibility. *Fleming* v. *Can. Pac. Rw. Co.*, 11 O. W. R. 982.

Station — Unsafe condition of platform —Negligence — Contributory negligence — Evidence — Damages — Husband and wife —Injury to wife — Claim of husband for loss of services of wife — Joinder of plaintiffs and causes of action—Quantum of damages. *Swan* v. *Can. Nor. Rw. Co.*, 8 W. L. R. 662, 9 W. L. R. 275.

Station — *Unsafe condition of platform —Negligence — Contributory negligence — Evidence — Damages.*]—Where passengers are impliedly invited by a railway company to make use of a platform as a means of access to the railway cars, it is the duty of the railway company to have the platform in a reasonably safe condition at all points or parts where such passengers are entitled to be or stand; consequently, where the plaintiff sustained injuries in attempting to board a passenger car of the defendant railway company, by falling over the unprotected end of the platform, the night being dark and the platform badly lighted, without any carelessness or contributory negligence on her part:—*Held*, by Stuart, J., that the company were liable for negligence in not having the platform in a reasonably safe condition; and *semble*, that it made no difference whether the platform were well lighted or not. — Circumstances to be considered in estimating damages for personal injuries, etc., discussed.—*Per curiam*—While an act or a circumstance under ordinary conditions may not constitute negligence, under other circumstances or in other conditions it may amount to negligence, or in other words that there may be negligence in the combination.—*Held*, therefore, that the combination of circumstances in this case, namely, a long night train drawn up at a short platform inadequately lighted, so that passengers attempting to board the train were not free from danger of accident, constituted actionable negligence on the part of the railway company. *Swan* v. *Can. North. Rw. Co.*, 1 Alta. L. R. 427, 8 W. L. R. 662, 9 W. L. R. 275.

What is personal luggage—*Liability for—Contract.*]—The plaintiff was one of fifty-four Chinamen travelling over the defendants' railway on one ticket purchased on their behalf by an employment agent, who received the price of his passage from each of the Chinamen, out of the wages earned by him after reaching his destination. The plaintiff's baggage, consisting of personal effects and bedding, was destroyed by the burning of the baggage car, the cause of the fire being unknown:—*Held*, that the contract was with each Chinaman, to carry him and his baggage safely, and that the defendants were liable in damages.—*Held*, also, that the defendants, having accepted the bedding as personal baggage, were liable for it as such; and *semble*, that it would have been held under the circumstances to be personal baggage, even without such acceptance. *Chan Dy Chea* v. *Alberta Rw. & Irrigation Co.*, 6 Terr. L. R. 175, 1 W. L. R. 371.

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18. Railway Committee of Privy Council.

Order of—*Junction of electric railway with Canadian Pacific Railway — Laying switch on highway—Power to authorise — Expropriation of right of way—Injunction—Enforcement of agreement.*]—The defendants were a company incorporated under statutes of the Province of Ontario, operating an electric railway upon Yonge street between the town of Newmarket and the city of Toronto, with its southern terminus in the northern part of the city, a few yards north of the Canadian Pacific Railway lines. By order of the 23rd November, 1899, the Railway Committee of the Privy Council of Canada, reciting the consent of counsel on behalf of the corporation of the city of Toronto, approved of the defendants connecting their tracks with the tracks of the Canadian Pacific Railway by means of a switch, as shewn on a plan annexed to the order, and on the conditions imposed by the order:—*Held*, that the defendants had not the right, without the authority or consent of the city corporation, to occupy or expropriate or otherwise to force their way over a part of Yonge street within the limits of the city so as to enter the lands of the Canadian Pacific Railway Company and make the proposed junction. The order of the Railway Committee was to be regarded as dealing only with the mode of junction or union, and not as expropriating or professing to expropriate a right of way over the highway. And the consent of counsel for the city corporation, when before the Railway Committee, was to be viewed in the same way. Section 173 of the Railway Act of Canada does not give the Railway Committee power to expropriate land or to deal with the right of property. The protection of the crossing or junction is the object of the committee, which has to approve of the place and mode thereof, and which is not concerned, so far as this section applies, with how the railways arrive at the point of union:—*Held*, also, that the defendants had not, by virtue of any statute or agreement, viewing their road as a mere street railway, the right to expropriate the right of way; and even if their road was a railway within the meaning of the Railway Act, s. 183 was not applicable, for the proposition here was not to carry the tracks "along an existing highway," and they could not avail themselves of s. 187, for the provisions of law applicable to the taking of land by the company had not been complied with. The plaintiffs were therefore entitled, without derogation of the order of the Railway Committee, to an injunction restraining the defendants from effecting the proposed junction by the method shewn on the plan. By an agreement made between the plaintiffs and defendants in 1891, the defendants agreed and undertook that upon receiving at any time twenty-four hours' notice from the plaintiffs' engineer they would cease running their cars by electricity on the portion of Yonge street within the city limits:—*Held*, that, nothing having occurred to operate as a waiver by the plaintiffs of this term of the agreement, and the engineer's notice having been given on the 14th November, 1899, the plaintiffs were entitled to an injunction restraining the defendants from propelling their cars by electricity within the limits of the city. *Toronto* v. *Metropolitan Rw. Co.*, 20 C. L. T. 40, 31 O. R. 367.

Order of—*Rule of Exchequer Court — Condition—Ex parte order.*]—By s. 29 of the Railway Act, 51 V. c. 17, the Exchequer Court is empowered to make an order of the Railway Committee of the Privy Council a rule of Court; but where there are proceedings pending in another Court in which the rights of the parties under the order of the Railway Committee may come in question, the Exchequer Court, in grant-

ing the rule, may suspend the execution until further direction.—28. The Court refused to make the order of the Railway Committee in this case a rule of Court upon a mere *ex parte* application, and required that all parties interested in the matter should have notice of the same. *In re Metropolitan Rw. Co.*, 20 C. L. T. 274, 6 Ex. C. R. 351.

See CONSTITUTIONAL LAW.

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19. SERVICE OF PROCESS.

Place of service.] — *Held*, that in an action against the Canadian Pacific Railway Company, service of process against the company must be effected at the company's office in Vancouver appointed pursuant to 44 V. c. 1, s. 9, following a former unreported decision in 1891 of *Hansen* v. *Can. Pac. Rw. Co.*, and refusing to hear subsequent decisions of the Privy Council which counsel alleged in effect overruled such decision. *Jordan* v. *McMillan*, 21 C. L. T. 192, 8 B. C. R. 27.

Place of service—*Special Act—General rules — Conflict.*]—The defendants having pursuant to s. 9 of sched. A. of "An Act respecting the Canadian Pacific Railway," 44 V. c. 1 (D.), appointed their office at Regina as the place where service of process might be made on them in respect of any cause of action arising within the North-West Territories, a service of process effected on a station agent of the defendants, pursuant to Rule 14 (3) of the Judicature Ordinance, was held bad, because s. 9 was special legislation, and Rule 14 (3), quoad the defendants, was overridden by it. *Lamont* v. *Can. Pac. Rw. Co.*, 21 C. L. T. 262, 5 Terr. L. R. 60.

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20. TOLLS.

Governor-General — *Penalty — Passenger.*]—The fact that a railway company have not had their tolls approved by the Governor-General under 51 V. c. 29, s. 227, does not in itself entitle a passenger who has paid such tolls to recover three times the amount under s. 290 of that Act, in the absence of evidence that the fares charged were unreasonable or excessive; nor is such passenger entitled to recover back the amount so paid by him as paid under a mistake of fact, where it is such as in equity and conscience he ought to have paid. *Lees* v. *Ottawa and New York Rw. Co.*, 20 C. L. T. 117, 31 O. R. 567.

Grand Trunk Railway of Canada—*Passenger tolls—Third-class fares — Construction of statutes—Repeal—Amendment by subsequent railway legislation.*] — The legislation by the late province of Canada and the Parliament of Canada since the enactment of s. 3 of the statute of Canada 16 V. c. 37, in 1852, has not expressly or by implication repealed the provisions of that section requiring third-class passenger carriages to be run every day upon the line of the Grand Trunk Railway of Canada, between Toronto and Montreal, on which the fare or charge for each third-class passenger shall not exceed one penny currency for each mile travelled.—Decision of the Board of Railway Commissioners for Canada affirmed. *Grand Trunk Rw. Co.* v. *Robertson*, 39 S. C. R. 506.

Tolls—Rate not approved—Rate fixed by predecessor in title—Payment under protest —Set-off—Counterclaim. *Rodgers* v. *Minudie Coal Co.*, 2 E. L. R. 480.

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21. MISCELLANEOUS CASES.

Contract—Breach — Controllable freight —Supply of cars. *Michigan Central R. R. Co.* v. *Lake Erie & Detroit River Rw. Co.*, 5 O. W. R. 608.

Contract—*Physician — Services to persons injured in accident—Authority of servant of company.*]—Where a person has been injured by a railway accident, the highest official of the company on the ground has authority to bind the company for the cost of such medical services and attendance as may be immediately requisite. And where the facts were reported by such official to the company immediately, and no disavowal or counter order was sent to the physician engaged until 7 weeks later, the company were held responsible to the physician engaged for the value of his medical attendance and services during this period. *Gaudreau* v. *Canada Atlantic Rw. Co.*, 24 Que. S. C. 337.

Contract with township — *Bonuses on —Conditions—Fulfilment—Question as to—Judgment for amount of bonuses unpaid.*]—Plaintiff railway company applied for assistance to defendant township, which agreed to pay $15,000, 25 per cent. on the completion of the surveys and the completion of the purchase or other acquisition of the necessary right-of-way, therefor, and the balance or the remaining 75 per cent. upon the completion of the construction of the railway, upon the condition that the construction of the railway should be completed on or before the 1st day of July, 1908.—Riddell, J., *held*, that the railway was completed and in good running order and in operation on July 1st, 1908; that the township had agreed to pay $15,000; that they had paid $12,996.30; that plaintiffs' claim to the balance, $2,003.61, should be allowed and judgment entered for the same with interest and costs. *St. Mary's & Western Ont. Rw. Co.* v. *West Zorra* (1910), 17 O. W. R. 957, 2 O. W. N. 455.

Conviction for obstructing officer — *Railway Act, 1903, s. 291—Premises of company—Dedication of highway — Expropriation—Restricted use.*]—Any person who obstructs or impedes an officer of a railway company in the execution of his duty upon any of the premises of the company, is liable to fine or imprisonment under s. 291 of the Dominion Railway Act, 1903.—2. The mere indication of a strip of land as a street, on a plan made by the city of Montreal and confirmed by the Superior Court under 57 V. c. 51, s. 171 (Q.), when not followed by expropriation proceedings, does not affect the

rights of the owner in it nor make it a public thoroughfare.—3. The restricted use as a street of a strip of land allowed the public by the private owner, the restriction consisting for a period in gates closed at both ends at certain hours each day, after which they were removed and replaced by sign-boards marked "Private, no thoroughfare," does not amount to dedication. The owner's title to the property is not affected thereby, and when such owner is a railway company, the land continues to form part of its premises within the meaning of s. 291 of the Railway Act, 1903. *Rex* v. *Leclaire*, 15 Que. K. B. 214.

Damages "sustained by reason of the railway"—*Timber cut for construction—Trespass — Limitation of actions—Plans not filed.*]—The defendants the railway commission were incorporated by 2 Edw. VII. c. 9 (O.), which provides, by s. 8, that they shall have in respect of the railway all the powers, rights, remedies, and immunities conferred upon any railway company by the Railway Act of Ontario. The latter Act, R. S. O. 1897 c. 207, s. 42, provides that "all actions for indemnity for damages or injury sustained *by reason of the railway*, shall be instituted within six months next after the time of the supposed damage sustained." The defendants (the railway commission and a contractor under them), before the filing of the plans of the railway, and in the course of constructing it, entered upon the timber limits of the plaintiffs and cut timber for construction purposes. These acts ceased much more than six months before the commencement of this action, brought to recover damages for the trespass and for the value of the timber:—*Held*, following *McArthur* v. *Northern & Pacific Junction Rw. Co.*, 15 O. R. 733, 17 A. R. 86, that the plaintiffs' claim was for damages sustained by reason of the railway, and was barred by the statute; and it made no difference that the commission had not filed the plans of their railway or taken the necessary steps to compensate those whose lands or interests they entered upon or affected.—Judgment of Riddell, J., 10 O. W. R. 115, affirmed. *Lumsden* v. *Temiskaming & Northern Ontario Rw. Commission*, 15 O. L. R. 469, 11 O. W. R. 78.

Ditches and drains—*Increase of servitude—Railway under Dominion jurisdiction—Blocking outlet of drain—Damages—Railway Commission.*]—Lands of railways under the jurisdiction of the Parliament of Canada are subject, in the province of Quebec, to Art. 501 of the Civil Code; and especially are the lands of the Grand Trunk Railway Company bound to receive the flow of water from the higher adjoining lands. A ditch *de lisage* between higher lands of two proprietors, necessitated by the ordinary needs of good husbandry, is not an addition to the servitude for the flow of water, although this ditch receives the water from the lands of the two proprietors, and brings it to the boundary of the lower land of the railway. If the railway company block this ditch at its entrance upon their lands, they will be liable in damages and will be ordered to remove the obstruction and receive the waters brought by the ditch. Where the company have constructed a ditch on each side of their road without sufficient fall so that the water remains stagnant in them, making the adjoining lands wet and injuring the crops on them, the company will be liable in damages to the adjoining owners and will be ordered to pay them. The Railway Commission of Canada alone, and not the Superior Court, has power to order the railway company to construct the necessary works to carry away the water it is bound to receive and to give greater fall to its ditches. The first part of s. 196 of the Dominion Railway Act (3 Edw. VII. c. 58) does not apply to railways actually built at the time of the passing of this Act, and the second part only applies to the Railway Commission. *Langlois* v. *Grand Trunk Rw. Co.*, 26 Que. S. C. 511.

Dominion undertaking — Mechanics' liens—Provincial Act—Application of—Constitutional law. *Crawford* v. *Tilden*, 8 O. W. R. 548.

Government railway — *Dominion Statutes 1908, c. 31—Construction — Fire—Negligence—Liability.*]—Appeal to Supreme Court of Canada from judgment allowed. *Leger* v. *Rex*, 8 E. L. R. 84.

Loan of money to railway company —Bill of exchange—Irregular acceptance—Ratification—Liability—Officer of company —Accepting bill — Personal liability—Statute of limitations. *Nickle* v. *Kingston & Pembroke Rw. Co.*, 6 O. W. R. 51.

Motion to restrain pending action —*Grounds for refusal.*] — In proceedings taken to confirm a scheme of arrangement, filed by a railway company under the provisions of s. 285 of the Railway Act, 1903, an application was made on behalf of the railway company for an order to restrain further proceedings in an action against such company begun in the Superior Court for the District of Montreal, by certain creditors, before the filing of the scheme of arrangement, but which had not proceeded to judgment:—*Held*, that, as there was real and substantial issues to be tried out between the parties in the action pending in the Superior Court, the same ought to be allowed to proceed pending the maturing of the scheme of arrangement. In *re Canadian Railway Company's Scheme*, L. R. 3 Ch. 280, n. 1, referred to. *In re Atlantic & Lake Superior Rw. Co.*, 25 C. L. T. 83, 9 Ex. C. A. 283.

Newfoundland— *Railway—Telegraphs.*] —By an agreement between a railway company and a telegraph company, the railway granted to the telegraph company the exclusive right for a term of years to enter upon the railway company's lands and to build, erect, maintain, and operate upon and along those lands as many lines of telegraph company's business as that company might deem necessary, and a special wire for the use of the railway company for use in and about its management. By a subsequent clause the railway company agreed not to pass or transmit commercial messages over their special wire except for the benefit and account of the telegraph company:—*Held*, that the exclusive right granted to the telegraph company of erecting and working the telegraph lines did not exclude the right of the railway company to erect and work telegraph lines on its own property for the purposes of its railway

business. *Reid Nfld. Co.* v. *Anglo-Am. Telegraph Co.* (1910), 3) C. L. T. 817.

Provincial incorporation—*Legislative authority of Dominion — Branch lines — Warrant of possession.*]—The railway company was incorporated in 1896, by the Provincial Legislature, one of the powers given it being to build branch lines, and on 13th June, 1898, by an Act of the Dominion Parliament its objects were declared to be works for the general advantage of Canada and thereafter to be subject to the legislative authority of the Dominion Parliament and to the provisions of the Railway Act:—*Held*, on an application for a warrant of possession, that the company's power to acquire land for branch lines after 13th June, 1898, must be exercised in accordance with the Dominion Railway Act. *In re Columbia & Western Rw. Co.*, 8 B. C. R. 415.

Provincial railway — *Dominion statutes—Work for the general advantage of Canada — Construction — Reconciling provisions—Procedure.*]—An Act of the Parliament of Canada that declares a railway built by a company incorporated by an Act of a provincial legislature, to be for the advantage of Canada, and that provides, in one section, that the company shall continue to have all the powers, etc., conferred on it by the Acts of the provincial legislature as if the same were incorporated in and re-enacted by the Act of Parliament, and, in another section, that the Railway Act of Canada shall apply to the company as if the latter had been originally incorporated by the Parliament of Canada, means that, while the powers, franchises, and liabilities under the provincial Acts remain as they were, matters of procedure relating to the same, such as the manner of making calls on stock from the shareholders, are governed by the provisions of the Railway Act of Canada. *McGibbon* v. *Armstrong*, 29 Que. S. C. 289; *Armstrong* v. *McGibbon*, 15 Que. K. B. 345.

Railway and Coal Company — Bill filed by directors for an accounting—Demurrer—Rights of parties—1 Edw. VII. (N.B.), c. 12—Authorisation of bonds and debentures—1 Edw. VII. (N.B.), c. 77—5 Edw. VII. (N.B.), c. 16 — Demurrer allowed with costs. *Pugsley* v. *N. B. Coal & Rw. Co.* (1910), 8 E. L. R. 579.

Receiver — *Appointment of — Jurisdiction — Legislation.*]—The High Court of Justice, at the instance of a creditor of a railway company, has power to appoint a receiver, both where the company, being situate within the province, is under provincial legislative jurisdiction, and where it is under federal legislative jurisdiction, if there is no federal legislation providing otherwise. *Wile* v. *Bruce Mines Rw. Co.*, 11 O. L. R. 200, 7 O. W. R. 157.

Receiver — Sale — 4 & 5 Edw. VII. c. 158—Reference to registrar to inquire and report as to creditors' claims—Distribution of moneys—Appeal from registrar's report —Judicial sale—Amalgamation of railways — Validity—New stock issue—*Bona fide* holders—Vendor's lien—Allotment of shares. *Minister of Railways and Canals for Canada* v. *Quebec Southern Rw. Co. & South Shore Rw. Co.*, 6 E. L. R. 1.

Receiver and manager — *Liability for deficit arising during management—Default —Reasonable care.*]—*Held*, that the law requires of a receiver and manager the same degree of diligence that a man of ordinary prudence would exercise in the management of his own affairs.—*Held*, *per* Meredith, C.J., and Harvey, J., Wetmore and Prendergast, JJ., *dissentiente*, that as it appeared upon the facts that the receiver and manager had exercised such supervision over the business as was possible for one in his position, he should not be held responsible for the deficit which had occurred under his management. The Court being equally divided, judgment of Newlands, J., affirmed. Reversed, 36 S. C. R. 647. *Plisson* v. *Dicmert* (1905), 6 Terr. L. R. 100.

Siding — *Undertaking in mitigation of damages in prior suit—Right of suppliant to maintain action.*]—In certain expropriation proceedings between the Crown and the suppliant's predecessor in title the Crown, in mitigation of damages to lands not taken, filed an undertaking to lay down and maintain a railway track or siding in front of, or adjoining, said lands and to permit the then owner, "his heirs, executors, administrators, assigns (and the owner or owners for the time being of the said land and premises or any part thereof and each of them) "to use the same for the purposes of any lawful business to be carried on or done on the said lands or premises." By order of Court the suppliant's predecessor in title was declared to be entitled to the execution of such undertaking. The undertaking was given in 1907, and at that time the lands in question were not being used for any particular purpose. The Crown in execution of its undertaking subsequently laid down a siding in front of or adjoining the said lands. There was, however, a retaining wall between the siding and such lands, and the Crown informed the solicitor of the suppliant on the 5th October, 1909, that "at any time you may desire, we are prepared to open a way through this retaining wall so as to give access to the siding in order that you may conduct your business in the manner contemplated in the order of the Court:" but, although the suppliant presented his claim for damages on the basis that the Crown had not given him a siding suitable for carrying on a corn-meal milling business, at the time of the institution of the present proceedings nothing had been done to utilise the property for any particular business.—*Held*, that upon the facts the Crown had fully complied with the terms of the undertaking mentioned, and that the suppliant had not made out a claim for damages. — *Quære*, whether the suppliant had any right to take proceedings to compel the execution of the undertaking by the Crown until the property was occupied for the purposes of some particular business?—2. Whether the suppliant would have any right to enforce a claim for damages in view of the fact that he had no assignment of any such claim from his predecessor in title? *Hart* v. *Rex* (1910), 15 Ex. C. R. 133.

Statutory obligation—*Enforcement by municipality — Prohibition against removal of "workshops" — Breach — Damages.*]—Upon a motion made by the plaintiffs, par-

suant to leave given in the judgment reported in 1 O. L. R. 480, 21 C. L. T. 226, for leave to amend by claiming a remedy against the defendants by virtue of the prohibition contained in s. 37 of 45 V. c. 67 (O.), providing that "the workshops now existing at the town of Whitby . . . the Whitby section, shall not be removed by the consolidated company (the Midland Railway Company of Canada) without the consent of the council of the corporation of the said town:"—*Held*, that this section imposed an obligation upon the Midland Railway Company of Canada for the benefit of the plaintiffs, who were entitled to maintain an action thereon in their own name; and by virtue of 56 V. c. 47 (D.), amalgamating the Midland Company with the defendants, and cl. 3 of the agreement in the schedule to that Act, the plaintiffs could maintain an action against the defendants for damages for any breach of the obligation committed by the Midland Company before the amalgamation or by the defendants since amalgamation; and the plaintiffs should be allowed to amend and to have judgment for such damages as they were entitled to:—*Held*, also, that "the workshops now existing" meant the buildings used as workshops; and damages could not be assessed on the basis of the prohibition being against the shutting down of or reducing the extent of the work carried on in the workshops. *Whitby* v. *Grand Trunk Ry. Co.*, 22 C. L. T. 175, 3 O. L. R. 336, 1 O. W. R. 292.

Telegraph company—*Contract between—Breach—Construction.*]—In 1888 the plaintiffs leased the defendants' predecessors, a special telegraph wire for 27½ years, to be used in connection with the management, operation and control of their railway lines then constructed. Later the railway became the property of the defendants, who operate several other businesses and have extended lines of railways. The defendants used the special line for all sorts of messages pertaining to their general business and refused to account to the plaintiffs for any such unauthorized messages.—Privy Council *held*, C. R. [1908] A. C. 286, that the defendants were bound to account to the plaintiffs for the messages transmitted by them through the special wire, which did not relate to the management, operation or control of the railway lines existing in 1888. Judgment of Supreme Court of Newfoundland affirmed.—Defendants thereupon constructed a telegraph line of their own along their line of railway, and plaintiffs claimed that they had the exclusive right to erect and work lines of telegraph on defendants' property upon furnishing defendants the use of said special wire.—Privy Council *held*, that the telegraph company's exclusive right to erect for its own business, did not prevent the railway company from erecting and working telegraph lines on its own property for the purposes of its railway business. Judgment of Supreme Court of Newfoundland reversed. *Reid & Nfld. Co.* v. *Anglo-Am. Tel. Co.*, C. R., [1910] A. C. 234.

Trespass — *Railway Act, 1888, ss. 90, 92, 146—Running trial line—Damages from exercise of statutory powers—Unnecessary damage—Right of action—New trial—Nonsuit—Appeal.*]—If damages are occasioned to a land-owner by the exercise of the powers conferred on a railway company by the Railway Act, and there is no negligence in the mode of exercising such powers, the person injuriously affected is limited to the provisions of the Act for compensation: *Roy* v. *Canadian Pacific Ry. Co.*, [1902] A. C. 220, and *Bennett* v. *Grand Trunk Ry. Co.*, 2 O. L. R. 425. But, if there is negligence in such exercise of statutory powers, or if damages are unnecessarily inflicted, then an action will lie, and the complainant is not limited to the remedy given by the arbitration clauses of the Act.—The plaintiff's claim was for damages for cutting down trees in his grove, through which the defendants were making a survey for a trial line for a proposed branch of their railway, but the possibility of running the trial line through the grove without cutting down the trees by making a rectangular detour around it was not raised at the trial, and the trial Judge did not pass upon it:—*Held*, that the plaintiff, who had been nonsuited at the trial, was entitled to a new trial to determine whether the line could not have been run in the manner suggested. *Barrett* v. *Canadian Pacific Ry. Co.*, 3 W. L. R. 132, 16 Man. L. R. 549.—At the new trial ordered in the foregoing case, the County Court Judge again nonsuited the plaintiff, who appealed to the Court of Appeal:—*Held*, that the evidence shewed that it was unnecessary to cut down the trees for the purpose of running the required trial line, and that the plaintiff was entitled to recover in the action, and that judgment should be entered for him for $250 damages and costs of both trials and both appeals. *Barrett* v. *Can. Pac. Ry. Co.*, 16 Man. L. R. 558.

Undertaking for general advantage of Canada—*Junction or crossing—Provincial railway—Connection by means of independent branch—Railway Act—Construction.*]—The Canadian Pacific Railway, the Great Northern Railway, the railway owned by the Quebec Railway, Lighting, and Motor Power Company, all three being railways which are undertakings for the general advantage of Canada and under the control of Parliament, and the Quebec and Lake St. John Railway, the latter being an undertaking purely provincial and under the control of the Quebec Legislature, all four enter the city of Quebec; and the harbour commission of Quebec, which is under the control of parliament, in order to facilitate these four railways in obtaining access to the pier Louise, constructed upon their own property a branch line of about 300 feet, which in no way entered into the system of these four railways, but by means of which the trains of the Quebec and Lake St. John Railway could pass upon the Canadian Pacific Railway and *vice versa*:—*Held*, that that did not constitute on the part of the Quebec and Lake St. John Railway, a junction with the Canadian Pacific Railway, nor a crossing in the sense of s. 306 of the Railway Act of Canada, 1888, so as to render the Quebec and Lake St. John Railway an undertaking for the general advantage of Canada, and to place it under the control of Parliament; the junction or crossing spoken of in s. 306 must be a physical connection, immediately and without intermediary.—2. The general declaration of s. 306 is insufficient to render railways not

mentioned in it in express and specific terms, undertakings for the general advantage of Canada.—3. Reading together ss. 306 and 177 of the same Act, s. 306 must be interpreted as applying solely to a branch line of railway which by reason of a junction becomes part of the system of one of the railways enumerated in the section, and consequently a branch line of one of the railways. *Garneau* v. *Quebec & Lake St. John Ry. Co.*, 12 Que. K. B. 205.

RAILWAY ACT.

See CONSTITUTIONAL LAW.

RAILWAY AND MUNICIPAL BOARD.

See STREET RAILWAYS.

RAILWAY BONDS.

See PLEDGE.

RAILWAY CHARTER.

See CONTRACT.

RAILWAY COMMISSIONERS.

See RAILWAY.

RAILWAY COMMITTEE OF PRIVY COUNCIL.

See CONSTITUTIONAL LAW — JUDGMENT — RAILWAY.

RAPE.

See CRIMINAL LAW — HUSBAND AND WIFE —SEDUCTION.

RATEPAYER.

See MUNICIPAL CORPORATIONS—MUNICIPAL ELECTIONS.

RATEPAYERS.

See SCHOOLS—TRIAL.

RATES.

See ASSESSMENT AND TAXES — MUNICIPAL CORPORATIONS — RAILWAY—SCHOOLS—TRESPASS TO GOODS — VENDOR AND PURCHASER.

RATIFICATION.

See BANKRUPTCY AND INSOLVENCY—BILLS AND NOTES—COMPANY — EXECUTION—INFANT — MUNICIPAL CORPORATIONS—MUNICIPAL ELECTIONS — PRINCIPAL AND AGENT — SALE OF GOODS—SOLICITOR — VENDOR AND PURCHASER.

REAL PROPERTY ACTS.

Application to file second caveat while first one in force.]—The plaintiff held a tax deed made by the defendants of a quarter section of land within the territorial limits of the defendants' municipality. The defendants claimed title under a vesting certificate issued by themselves to themselves, in pursuance of a tax sale held subsequent to that through which the plaintiff claimed, and applied for the issue of a certificate of title in their favour. The plaintiff filed a caveat setting up title under his tax deed:—*Held*, that the plaintiff's application for leave to file a new caveat, in order to set up a recently acquired title, must be refused with costs. Section 140 appeared to be only intended to deal with what may or may not be done after a caveat shall have lapsed or been withdrawn or discharged. The first words of the section, "after a caveat shall have elapsed or been withdrawn or discharged, it shall not be lawful," etc., control the whole section. In no case is the same party to be allowed to have in force more than one caveat at one time, and when his first caveat lapses he is not entitled as of right to file another, but may be given leave by a Judge to do so. The power of a Judge to order the filing of a new caveat arises only after the first one has lapsed or been withdrawn or discharged. As the first caveat was still in force there was no power to entertain the application. *Alloway* v. *Rural Municipality of St. Andrews*, 24 C. L. T. 248.

Caveat — Charge on land — Validity — Lien Notes Act — Construction of s. 4. *Smith* v. *American Abell Engine and Thresher Co.* (Man.), 5 W. L. R. 329.

Caveat — *Requirements of — Section 133 of Act — Non-compliance with — Dismissal of petition—Action by caveatees—Lis pendens—Section 140 of Act.*]—A plan, of record in the Winnipeg land titles office, set forth a subdivision of a tract of land, including parcels numbered 1 to 9. The caveators agreed to buy from the N. L. company parcels 5 and 9; and by their caveat, against parcels 4 and 8, claimed "an estate or interest as purchasers under a certain agreement for sale," describing it. Parcels 4 and 8 stood in the name of the C. T. company, the caveatees. By the petition of the caveators, under schedule L. to the Real Property Act, they set up representations made to them by M., who was alleged to control the property, personally and as a member of the N. L. company, that parcels 4 and 8 were set apart for a public street; that the caveators had bought on the faith of such representation; and that they were entitled to a way of necessity over parcels 4 and 8. Section 133 of the Act requires

that the caveat shall state the nature of the title, estate, interest, or lien under which the claim is made:—*Held*, that the caveat did not comply with the requirements of s. 133; and the petition should be dismissed. *McArthur* v. *Glass*, 6 Man. L. R. 224, followed.—Order of the Referee in Chambers reversed.—As the matters set forth in the petition were distinct from the claim set up in the caveat, s. 140 of the Act would not affect the filing of a certificate of *lis pendens* in respect of an action brought by the caveators against the caveatees to enforce the right claimed in the petition. *Re Cass & Canada Traders Ltd.* (1910), 15 W. L. R. 194.

Caveator out of jurisdiction — *Security for costs.*]—In May, 1893, the caveatee executed a mortgage to the caveator, which was registered in the proper land titles office. The caveatee afterwards applied for a certificate of title under the Real Property Act of the land mortgaged and other lands, and the caveator was served with notice of the application. He thereupon filed a caveat and a petition asking that his mortgage might be declared to be a subsisting security on the land mortgaged for the sum secured, interest and costs. The caveator was resident out of the jurisdiction, and *prima facie* the caveatee was entitled to security for costs; he took out a *praecipe* order, and the caveator applied to set it aside:—*Held*, that it must be assumed that the district registrar had good reason for causing the notice of the application to be served on the caveator, and it could not be said that it was the caveatee who had compelled the caveator to come into Court to litigate. The caveator was the actor in the proceedings in Court, and, as he resided out of the jurisdiction, he was subject to the general rule as to security for costs: *Apollinaria Co.* v. *Wilson*, 31 Ch. D. 632. *In re Lang and Smith*, 22 C. L. T. 212.

Petition of caveator—*Objections to tax sale — Statement of — Amendment.*]—The caveator filed a petition under schedule L, Rule 1, of the Real Property Act, 1 & 2 Edw. VII. c. 43, to prevent the caveatees, tax sale purchasers, from getting a certificate of title applied for by them; and, after setting out the nature of her title by grant from the Crown, alleged that the caveatees claimed title to the same land under certain alleged sales of same for taxes, and that the said tax sales and all proceedings connected therewith under which the caveatees claimed title were illegal, null, and void, and that the caveatees were not at the time of their application the owners of the land: — *Held*, without deciding whether it is necessary in such a petition to go further than to set forth fully the title of the caveator, that, as the petitioner had set out the claim of the caveatees and the nature of it, it should also have shewn in what particulars the title of the caveatees was defective or invalid, and what facts were relied on to have the tax sales declared void, and *prima facie* to displace the adverse claims of the tax purchasers. An order giving leave to the petitioner, within a limited time, and upon payment of the costs, to amend the petition as she might be advised and to bring it on for further hearing before the Referee, and that in default the petition should be dismissed with costs, was affirmed with costs. *Iredale* v. *McIntyre*, 22 C. L. T. 330, 14 Man. L. R. 199.

Sale of land — Caveat — Sale by administrators—Freehold or leasehold—Direction that action be brought. *Re Rowland & Strathcona* (Man.), 5 W. L. R. 450.

Transfer — *Executions — Priorities.*]—While the Territories Real Property Act was in force, a title stood as follows: 5th July, 1887, certificate of ownership to Canadian Pacific Railway Company; 12th July, 1887, transfer, J. S. to L. H. R., filed and entered in day book; 31st March, 1888, transfer, Canadian Pacific Railway Company to J. S. registered, and certificate of ownership issued to J. S.; 5th February, 1891, 14th April, 1891, 13th January, 1893, executions, King and others v. J. S., lodged by sheriff. On 19th January, 1893, L. H. R. applied to the registrar to issue her a certificate of ownership upon her transfer of 12th July, 1887. The registrar was ready to do so, but proposed to mark the certificate as being subject to the several above mentioned executions. On a reference by the registrar under s. 114: —*Held*, that in view of ss. 34 and 65, the registrar had no right, where the land had been brought under the Act, to receive a transfer for registration executed by a person other than the certified owner, and that therefore the filing of the transfer, prior to the lodgment of the executions, was ineffective, and that therefore the registrar's view was correct. *In re Rivers*, 13 C. L. T. 118, 1 Terr. L. R. 464.

See REGISTRY LAWS.

REAL PROPERTY LIMITATION ACT.

See LIMITATION OF ACTIONS—MORTGAGE.

REAL REPRESENTATIVE.

See DEVOLUTION OF ESTATES ACT.

REASONABLE AND PROBABLE CAUSE.

See MALICIOUS PROSECUTION AND ARREST.

RECEIPT.

See CONTRACT — INSURANCE — VENDOR AND PURCHASER—WAREHOUSE RECEIPTS.

RECEIVER.

Accounts — Municipal corporation — Trustee for — Discount allowed on taxes—Interest lost by receiver not depositing in bank moneys collected — Liability—Counterclaim — Costs. *Emerson* v. *Wright* (Man.), 5 W. L. R. 365.

Action against receiver — Leave of Court. *Morash* v. *Wade*, 40 N. S. R. 622.

Action brought by receiver in his own name — Seizure of property in hands of receiver — Injunction — Damages—Bank —Lien — Timber — Bank Act — Practice —Costs. *Craig* v. *Kinch*, 10 O. W. R. 28.

Action by annuitant for arrears — *Abandonment of land by donee — Long vacation — Harvest — Collection of rents.*] — Pending an action by an annuitant to recover the arrears of his life annuity, stipulated for in a donation *inter vivos* to his son, the donor has a right, on the abandonment of the land by the defendant, after the action has been commenced and during the long vacation, to obtain the appointment of a receiver to take care of the property, get in the harvest, and receive the rents. Art. 1823 is not limitative. *Hainse* v. *Pilote*, 27 Que. S. C. 71.

Company — Person indebted to — Set-off — Payments — Allowance by receiver of company's assets. *Indian Trust* v. *Acadia Pulp Co., Re Ford*, 40 N. S. R. 621.

Contract for construction of paving —*Money payable to judgment debtor under —Retention of money by municipality as security for repairs—Debitum in praesenti— Equitable execution—Receiving order—Form —Effect of on third parties—9 Edw. VII. c. 48, s. 25.*] — Defendant contractor had earned $1,300 under a contract for paving streets in Stratford. Execution creditors desired to attach this money. The municipality held the money as security for a guaranty by defendant to keep said pavement in repair during a specified term.—Middleton, J., *held*, 17 O. W. R., 9, 22 O. L. R. 36, 2 O. W. N. 79, that the money was not a *debitum in praesenti* which could be reached by ordinary process of attachment. Order granted for a receiver to receive the money when same may become payable by municipality. Order to conform to requirements of 9 Edw. VII. c. 48, s. 25. — Divisional Court reversed above judgment with costs in appeal and Court below. *Manufacturers Lumber Co.* v. *Pigeon* (1910), 17 O. W. R. 691, 2 O. W. N. 341, 22 O. L. R. 378.

Equitable execution — *Claim against Crown — Distribution of fund—Creditors' Relief Act — Undertaking.*]—The plaintiff and defendant were partners, and as such had a claim against the Crown for work done, which resulted in the payment of a large sum. Subsequently the partnership made a further claim for interest on the sum paid, which was rejected, and could not have been enforced by a petition of right. The Crown, however, without admitting any liability, offered a sum in satisfaction of the claim for interest, and an appropriation was made by Parliament to enable that to be done, but the appropriation lapsed. A Minister of the Crown afterwards offered to pay the defendant half the amount of the appropriation, and the defendant agreed to accept it. Accordingly a sum was granted by Parliament for this purpose, and by an order-in-council authority was granted to pay it to the defendant:—*Held*, that on the date of the order-in-council there existed a debt due by the Crown to the defendant, arising out of contract, and recoverable by petition of right.—*Held*, also, that this sum could be made available for satisfaction of a judgment recovered by the plaintiff against the defendant. *Willcock* v. *Terrell*, 3 Ex. D. 323, and *Manning* v. *Mullins*, [1898] 2 Ir. R. 34, followed. The fact that the Crown is the debtor does not stand in the way of the Court going as far as it can go, without directing or assuming to direct what shall be done by the Crown, towards making such an asset of a judgment debtor available to satisfy the claim of his judgment creditor. Upon the plaintiff undertaking that the fund, if and when it should come to the hands of the receiver, should be applied as if it had come to the hands of the sheriff under the Creditors' Relief Act, an order was made restraining the defendant from receiving the fund, authorising the receiver to receive it, and providing that his receipt should be a sufficient discharge to the department or officer making payment. *Stewart* v. *Jones*, 20 C. L. T. 380, 19 P. R. 227. (Reversed, 21 C. L. T. 141.)

Equitable execution — *Claim against Crown — Voluntary payment.*] — *Held*, reversing the decision of Meredith, C.J., 19 P. R. 227, 20 C. L. T. 380, that payment of the money in question in this case was to be made by the Crown to the judgment debtor purely out of bounty, and was not enforceable by any Court, and was not to be made in pursuance of any contract; and therefore the money could not be reached by the judgment creditor by means of a receiving order. *Willcock* v. *Terrell*, 3 Ex. D. 323, distinguished. *Stewart* v. *Jones*, 21 C. L. T. 141, 1 O. L. R. 34.

Equitable execution — *Collection of dues or assessments of members of local branch of trade union.*]—Motion to continue the appointment of a receiver. Plaintiffs had judgment against some defendants individually, and against the defendants in their respective capacity, that is, representing the local branch of a trade union. The only property of the union which might come into the receiver's hands was some chattel property of small value, and the dues levied by the said union on its members. As the dues could not be recovered by the receiver by action, and the chattel property was of little value, motion dismissed. *Cotter* v. *Osborne*, 11 W. L. R. 569.

Equitable execution — *Ex parte* order —Local Judge — Appeal — Forum — Extension of time for appeal — Previous *ex parte* application — Direction to serve notice —Non-disclosure — Interest under will — Income — Married woman — Restraint upon anticipation. *Wise* v. *Gaymon*, 7 O. W. R. 61.

Equitable execution—*Interest in partnership — Inspection of books and papers— Rights of receiver — Rights of solicitor for judgment creditor.*] — The plaintiff, a judgment creditor of the defendant, obtained an order appointing a receiver of the interest of the defendant in a partnership and an order under sec. 26 of the Partnership Act; the orders provided for inspection by the receiver of all books and documents of the

partnership, and for a reference to the Master. One of the solicitors for the plaintiff was refused inspection of partnership books and documents:—*Held*, that this was not included in the terms of the orders; and a motion for production and deposit of the documents with the prothonotary, for inspection by the plaintiff or her solicitor or agent, was refused. *Desaulnier* v. *Johnston* (1910), 15 W. L. R. 205.

Equitable execution—Interest of debtor under will—Restraint on anticipation—Arrears of income—Contingent interest — Dependence on will of another — Creditors' rights. *Adams* v. *Cox*, 4 O. W. R. 15.

Equitable execution — *Judgment for alimony — "Creditor" — Pension.*] — The plaintiff, the wife of a retired member of the Toronto police force, and entitled to interim alimony under an order theretofore made, alimony which could be applied to the payment of which the defendant, her husband, would become entitled as a pension, under the rules of the Police Benefit Fund (a friendly society incorporated under R. S. O. 1897 c. 211), on application by him before the Benefit Fund committee, which application, however, he had not yet made:—*Held*, that the plaintiff was not entitled to succeed, for, whereas arrears of pension constitute a debt which may be attached by garnishee proceedings, unearned pension cannot be reached either by that procedure or by the appointment of a receiver.—*Semble*, that the plaintiff was a "creditor" within the meaning of s. 12 of R. S. O. c. 211, and on that ground also her application must fail. *Slemin* v. *Slemin*, 24 C. L. T. 57, 7 O. L. R. 67, 2 O. W. R. 1176.

Equitable execution — *Judgment more than 20 years old — Statute of Limitations —Effect of receivership — Order of expiry of judgment.*]—Plaintiff, an execution creditor of defendant, was appointed receiver by way of equitable execution of defendant's share of his father's estate. His judgment was barred by the Statute of Limitations:—*Held*, that this did not affect the receivership order as it was in effect equivalent to a judgment for equitable relief, and gave a new point of departure for the Statute of Limitations, if that were material. *Kinnear* v. *Clyne* (1909), 13 O. W. R. 776, 1138, 18 O. L. R. 457.

Equitable execution — *Judicature Act, s. 58, s-s. 9 — Property to be reached — Book debts — Shares in foreign company — Insurance policy.*]—The provision in s. 58, s-s. 9, of the Judicature Act, R. S. O. 1897 c. 51, that a receiver may be appointed in all cases in which it shall appear to be just or convenient that such order should be made, was intended merely to expressly confer upon all the Courts that jurisdiction which, under the designation of equitable execution, had, before the fusion of law and equity, been exercised by the Court of Chancery alone:—*Held*, that a judgment creditor was not entitled to have a receiver appointed to receive all debts due to the judgment debtor, to receive and sell certain shares of stock in a foreign company said to be owned by the debtor, and to receive the interest of the debtor in a certain policy of insurance on the life of another, assigned to the debtor. *In re Asselin and Cleghorn*, 23 C. L. T. 288, 6 O. L. R. 170, 2 O. W. R. 712.

Equitable execution — *Judicature Act —Trustees — Rents.*]—The Judicature Act, s. 58, s-s. 9, does not give jurisdiction to appoint a receiver in cases where prior to that Act no Court had such jurisdiction. And, in order to justify the making of an order for the appointment of a receiver at the instance of a judgment creditor, the circumstances of the case must be such as would have enabled the Court of Chancery to make such an order before the Judicature Act. Where the plaintiffs were judgment creditors of the defendant, and were also the trustees entitled to receive the rents and other property in respect of which they asked that they should be appointed receivers, to which the defendant was beneficially entitled:—*Held*, that there was no impediment in the way of their receiving such rents and other property, and their motion for an order appointing them receivers was unnecessary. *O'Donnell* v. *Faulkner*, 21 C. L. T. 75, 1 O. L. R. 21.

Equitable execution — *Life policy — Assignment — Security.*] — *Held*, that the plaintiffs were entitled to a receivership order to receive the defendant's interest in a life ten-payments policy, which was fully paid up,—the same having been assigned to the plaintiffs as security for a debt due to them, and the assignment entitling the defendant to receive from time to time the cash surrender value of the bonus additions to the policy, and so having ceased to be exigible in execution under R. S. O. c. 77, s. 18, as a security for money,—on the principle that the benefit of the defendant's interest in the policy under ordinary process being defeated by a prior title,—that of his assignee,—not extending to the whole interest of the defendant in the property upon which the judgment was proposed to be executed,—the plaintiffs were entitled to the aid of the Court to enable them to reach it. *Canadian Mutual L. & I. Co.* v. *Nisbet*, 20 C. L. T. 117, 31 O. R. 562.

Equitable execution — *Mortgage — Right of indemnity.*]—A judgment creditor of a mortgagor cannot obtain a receiving order to enforce payment by a purchaser of the equity who, on purchasing, has agreed to assume and pay the mortgage, though he make the application on behalf of himself and all other creditors of the mortgagor. *Palmer* v. *McKnight*, 31 O. R. 306.

Equitable execution — Rents of mortgaged lands. *Imperial Bank of Canada* v. *Twyford* (N.W.T.), 1 W. L. R. 157.

Equitable execution — *Return of nulla bona.*]—A receiver for the purpose of giving a judgment creditor equitable relief will not be appointed until the judgment creditor has exhausted his legal (as distinguished from equitable) remedies. *Davidge* v. *Kirby*, 10 B. C. R. 231.

Equitable execution — *Salary of civil servant not yet due.*]—The application of a judgment creditor for the appointment of a receiver to receive the cheques for salary

not yet due of the judgment debtor, a Dominion civil servant, was dismissed. *Forin* v. *Wagner*, 9 W. L. R. 593.

Equitable execution—Salary of schoolmaster. *Ingles* v. *McPherson*, 40 N. S. R. 621.

Injunction — *Appeal to Court of Appeal pending — Application after security for costs given — Forum — Jurisdiction.*] — The plaintiff in a partnership action obtained judgment in his favour, and the defendant having given security for costs appealed to the Court of Appeal. The plaintiff then made an application to the Court of Appeal for an injunction to restrain the defendant from dealing with partnership moneys and for a receiver:—*Held*, that a Judge of the Court of Appeal may at any time during vacation make any interim order to prevent prejudice to the claims of any party pending an appeal, and that what may be done by a Judge during vacation may be done by the Court at any other time; and that the Court of Appeal, for the purposes of appeals, etc., may exercise the power, authority, and jurisdiction by the Judicature Act vested in the High Court.—Order for receiver granted; Meredith, J.A., dissenting. *Embree* v. *McCurdy* (No. 2), 10 O. W. R. 131, 14 O. L. R. 325.

Injunction — *Creditors' Relief Act.*]—Motion made continuing the appointment of defendants' receivers and continuing injunction. Rights under Creditors Relief Act, 1880, protected. *Kelly* v. *Ottawa Journal* (1909), 14 O. W. R. 934, 1 O. W. N. 136.

Management of business — *Supervision and control — Laches.*]—The receiver of a partnership, who is directed by the Court to manage the business until it can be sold, should exercise the same reasonable care, oversight, and control over it as an ordinary man would give to his own business, and if he fails to do so he must make good any loss resulting from his negligence.—The fact that the receiver is the sheriff of the district does not absolve him from this obligation, though the parties consented to his appointment knowing that he would not be able to manage the business in person.—Taschereau, C.J.C., and Maclennan, J., dissented, taking a different view of the evidence.—Judgment of the Court below, *Plisson* v. *Diemert*, 1 W. L. R. 359, reversed. *Plisson* v. *Duncan*, 26 C. L. T. 74, 36 S. C. R. 647.

Management of hotel — Liability for loss — Wilful default. *Plisson* v. *Diemert* (N.W.T.), 1 W. L. R. 359.

Moneys deposited in the hands of the defendant company—*Spending these moneys — Affidavit — Inscription in law—C. P. 191, 955.*]—Any person who regularly deposits money in the hands of a financial company ought, in his affidavit for a receiver of the goods of that company, shew an obligation on the part of the latter to keep in specie the money that he has thus paid, otherwise he shews no right which might be conserved by receiving order. In the case, the plaintiff alleges that the defendant has squandered the moneys that he has sent in, and consequently he cannot have any special right in the thing scattered and squandered. *Provost* v. *Société des Arts du Canada* (1909), 10 Que. P. R. 349.

Partnership — *Costs — Personal liability — Opposition to judgment.*] — The receiver of a partnership appointed under Art. 1896a, C. C., who gets in moneys due to the firm and distributes them in conformity with orders of the Court, will not be charged personally with the costs of an opposition to such orders.—The remedy of opposition to quash orders for payment of moneys is not open on account of defects of form in favour of a creditor who suffers no real prejudice. *Bédard* v. *Owens*, 15 Que. K. B. 553.

Partnership action — Appointment of defendant, the active partner, as manager and receiver — Misconduct — Salary. *Kelly* v. *Kelly*, 7 W. L. R. 542.

Partnership action — *Discharge of interim receiver — Dismissal of action—Money in hands of receiver.*]—Action for dissolution of partnership and accounting, possession, damages and appointment of receiver. A receiver had been appointed who neither gave nor took security. The plaintiff now refused to proceed with the action. Receiver directed to pass his accounts, pay into Court all moneys received, proper disbursements to be allowed, plaintiff to be charged with all costs and damages. *Le Brun* v. *Le Brun*, 11 W. L. R. 267.

Partnership action — Order appointing receiver — Notice of discontinuance served after pronouncing but before issue of order — Issue of order by defendant — Receiver taking possession — Order for withdrawal — Receiver's costs and charges — Defendants' costs. *Hadley* v. *Edler*, 12 O. W. R. 853.

Receiver and manager — *Liability for deficit arising during management—Default—Reasonable care.*]—*Held*, that the law requires of a receiver and manager the same degree of diligence that a man of ordinary prudence would exercise in the management of his own affairs:—*Held*, *per* Sifton, C.J., and Harvey, J., Wetmore and Prendergast, JJ., dissenting, that, as it appeared upon the facts that the receiver and manager had exercised such supervision over the business as was possible for one in his position, he should not be held responsible for the deficit which had occurred under his management. The Court being equally divided, judgment of Newlands, J., affirmed. *Plisson* v. *Diemert*, 6 Terr. L. R. 160, 1 W. L. R. 359.

Security — Bond of foreign guarantee company — Insufficiency — Amount—Standing of company — Form of bond — Execution — Power of attorney — Affidavit of justification. *Boyle* v. *Rothschild*, 12 O. W. R. 104.

Succession — *Inventory — Creditor — Seizure.*]—A creditor cannot demand the appointment of a receiver of the property of a succession, especially if the time for making an inventory has not expired, and if the ascertained property of the succession is already under seizure. *O'Brien* v. *Church*, 9 Que. P. R. 92.

See ABSCONDING DEBTOR — ATTACHMENT OF DEBTS — BANKRUPTCY AND INSOLVENCY —COMPANY — EQUITABLE ASSIGNMENT — FRAUDULENT CONVEYANCE — JUDGMENT — PARTNERSHIP — PLEADING — RAILWAY — WILL.

RECEIVER-GENERAL.

See CROWN.

RECEIVER OF WRECKS.

See SHIP.

RECEIVING STOLEN GOODS.

See CRIMINAL LAW.

RECOGNIZANCE.

See APPEAL—BAIL—CERTIORARI—CRIMINAL LAW — FISHERIES—MUNICIPAL ELECTIONS.

RECORD.

See APPEAL — CRIMINAL LAW—EVIDENCE JUDGMENT.

RECORD OF ACQUITTAL.

See MALICIOUS PROCEDURE.

RECORDER.

See CRIMINAL LAW—MUNICIPAL CORPORATIONS.

RECORDER'S COURT.

See APPEAL — CONSTITUTIONAL LAW — COSTS—COURTS.

RECOUNT.

See MUNICIPAL ELECTIONS—PARLIAMENTARY ELECTIONS.

RECOVERY OF LAND.

See EJECTMENT.

RECOVERY OF POSSESSION.

See EJECTMENT — LIMITATION OF ACTIONS.

RECTIFICATION.

See ACCOUNT—CONTRACT—DEED.

RECTIFICATION OF POLICY.

See INSURANCE.

RECTIFICATION OR REFORMATION.

See DEED — JUDGMENT — VENDOR AND PURCHASER—WILL.

REDDITION DE COMPTE.

See ACCOUNT.

REDEMPTION.

See ACCOUNT — ASSESSMENT AND TAXES—COSTS — DEED — EQUITABLE EXECUTION — EVIDENCE — LIMITATION OF ACTIONS — MORTGAGE — STAY OF PROCEEDINGS — TRUSTS AND TRUSTEES — VENDOR AND PURCHASER.

REFEREE.

See PARTITION.

REFEREE IN CHAMBERS.

See ADMINISTRATOR PENDENTE LITE—JUDGMENT—TRIAL.

REFEREE UNDER DRAINAGE LAWS.

See MUNICIPAL CORPORATIONS.

REFERENCE.

Accounts—*Reference to take.* *See* ACCOUNTS.

Accounts—*Warrant to proceed—Dismissal of bill.*]—It is not a ground for dismissal of the bill in a suit that the plaintiff fails to take out a warrant to proceed in a reference in the suit to take accounts between the parties. On the failure of the plaintiff to take out the warrant the defendant is entitled to do so. *Gallagher* v. *Moncton*, 22 C. L. T. 169, 2 N. B. Eq. R. 360.

Allowing payment to agents — *Practice of real estate agents—Appeal partially allowed—No costs of appeal.*]—A trust corporation were engaged to collect rents for the purpose of paying off mortgages in their pos-

session. They employed agents to do this for them and the agents, without their knowledge, deducted 10 per cent. commission from all contractors doing repairs on the mortgaged property. In an action on a mortgage and an enquiry to the Master as to subsequent encumbrancers, *held*, upon the facts that the Trust Corporation were justified in employing agents, and that they must submit to the terms of the agency business. — On appeal, this judgment was partially reversed. — Sutherland, J., *held*, that this commission, as it is called, was held to be contrary to law.—*Held*, also, that the custom of real estate agents was not satisfactorily proved.—Case again referred to the Master, as success was divided; no costs of appeal. *Toronto General Trusts Corp.* v. *Robins* (1911), 19 O. W. R. 212, 2 O. W. N. 1023.

Death of Local Master—New order of reference. *Caswell* v. *Buchner* (1910), 1 O. W. N. 738.

Drainage Referee — *Official Referee—Reference — Statutes.*] — The Drainage Referee is not an official referee, and an action cannot be referred to him for trial unless he is agreed upon by the parties as a special referee. Provisions of the Judicature, Arbitration, and Drainage Acts, discussed. Decision of a Divisional Court, 22 C. L. T. 255, 4 O. L. R. 97, reversed. *McClure* v. *Brooke, Bryce* v. *Brooke*, 23 C. L. T. 40, 5 O. L. R. 59, 1 O. W. R. 274, 324, 835.

Jurisdiction of Master—Remuneration and costs of trustee-plaintiff—Debt due to estate — Set-off — Solicitor's lien. *Thorne* v. *Parsons*, 6 O. W. R. 377.

Liquidation — *Accounts — Notice — Reports.*]—A referee appointed to proceed with the liquidation of a community of property, as well as with the liquidation of the estate of the husband, and the ascertainment of the respective rights of his heirs, and the settlement of the accounts between them, must give notice to the parties interested before proceeding, and the omission of such notice is a ground for setting aside his report. *Chenier* v. *McMartin*, 16 Que. S. C. 368.

Local Master — *Acceptance as solicitor of retainer from one of the parties — Disqualification — Setting aside proceedings.*]—The firm of solicitors in which a local Master was a partner had accepted, pending a reference before the latter, a retainer from the defendant for some non-contentious business in the Surrogate Court:—*Held*, that the reference and proceedings thereon must be set aside, for, without suggesting that there had been or would be any bias, the Master, as the solicitor even in a small matter for the defendant, a man of large business interests, might reasonably be suspected of bias. Judgment of Anglin, J., 7 O. W. R. 830, affirmed. *Livingston* v. *Livingston*, 9 O. W. R. 273, 13 O. L. R. 604.

Quebec Superior Court—*Practice as to appointment of referee — Powers of—Rights of parties — Liability for costs.*]—While a Judge can *suo motu*, in the cases provided for in Art. 410, C. P. C., refer a case to a referee, he should, nevertheless, first afford the parties an opportunity to agree upon a practician, and he cannot name the person who is to act, in such manner, at all events, as to impose upon both parties, even though neither of them should desire them, the services of the person so named and the obligation of paying for such services, and such judgment cannot be invoked by the person so named as imposing upon the parties to the suit the obligation of proceeding before him, or of paying for services by him performed, without any proceeding being by them or either of them taken before him, merely because it has not been appealed from. Moreover the judgment making such reference and appointment is a judgment rendered in the interest of the parties, and it is for them to avail themselves of it; and, therefore, save in case of acquiescence of the parties, such referee cannot act until served with the judgment and a requisition calling upon him to be sworn, or in some equivalent manner required to act by one of the parties, nor until he has given notice to the parties of his intention to proceed and of the time when and place where he will proceed. The judgment appointing a referee, although it may become *chose jugée* as to the parties to the action, cannot bind the latter in favour of such referee, and until they have signified an intention to avail themselves of it, such judgment confers no rights on the referee and no obligation on the parties to the action. The taxation of the bill of the referee by the Court against the will and in spite of the objections of the parties, has only the effect of fixing the amount thereof and does not render the parties liable. *Germano* v. *Mussen*, 26 Que. S. C. 525.

Referee's fees — *When payable.*] — A referee having entered upon a reference is not entitled to payment of his fees from day to day as a condition of proceeding with the reference: — *Semble*, where special circumstances shew a probability that the fees of a referee will not be paid, the Court will require that his fees be secured to him before ordering the reference to be proceeded with. *Gallagher* v. *Moncton*, 21 C. L. T. 485, 2 N. B. Eq. Reps. 269.

Report — Appeal from — Judgment — Costs. *Stanley* v. *Mennie* (1910), 1 O. W. N. 890.

Report—*Confirmation—Notice of filing—Non-appearance — Rules 573, 694, 769.*]—Rules 694 and 769, requiring notice of filing a Master's report as a condition of its becoming absolute, are governed by Rule 573; and, therefore, notice of filing a Master's report need not be served upon a defendant who has not entered an appearance in the action; and where there is no defendant upon whom notice of filing need be served, the report becomes absolute upon the expiration of fourteen days from the filing. *Toronto General Trusts Corporation* v. *Craig*, 21 C. L. T. 502, 2 O. L. R. 238.

Report—*Order—Evidence before Referee —Illegibility — Intituling — Notice of hearing.*]—A motion to confirm the report of a referee on an application for the appointment of a guardian, was refused where the order of reference was not attached to the

report, and the evidence before the referee was in lead pencil and difficult to read, and was not intituled in the matter, and it appeared that notice of the hearing before the referee was not given to the relatives. *In re Turner* 21 C. L. T. 510, 2 N. B. Eq. Reps. 318.

Report on sale—*No sale for want of bidders — Confirmation.*]—A report on sale, though only a report that there was no sale for want of bidders, is a report that may be appealed from, and requires confirmation. And an order made by a local Judge (without consent) confirming such a report four days after it was made, and granting foreclosure in default of payment, was held bad. *Robert* v. *Caughell*, 23 C. L. T. 305, 6 O. L. R. 381, 2 O. W. R. 799, 939, 971.

Scope of—Mortgage action — Reference back to readjust accounts—Change in computation of interest—Jurisdiction of Master to fix a new day for redemption. *Imperial Trusts Co.* v. *New York Security Co.*, 5 O. W. R. 641.

Stay—Judgment on special case—Appeal—Rule 829—Terms of special case. *Toronto* v. *Toronto Ry. Co.*, 5 O. W. R. 415.

Stay of reference pending appeal—*Ruling of Master in Ordinary—Appeal from—Forum.*]—A judgment directed the Master in Ordinary to make partition of lands; ordered that the parties should execute and deliver all necessary conveyances, to be settled by the Master, and should give possession to each other in accordance therewith; and directed the Master to ascertain the plaintiff's damages for *ouster*, *mesne* profits, and waste. The defendants appealed from the judgment to the Court of Appeal, and gave the security provided for by Rule 826: —*Held*, that the reference was stayed pending the appeal. Construction and application of Rules 827 and 829. The ruling of the Master that the reference was not stayed was a ruling upon a question of practice, and therefore came within the exception in s. 75 (2) of the Judicature Act, R. S. O. 1897 c. 51; and an appeal from his ruling lay to a Judge in Court. *Monro* v. *Toronto Ry. Co.*, 23 C. L. T. 12, 5 O. L. R. 15, 1 O. W. R. 25, 316, 813, 2 O. W. R. 207.

Taxation of bill—*Illness of Referee—Proof of — Change of Referee — Use of depositions already taken.*]—Where a deputy-registrar before whom a reference had been made to tax a solicitor's bill of costs fell ill after the evidence and argument was all in, but before judgment had been given, and being ill for nearly a year and not able to attend to his duties, an application was made by the client to change the reference to one of the taxing officers at Toronto. The solicitor opposed the change:—*Held*, the matter should be referred to the deputy clerk of the Crown. *Re Solicitor*, 6 O. W. R. 422, 10 O. L. R. 393.

Yukon Court—*Nullity — Boundaries of mining locations.*] — In an action in the Yukon Territory in which the question in issue was as to the true boundary between a creek and a hill claim, a reference to ascertain the boundary was ordered on the application of the plaintiff; the referee adopted a line run by a surveyor named Gibbons under instructions from the Gold Commissioner (after the location of the plaintiff's claim) for the purpose of establishing an official boundary between the hill and creek claims, which cut off part of the plaintiff's claim. On motion to the Court the report was confirmed and judgment entered accordingly:—*Held*, on appeal, *per* Walkem, J., that the Gibbons line was a nullity, and, as the Court below adopted it and based its judgment upon it that judgment must be set aside. 2. The reference was a nullity, as it involved the determination of a mixed question of law and fact, and was not a matter of "practice and procedure," but of jurisdiction; and it was beyond the power of the Court to order the reference even by consent. *Per* Irving, J., following *Williams* v. *Faulkner*, 8 B. C. R. 197, that the Yukon Court has no power to make an order of reference, and, as the whole proceedings before the referee were founded on a mistaken idea of the jurisdiction to refer, the doctrine of *extra cursum curiæ* did not apply. *Stevenson* v. *Parks*, 10 B. C. R. 387.

Yukon law—*Order of reference—Jurisdiction of Court to make.*]—The power to make an order of reference in an action is a matter of jurisdiction and not merely a question of "procedure and practice," within the meaning of s. 3 of the Judicature Ordinance, N. W. T., and therefore the Yukon Court had no power under this section to make an order of reference. *Williams* v. *Faulkner*, *Raymond* v. *Faulkner*, 22 C. L. T. 40, 8 B. C. R. 197.

See Account — Admiralty — Appeal — Company — Local Master — Lunatic — Mortgage — Municipal Corporations — Practice — Railway — Sale of Goods — Solicitor — Timber — Trespass to Land.

REFERENDUM.

See Constitutional Law — Liquor Act of Ontario — Mandamus.

REFORMATION.

See Contract.

REFORMATION OF CONTRACT.

See Contract — Patent for Invention — Pleading — Vendor and Purchaser.

REFORMATION OF DEED.

See Deed.

REFORMATION OF LEASE.

See Landlord and Tenant.

REFORMATION OF MORTGAGE.

See MORTGAGE.

REGISTERED BOND.

See VENDOR AND PURCHASER.

REGISTRATION.

See BILLS OF SALE AND CHATTEL MORTGAGES —COPYRIGHT — PHYSICIANS AND SURGEONS — REGISTRY LAWS — SALE OF GOODS — TRADE MARK.

REGISTRY ACT, NOVA SCOTIA.

See REGISTRY LAWS.

REGISTRY ACT, QUEBEC.

See REGISTRY LAWS.

REGISTRY LAWS.

See ANNUITY — CROWN — DOWER — EVIDENCE — MECHANICS' LIENS — MUNICIPAL CORPORATIONS — RAILWAYS AND RAILWAY COMPANIES — VENDOR AND PURCHASER — WAY.

1. BRITISH COLUMBIA.

British Columbia Land Registry Act —*Amending Act, 1898* — *Fees on registration of transfer to new trustees* — *Local Judge.*]—The fee payable for registration of a transfer of realty to new trustees is based on the value of the lands included in the conveyance to such new trustees. — A local Judge has jurisdiction to hear an application under the Act to determine the fees payable. *Re Hall Mining & Smelting Co.*, 11 B. C. R. 492.

British Columbia Land Registry Act —*Mortgage*—*House built partly on lot not included*—*Rights of mortgagee* — *Purchaser for value* — *Notice*—*Registered title.*]—The plaintiffs owned lot 19 and the defendant owned lot 20 of a certain subdivision in the city of Vancouver. Lots 19 and 20 were at one time owned by the same person, who built a house partly on both lots. The plaintiffs brought an action for a declaration that the house belonged to them, and based their action on the fact that the original owner of the two lots had obtained a loan on lot 19 for the purpose of constructing the building in question, and that, being the owner of the two lots, they were entitled to the whole building, alleging that the defendant, the owner of lot 20, had constructive notice of the claim of the plaintiffs:—*Held*, that, under s.-ss. 3 and 4 of s. 43 of the Land Registry Act, the defendant, being a purchaser for valuable consideration and claiming under the registered owner of lot 20, was not in any way affected by any relation that might exist between the original owner of lots 19 and 20 and the plaintiffs, in connection with the building having been erected with the proceeds of a loan obtained by the original owner from the plaintiffs. *Canadian Birkbeck Investment & Savings Co.* v. *Ryder*, 12 B. C. R. 92, 2 W. L. R. 158.

British Columbia Land Registry Act —*Registrable instrument* — *Transfer of interest in land* — *Surface rights of mineral claim.*]—The grant from the Crown of the surface rights of a mineral claim, being given in conjunction with the right to win the minerals thereunder, does not confer an interest which can be separately transferred by the grantee so as to secure registration under the Land Registry Act. *In re Reliance Gold Mining & Milling Co.*, 13 B. C. R. 482.

British Columbia Land Registry Act —*Unregistered deed*—*Validity of, as against assignment for creditors* — *Construction of deed* — *Security to indorser* — *Scope of.*]—Notwithstanding s. 74 of the Land Registry Act, c. 23 of 1906, an unregistered deed confers a good title upon the grantee as against a registered assignment for the benefit of creditors of the grantor, if the grantee, or any one claiming under him, can subsequently effect registration.—A deed conveyed land to a party as security to indemnify him from loss in respect of his indorsement of a promissory note:—*Held*, that it secured him and his estate in respect of every subsequent indorsement of any other note, whether by way of renewal or as collateral security in respect of the same debt. *Westfall* v. *Stewart & Griffith*, 13 B. C. R. 111.

British Columbia Land Registry Act, s. 74 — *Construction* — *Unregistered deed* — *Validity of registered judgment against grantor*—*Judgments Act, s. 3* — *Execution debtor* — *Dry legal trustee.*]—Execution creditors registered their judgment in April, 1907, against the lands of the judgment debtor, pursuant to the Judgments Act. Previous to this, in January, 1906, the debtor conveyed a certain lot to the plaintiff, who neglected, through ignorance of s. 74 of the Land Registry Act, to register his conveyance until August, 1907, when he found this judgment registered against the lot. In an action to set aside this cloud upon his title, the trial Judge ruled that s. 74, making registration of conveyances a *sine qua non* to the passing of any title, at law or in equity, to lands, governed:—*Held*, on appeal, that the Judgments Act gives the judgment creditors only a right to register against the interest in lands possessed by the judgment

debtor; and that in this case the debtor, having conveyed the land to the plaintiff so long before the execution creditors' judgment was obtained, was a dry trustee of the land for the plaintiff. *Lery* v. *Gleason*, 13 B. C. R. 357, explained. *Entwistle* v. *Lees*, 14 B. C. R. 51, 9 W. L. R. 17, 317.

Caveat—*Lis pendens—Time of filing—Sec. 49, sub-sec. 8.*]—Section 49, sub-sec. 8 of the Land Registry Act does not require that the *lis pendens* (or other evidence) of a caveator shall be filed during the currency of the caveat; it is effective if filed before the caveat; the words "have filed" are to be construed as meaning "have on file." *Croft* v. *Whiting* (1910), 14 W. L. R. 634.

Foreign company — *Owner of lands—Right to registration.*]—A company duly incorporated in a foreign country, have a right, though not licensed to do business in British Columbia, to be registered as the owners of lands acquired by them. Judgment of Begbie, C.J., 2 B. C. S. reversed. *Ex p. New Vancouver Coal Mining & Land Co.*, 9 B. C. R. 371.

Land Registry Act — *Registered judgment—Mortgage—Priorities.*]—*Held*, that a registered judgment binds only the interest of the debtor existing at the time of registration, and therefore cannot affect a mortgage already given by the debtor, although such mortgage is not registered before the judgment. *Yorkshire Guarantee and Securities Corporation* v. *Edmonds*, 20 C. L. T. 447, 7 Brit. Col. L. R. 348.

Land Registry Act — *Registration of tax deed—Certificate of title—Priority over earlier certificate.*]—Section 13 of the British Columbia Land Registry Act, R. S. B. C. c. 111, provides that a person claiming ownership in fee of land may apply for registration thereof, and the Registrar, on being satisfied, after examination of the title deeds, that a *prima facie* case is established, shall register the title in the "Register of Absolute Fees." Section 19, which authorises the Registrar to issue a certificate of title to the person so registering, contains this provision: "Every certificate of title shall be received as *prima facie* evidence in all Courts of Justice in the Province, of the particulars therein set forth." And by s. 23: "The registered owner of an absolute fee shall be deemed to be the *prima facie* owner of the land described or referred to in the register for such an estate of freehold as he may possess." . . . :—*Held*, affirming the judgment in 7 Brit. Col. L. R. 12, that a certificate of title issued on registration of a deed from the assessor of taxes to a purchaser at a tax sale does not of itself oust the prior registered owner of the land described in the register, but the holder must prove that all the statutory provisions to authorise a sale for taxes had been complied with. *Johnson* v. *Kirk*, *Kirk* v. *Kirkland*, 20 C. L. T. 294, 30 S. C. R. 344.

Land Registry Act — *Title to land — Proof of—Certificates of title — Insufficient description—False date—Plan of subdivision —Navigable river — Road allowance — Trespass — Injunction.*] — *Held*, reversing the judgment of Clement, J., 13 W. L. R. 629, that the plaintiff had failed to prove his title and could not succeed in the action.—*Per* Macdonald, C.J.A.:—The plaintiff relied upon two certificates of indefeasible title, neither of which described the land intended to be included in it, by metes and bounds or other description as in the deed to the plaintiff's immediate predecessor in title. It was an attempt to subdivide, on paper, one parcel into two. The Land Registry Act does not authorise an owner, with the assistance of the Registrar of Titles, to subdivide his land in this way and to secure a certificate which contains no description in the body of it which would identify the land. The certificates were also open to objection because, though dated as of May, 1908, they were in fact not issued until February, 1909, long after the action had been begun and shortly before the trial. Had the title deeds been produced, it probably would have appeared that the plaintiff had no right to the land lying between the road and the water. *Rorison* v. *Kolosoff* (1910), 15 W. L. R 497, B. C. R.

Land Registry Act, B. C. — *Debentures—Charge—No description of land.*]—A company issued debentures which created a charge upon all its property without describing the property:—*Held*, that the debentures were capable of registration under the Land Registry Act. *In re Land Registry Act*, 24 C. L. T. 259, 10 B. C. R. 370.

Land Registry Act, B. C.—Mortgage—House built partly on lot not included—Rights of mortgagee — Purchaser for value—Notice — Registered title. *Canadian Birkbeck Investment & Savings Co.* v. *Ryder* (B.C.), 2 W. L. R. 158.

Land Registry Act, B. C.—*Registered plan — Unregistered plan — Description of land by reference to plan — Boundaries — Mistake.*]—The owner of a district lot registered in 1885 a plan of it drawn to scale, but not shewing the subdivisions, and afterwards had another plan made from a survey, which differed from the registered one; from an inspection of the ground and the unregistered plan, one Kilby, who was unaware of the registered plan, bought in 1889, lot 16, and registered his deed, which did not refer to the plan. On the 11th July, 1889, the defendant bought from the same vendor lot 15. In 1890 the plaintiff bought from Kilby lot 16, the deed shewing the purchase to be according to the registered plan, but before purchase she inspected the property and saw the fence which Kilby and the defendant considered the boundary between lots 15 and 16 according to the unregistered plan. Lot 16 according to the registered plan overlapped lot 15 according to the unregistered plan:—*Held*, in an action for possession by the owner of lot 16, that both the plaintiff and defendant must be deemed to be holders of their respective parcels according to the registered plan and to have registered their conveyances in conformity with the Land Registry Act. 2. It is not open to a person who accepts and registers a conveyance of land according to a registered plan to afterwards object, in an action respecting the title to the same land, to the validity of that plan. *Fowler* v. *Henry*, 24 C. L. T. 159, 10 B. C. R. 212.

Refusal of registrar to register title — *Appeal — Conveyance without covenants for title—"Good safe holding and marketable title."*]—The decision of a District Registrar refusing to register a title may be reviewed by a Judge under secs. 83 to 91 of the Land Registry Act, 1906.—The absence of the usual covenants for title in a conveyance of land in fee simple is not a ground for holding that the grantee has not "a good safe holding and marketable title in fee simple," as required by sec. 15. *Re Dalgleish* (1910), 14 W. L. R. 253.

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2. MANITOBA.

Real Property Act — *Cancellation of certificate of title—Error—Fraud—Tax sale.*]—A certificate of title issued through an error on the part of a district registrar may be ordered to be cancelled pursuant to the provisions of ss. 126 and 127 of the Real Property Act, R. S. M. c. 133, notwithstanding the proviso in s. 128, and that there was no fraud on the part of the holder of the certificate. Under 60 V. c. 21, s. 1, as amended by 61 V. c. 33, ss. 8-10, which prescribe the proceedings for obtaining certificates of title for lands purchased at tax sales, it was error in law for the district registrar to issue the certificate in question within six months from the date of the application, as he did, although he had the consent of the only persons who to his knowledge had any interest in opposing the issue. When the certificate in question was issued, the district registrar was not aware that other parties were interested in the land who should have been served with notice under s. 49 of the Act, and this was error in point of fact sufficient with the error in law to warrant an order for cancellation. *In re Buchanan*, 19 C. L. T. 306, 12 Man. L. R. 612.

Real Property Act — *Caveat — Address and description of caveator—Foreign corporation—Seal—Signature.*]—In proceeding by way of caveat and petition under the Real Property Act, if the caveator is an incorporated company, it is sufficient to state the full name of the company without further description, although s. 143 of the Real Property Act, R. S. M. c. 133, says that "every caveat filed with the district registrar shall state the name and addition of the person by whom or on whose behalf the same is filed." *Shears* v. *Jacob*, L. R. 1 C. P. 513, and *Woolf* v. *City Steamboat Co.*, 7 C. B. 103, referred to. The signature to the caveat was the name of the company with "O. H., & N., managers," underneath, without the corporate seal:—*Held*, sufficient. A registered judgment creditor has a right, under the Real Property Act, to claim an estate or interest in the lands bound by the judgment. It is not necessary for the petitioners, although a foreign corporation, to shew that they are authorised to hold real estate in this Province. *North of Scotland Canadian Mortgage Company* v. *Thompson*, 20 C. L. T. 181, 13 Man. L. R. 95.

Real Property Act—*Registry Act—Entry of deed on register not constituting registration.* — Upon a petition under the Real Property Act:—*Held*, that, under the Registry Act, it does not follow from the fact that a deed is entered on the register that there is necessarily a valid registration; and, on the facts disclosed, that the deed to the respondent was not produced for registration, and was not in fact registered, within the meaning of that expression in the Registry Act. *Re Stanger & Mondor* (1910), 15 W. L. R. 346.

Affirmed 16 W. L. R. 53, Man. L. R.

Real Property Act (Man.)—*Caveat—New title — Second caveat — Trial.*]—1. The words "a caveat" in s. 127 of the Real Property Act, R. S. M. 1902 c. 148, in view of s.-s. (m) of s. 8 of the Interpretation Act, R. S. M. 1902 c. 89, cannot be construed to mean "only one caveat," and if the caveator, after filing his caveat and taking proceedings under it for the trial of an issue, pending such trial acquires a new title or estate in the land in question, he may file a new caveat thereon without getting a Judge's order for leave to do so. 2. The provisions of s. 140 of the Act only apply to a second caveat "in relation to the same matter," that is, the same estate or interest on which the first caveat was based. *Frost* v. *Driver*, 10 Man. L. R. 209, distinguished. 3. When such a second caveat is properly filed, the trial of the issue under the first caveat should be postponed to enable proceedings to be taken upon such new caveat, so that the trial of the issues under both caveats may take place at the same time, and if convenient, the issues might be consolidated. *Alloway* v. *St. Andrews*, 15 Man. L. R. 188, 1 W. L. R. 407.

See FRAUDULENT CONVEYANCE, 5.

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3. NORTH-WEST TERRITORIES.

Land Titles Act — *Assurance fee — "Incumbrances."*] — Where an application is made to have lands brought under the Land Titles Act of the North-West Territories, and the abstract shews a patent from the Crown and several conveyances, but no incumbrances within the definition of s. 2 (8) of the Act:—*Held*, upon the construction of ss. 40 (2) and 115 and item 3 of the tariff of fees, that the assurance fee provided by s. 115 when the land is incumbered, is not payable. *In re Synod of Diocese of Qu'Appelle*, 20 C. L. T. 429.

Land Titles Act — *Description — Uncertainty — Exceptions.*] — In 1882 the Hudson's Bay Company conveyed to P. the south-half and north-west quarter of a section of land. In 1897 P. by quit claim conveyed to B. the said land, "saving and reserving nevertheless thereout any lots or blocks that may heretofore have been deeded to others," and a few days later B. conveyed to L. by the same description. An application was made by L. to bring the land, except certain specified lots according to a survey, under the operation of the Land Titles Act. He conceded that the lots excepted had been deeded to others, but there was nothing to shew that P. or B. might not have conveyed other lots. Notice of the application was published, but no

adverse claimant appeared:—*Held*, nevertheless, that the application must be refused, for uncertainty as to the title of the applicant. *In re Lillis*, 20 C. L. T. 190.

Land Titles Act (N. W. T.) — Fees of registrar — Registration of injunction order after caveat. *Re Saskatchewan Land & Homestead Co.* (N.W.T.), 2 W. L. R. 419.

Land Titles Act (N. W. T.) — Mortgages — Priorities — Production of certificate of title. *Re Greenshields Co.* (N.W. T.), 2 W. L. R. 421.

Land Titles Act (N. W. T.)—Transferee for value without notice of fraud of transferors — Injunction — Equities — Priority. *Hooper* v. *Smith* (N.W.T.), 2 W. L. R. 194.

North-west Territories Land Titles Act — Cancellation of lease — Jurisdiction of registrar—Re-entry of lessor on non-payment of rent, without process of law—"Legal proceeding." *Re Tucker & Armour* (N.W.T.), 4 W. L. R. 394.

North-west Territories Land Titles Act — *Description — Uncertainty — Exceptions.*]—A deed in which the land is described as a certain parcel of land "saving and reserving nevertheless thereout and therefrom any lots or blocks that may heretofore have been deeded to others," is, unless supplemented by conclusive evidence of the full extent of the exceptions, too uncertain to justify the Registrar in acting on it on an application to bring the land under the Land Titles Act, 1894. *In re Lillis*, 20 C. L. T. 190, 4 Terr. L. R. 300.

North-west Territories Land Titles Act — *Earlier registration laws — Duty of registrar — Estoppel.*]—The registrar in issuing certificates of ownership is bound to take notice of instruments registered or filed, previously to the issue of the patent, under the provisions of the Registration of Titles Ordinance, or the Territories Real Property Act. It was the intention of the Territories Real Property Act and the Land Titles Act, 1894, to recognize and continue, as creating vested interests, the proper effect of all instruments registered or filed under previous legislation in that behalf. Where an agreement for the sale of land by the Canadian Pacific Railway Company was registered under the Registration of Titles Ordinance, and subsequent instruments, purporting to be executed by the purchaser under the agreement, and persons claiming under him, were also registered or filed under that Ordinance or the Territories Real Property Act; the Registrar, on an application by the company for a certificate of ownership upon a patent subsequently issued to the company, was directed to issue the certificate of ownership to the company indorsed with memoranda of the agreement and other instruments. Where, on a similar application, a transfer was filed under the Territories Real Property Act, purporting to be executed by the purchaser under an agreement (recited, but not registered or filed) for sale by the Canadian Pacific Railway Company, and, after the Registrar's reference, a quit claim deed from the transferee to the company was produced, the Registrar was directed to issue a clear certificate of ownership to the company. Where, on a similar application, it appeared that an agreement purporting to be executed by the purchaser under an agreement (recited, but not registered or filed) for sale by the company, was registered, and also other instruments purporting to be executed by persons claiming under the purchaser, the Judge, to whom the reference was made, was advised to cause notice to be given, to all persons appearing to be interested, of the time and place when the questions submitted by the Registrar would be investigated. If such parties failed to appear, or having appeared failed to establish the existence of the agreement, the Registrar should be directed to issue a clear certificate of ownership to the company. If the existence of the agreement was properly proved, the proof should be filed with the Registrar, and he should be directed to issue a certificate of ownership to the company, indorsed with memoranda shewing the interests apparently created by the agreement and other instruments. Title by estoppel discussed. *In re Can. Pac. Ry. Co.*, 4 Terr. L. R. 227.

North-west Territories Land Titles Act — *Execution — "Instrument" — Unregistered equitable mortgage—Priority.*]—Notwithstanding that by the Land Titles Act, 1894, differing in this respect from the Territories Real Property Act, an execution is declared to be an "instrument," the principle established in *Wilkie* v. *Jellett*, 2 Terr. L. R. 133, 26 S. C. R. 283, still applies; and therefore an unregistered equitable mortgage takes priority over a writ of execution against lands delivered to the registrar subsequently to the creation of the equitable mortgage. *Sawyer & Massey Co.* v. *Waddell*, 6 Terr. L. R. 45.

North-west Territories Land Titles Act—*Issue of certificate of title to executor as such — Executor entitled as residuary devisee—Execution against him personally—Entry of, upon certificate of title.*]—Where an executor is by the will entitled as legatee to the lands of the estate, a registrar should not register against them an execution against the executor personally until he has satisfactory evidence that the debts and other charges against the estate have been satisfied.—Remarks by Wetmore, J., upon the position with regard to executions against an executor so entitled, or an administrator entitled in distribution. *Re Galloway*, 3 Terr. L. R. 88.

North-west Territories Land Titles Act — Mortgages — Registration—Priority —Production of duplicate certificate of title. *Re American-Abell Engine & Thresher Co. and Noble* (N.W.T.), 3 W. L. R. 324.

Real Property Act — *Executions — Memorials—Certificate of ownership—Duty of Registrar—Exemption—Dominion Lands Act—Homestead Exemption Act—Exemption Ordinance—Homestead — Legislative powers —Ultra vires.*]—The Territories Real Property Act (R. S. C. c. 51), s. 94, as amended by 51 V. c. 20, s. 16, provides that the sheriff may deliver to the registrar a copy of a writ of execution and a memorandum

of the lands intended to be charged; and that the registrar shall thereupon, if the title has been registered or so soon as the title has been registered, enter a memorandum thereof on the register; and that from and after such delivery the same shall operate as a caveat. Section 54 of the same Act provides that, after a title is registered, the applicant shall be granted a certificate of title; and that the registrar shall indorse upon the certificate, and the duplicate, a memorial of every mortgage, incumbrance . . . or other dealing affecting the land. The Dominion Lands Act (R. S. C. c. 54), s. 34, provides that the title to a homestead and its attached pre-emption shall remain in the Crown until the issue of the patent. R. O. 1888 c. 45, s. 1, s.-s. 9, exempts from seizure under execution "the homestead of the defendant, provided the same be not more than 160 acres; in case it be more, the surplus may be sold subject to any lien or incumbrance thereon." The sheriff delivered to the registrar a copy of a writ of execution accompanied by a memorandum comprising land for which the execution debtor then had a homestead entry under the Dominion Lands Act, but for which at that time a patent had not yet issued:—*Held*, that, whatever might be the liability of the sheriff by reason of his assuming to charge lands which he could not "take," or which were exempt from seizure under execution, it was the duty of the registrar, when issuing a certificate of title to the execution debtor upon his patent, to indorse upon the certificate a memorial of the execution; although without such memorial the land would under s. 61 of the T. R. P. Act be, by implication, subject to the execution. The term "homestead" in the Dominion Lands Act, the Homestead Exemption Act, and the Exemption Ordinance, has a different meaning in each case. In the Dominion Lands Act, it means land acquired from the Government by the fulfilment of certain conditions as to residence and improvements; in the Homestead Exemption Act it means any land specially registered in accordance therewith, whether acquired as a homestead under the Dominion Lands Act or not; in the Exemptions Ordinance it may apply to lands which are neither registered under the Homestead Exemption Act, nor acquired otherwise than as a homestead under the Dominion Lands Act. *Per* McGuire, J.—In the Exemption Ordinance the term "homestead" means the enclosure or ground immediately surrounding the mansion or home-residence of the debtor. The Exemption Ordinance, R. O. 1888 c. 45, s. 9, is *ultra vires* of the legislative powers of the N. W. T., inasmuch as it is inconsistent with the Homestead Exemption Act, R. S. C. c. 52. *Re Claxton*, 1 Terr. L. R. 282.

Real Property Act (N. W. T.)—*Mortgage — Omission of Registrar to enter memorial of — Subsequent mortgagee — Payment of prior mortgage — Subrogation — Laches — Assurance fund — Costs — Distribution.*]—On the 26th September, 1889, one G. applied to the plaintiff for a loan of $500, and executed a mortgage to him of the lands in question, of which he was the owner. The plaintiff's advocates made search in the Land Titles office on the 14th October, and, ascertaining that the only incumbrance on the register was a mortgage to one P., registered the plaintiff's mortgage and a discharge of the other, which had been obtained on their undertaking to pay the amount due, and the registrar indorsed memorials accordingly on the certificate of title, on receipt of which certificate the plaintiff's advocates paid the amount due to P., and advanced the balance to G. No other memorial appeared on the certificate at the time of the advance, nor were the plaintiff's advocates aware of any other incumbrances, but there had in fact been filed with the registrar a mortgage from G. to the defendant B. for $2,000, which had been entered in the day book only. Subsequently on an application under the Territories Real Property Act, on behalf of the defendant B., by way of a summons to the registrar and the plaintiff to shew cause, it was held that the $2,000 mortgage to B. had been registered within the meaning of the Act at the time of filing, and had priority over the plaintiff's mortgage, and an order was made to amend the memorials on the certificate accordingly. Then, default having been made by G. in payment of the mortgage to the defendant B., the lands were offered for sale, and a foreclosure order obtained on the 15th September, 1890, notice of application therefor having been duly served on the plaintiff:—*Held*, that the plaintiff was entitled as against the defendant B. to be subrogated to the rights of P. in respect of the mortgage held by him and paid by the plaintiff, and to a first mortgage upon the lands in question for the amount thereof with interest; so held against the contention of the defendants that the question of the plaintiff's priority was *res judicata* either by the amending order or the foreclosure order. *Brown* v. *McEwen*, 18 O. R. 533, and *Abell* v. *Morrison*, 19 O. R. 669, followed. Laches discussed.—*Held*, also, that the indorsement on the certificate of title of the plaintiff's mortgage was equivalent to a certificate that there were no prior incumbrances affecting the land other than those appearing on the certificate, and that the plaintiff was entitled to be paid out of the assurance fund the balance of his claim, with interest, under s. 108 of the Territories Real Property Act. It is unnecessary for the plaintiff, in order to recover against the assurance fund, to shew that he has been deprived of any land or any interest therein by the mistake or omission of the registrar, it being sufficient if loss or damage is shewn. Nor is it necessary for the plaintiff to shew that he has been barred from all other remedies before proceeding under s. 10; it is enough that his principal remedy has been barred. Section 108 discussed. And held, in a subsequent judgment as to costs, that the plaintiff and the registrar were both entitled to tax as against the defendant B. the costs of the issue as to the right of subrogation, and the plaintiff against the registrar the other costs of the action. *Morris* v. *Bentley*, 2 Terr. L. R. 253.

Territories Real Property Act—*Unregistered transfer — Execution — Priority — Cloud on title — Sheriff — Parties — Costs.*]—The Territories Real Property Act has not altered the law that a writ of execution binds only the beneficial interest of the execution debtor and therefore a transfere

(whose transfer is unregistered) from the certificated owner is entitled to have an execution, filed subsequently to the making of the unregistered transfer declared to be a cloud upon his title; so likewise is entitled a person who, though he has received no actual transfer, is entitled to one under an enforceable agreement. To such an action the sheriff, against whom an injunction is asked to restrain proceedings upon the execution, is a proper party. Where in such an action the sheriff joined in, and set up, the same defences as the execution creditor, he, as well as the execution creditor, was ordered to pay the costs. *Wilkie* v. *Jellett*, 2 Terr. L. R. 133, 15 C. L. T. 315. Affirmed 26 S. C. R. 282, 16 C. L. T. 209.

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4. NOVA SCOTIA.

Imperfect registration — *Notice — Subsequent purchaser.*]—The defendant took a mortgage from M. J. M. and had it registered in the office of the registrar of deeds at Sydney. M. J. M. subsequently conveyed the same lands by deed to the plaintiff, who had no actual notice of the mortgage. The mortgage, although spread on the books of the registrar, was not proved in accordance with the provisions of R. S. N. S. 1900 c. 137, the attempted proof falling short of the statutory requirements. The trial Judge held the registration to be immaterial, and the defendant appealed:—*Held*, dismissing the appeal, that the formalities prescribed by the statute are for the benefit of the public and must be complied with. Unless complied with, the registrar ought not to record the instrument. *Burchell* v. *Bigelow*, 24 C. L. T. 137.

New Brunswick Registry Act—*Competing purchasers — Unregistered deed — Subsequent registered mortgage — Notice — Priorities.*]—A part of a lot of land was sold to the plaintiff by M. by deed, which the plaintiff neglected to register. Subsequently M. mortgaged by registered conveyance the remainder of the lot to S. The description in the mortgage of the land followed the original description of the whole lot, but "excepted the portion sold and conveyed by the said" M. to C. (the plaintiff.) Subsequently M. sold and conveyed by registered deed, for valuable consideration, the whole lot of land to the defendant, who had notice of the mortgage, but not of its contents. By 57 V. c. 20, s. 23, an unregistered conveyance shall be fraudulent and void against the subsequent purchaser for valuable consideration whose conveyance is previously registered. By s. 69 the registration of any instrument under the Act shall constitute notice of the instrument to all persons claiming any interest in the lands subsequent to such registration:—*Held*, that by the Act the registration of the mortgage constituted actual notice of its contents to the defendant, whose title therefore should be postponed to the plaintiff's. *Carroll* v. *Rogers*, 21 C. L. T. 96, 2 N. B. Eq. Reps. 159.

Nova Scotia Registry Act — *Deed — Priority of registration — Constructive notice — Operation of deed — Bona fide purchaser — Quit claim.*]—Constructive notice is insufficient to take away the priority conferred by the Registry Act upon a registered deed over a prior unregistered deed. The effect of the statute is that, upon the registration of the later deed, the prior unregistered one is, so far as the registered deed is concerned, *ipso facto* avoided and as if it had never existed. The defendants were in possession when they got their conveyance, which contained apt words to convey the lands. There was full consideration, the lands being bought in good faith, and a good title being apparently contracted for:—*Held*, that the conveyance operated as a deed of bargain and sale.—Elements necessary to constitute a *bona fide* purchaser.—Purpose of the Registry Act.—A quit claim deed is within the provisions of ss. 8 and 18 of the Registry Act. *Grindley* v. *Binkie*, 7 R. & G. 27, followed. *Burns* v. *Young*, 40 N. S. R. 199.

Nova Scotia Registry Act — *Lease for more than three years — Neglect to register — Subsequent purchaser — Actual knowledge — Notice.*]—The plaintiff's lease was for a term greater than three years, but was not registered. The defendant claimed under a subsequent instrument and set up c. 127, R. S. N. S. 1900, s. 29. The defendant had knowledge that the plaintiff had a previous lease:—*Held*, that the conscience of the defendant, through his knowledge of the lease to the plaintiff, was affected, and that the defendant could not retain any rights acquired by him under his later instrument to the injury of the plaintiff. *Burchell* v. *Smith*, 40 N. S. R. 499.

Nova Scotia Registry Act — *Proof of execution of instrument for registration — Certificate of justice.*]—A mortgage to the defendant, which was prior to the deed to the plaintiff in point of registry, is insufficiently proved where the only proof of execution was the certificate of a justice of the peace, prescribed for acknowledgement of release of dower. Such certificate is not a compliance with the statutory requirement, s. 28, which provides that where no oath is administered the execution of the conveyance shall take place in the presence of the functionary who signs the certificate. As a pre-requisite to registration in such a case, the usual certificate must be varied to shew that the parties executed the conveyance in the presence of the justice of the peace. All conditions necessary to proper registration must be observed. *McKenzie* v. *Lamont*, 2 R. & C. 517, not followed. *Burchell* v. *Bigelow*, 40 N. S. R. 403.

Nova Scotia Registry Act—*Unrecorded deed — Constructive notice — Dissesin — Evidence — Certified copy.*]—On the 8th May, 1888, N. M. made a deed of a piece of land to her son H. M., and about three years later made a second deed of the same piece of land to H. The grantee under the latter deed placed his deed on record about a month earlier than the deed to H. M., under which the plaintiff claimed:—*Held*, that *bona fide* purchasers for value claiming under H. were not affected with constructive notice of the prior deed to H. M., although that deed had, in the meantime, been registered, and there was evidence that H. personally, at the time he took his deed, had knowledge of its exist-

ence. — *Held*, also, that evidence that the plaintiff, claiming under the unrecorded deed, took two years' hay off the property and arranged with F., who lived on an adjoining property, to look after it for him, and that F. cut logs and pastured cattle for a time as compensation for doing so, was not sufficient to support a *disseisin*, there being evidence on the other hand to shew that the land was not fenced, and was spoken of as the "commons," and that others pastured cattle there, and that subsequent purchasers obtained timber from it.—*Held*, also, that the trial Judge was in error in rejecting a copy of a deed from the registry office tendered on behalf of the defendant, which purported to have been executed by the grantor under whom both parties claimed.—It is not necessary, in order to procure the admission in evidence of a certified copy of a registered deed from the books of the registry office, to also prove the execution of the original deed, the statute respecting the registration of deeds requiring proof on oath of the execution of the deed before it is admitted to registry. *McDonald* v. *McDonald*, 38 N. S. R. 261.

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5. ONTARIO.

Amendment of registered plan — *Petition to County Court Judge — Jurisdiction of Judge of another county — Local Courts Act — Evidence on petition—Affidavits — Merits — Order refusing to re-open — Appeal.*]—A petition under s. 110 of the Registry Act, R. S. O. 1897 c. 136, for an order amending a plan of land in a town by closing part of a street allowance, was presented to the Judge of the County Court of Perth, in which county the land lay:—*Held*, that the Judge of another County Court had jurisdiction, upon the request of the Judge of the County Court of Perth, to hear and adjudicate upon the petition. To hear such a petition is one of the judicial duties to be performed by the Judge of the County Court in any case where application is made to him instead of to a Judge of the High Court; and he has jurisdiction by virtue of ss. 16 and 18 of the Local Courts Act, R. S. O. 1897 c. 54. 2. Although the application to amend the plan is by petition, and is therefore interlocutory in form, the order to be made finally and conclusively settles the rights of the parties concerned; and the evidence upon the application, if the facts are in dispute, should, in the absence of agreement, be given *viva voce*. The Judge properly refused to receive affidavits in answer to the oral testimony of witnesses given in support of the petition. 3. Upon the merits the order of the Judge amending the plan was justified, the portion of the street in question never having been opened or used as a highway, and the lands abutting on both sides being owned by the petitioner. 4. No appeal lay to the Court of Appeal from a subsequent order of the Judge refusing to open the proceedings and receive further evidence. *In re McDonald & Listowel*, 24 C. L. T. 8, 6 O. L. R. 556, 2 O. W. R. 1000.

Certificate of allowance of petition under Partition Act—*Lien of execution creditor — Expiry of writ — Notice—Bona fide purchaser for value — Priorities.*]—At the date of the filing by the plaintiff of a petition for partition the defendant company had in the hands of the sheriff a writ of execution against the lands of the defendant L., who was entitled to an undivided interest in the lands sought to be partitioned, and their lien by virtue thereof was still in existence at the date of the allowance of the petition (to which they were made parties) and the registration of a certificate thereof, but their writ, not having been renewed, expired before the date of a conveyance by the defendant L. to the defendant G., a *bona fide* purchaser for value:—*Held*, that the company's lien was not preserved by the proceedings taken before the conveyance to G., who was not, therefore, affected with notice of the lien. The company were bound to keep alive the lien which they had at law, at least until there was some act or declaration of the Court recognising their claim as an existing one against the lands. *Macdonell* v. *Best*, 23 C. L. T. 262, 6 O. L. R. 18, 2 O. W. R. 459.

Easement — *Artificial waterway—Parol permission — User — Subsequent unregistered grant — Notice — Prescription.*]—In 1871 the defendants' predecessor in title, with the permission (not in writing) of plaintiff's predecessor in title, laid pipes under the land of the latter for the purpose of conveying water from a spring to the lands of the defendants. These pipes continued there and in use up to the time this action was brought in July, 1903. In 1878 the plaintiff's predecessor in title, by an instrument under seal, purported to grant and convey to the defendants' predecessor the right to convey the water in pipes "in such manner and under such circumstances as the same are now:" and at the time of the conveyance to the defendants in 1879 their predecessor purported to grant to the defendants the same right. The plaintiff, who was a son of his predecessor in title, in 1887 became the owner of the lands through which the pipes were laid, by virtue of a conveyance to him, registered before the registration of the instruments of 1878 and 1879. The plaintiff knew of the existence of the pipes under ground, and the use that was being made of them. He believed that they could not have been placed there without his father's permission, but he was not aware of the instruments of 1878 and 1879 or their nature:—*Held*, that the plaintiff was entitled to rely upon his conveyance, the registration of which without notice of the defendants' interest or claim rendered it void as against him; and there had not been a sufficient lapse of time since to give the defendants a right under the statute or by prescription. *Harrington* v. *Spring Creek Cheese Manufacturing Co.*, 24 C. L. T. 209, 7 O. L. R. 319, 3 O. W. R. 26.

Ontario Land Titles Act — Appeal—Time — Registration of caution — Application to vacate — Status of applicant—Registered owner attacking mortgage — Determination of invalidity of mortgage by local Master of Titles — Jurisdiction — Findings of fact. *Yemen* v. *Mackenzie*, 7 O. W. R. 701, 896.

Registry Act (Ont.) — *Registered plan —Sale of lots according to — Building —*

Projection on adjoining lot — Possession — Title — Mortgage — Construction—Short Forms Act — General words.]—After building a house on certain land, the owner thereof had a plan prepared and registered in June, 1872, covering amongst other lands, those subsequently known as lots 3 and 4. The boundary line between these two lots was so run that, while the main part of the house stood upon lot 3, a small portion extended over part of lot 4. According to this plan subsequent sales were made. In 1872 lot 3 was conveyed to one person and lot 4 to another person—all parties acting upon the assumption that the house was wholly upon lot 3, the deeds describing the lands as lots 3 and 4 according to the registered plan, and these descriptions being carried down through all subsequent conveyances and mortgages of the respective properties. The ownership and possession of the two properties remained distinct until 1883, and from that time until 1896 both were owned and possessed by one person, subject to mortgages. This person in 1892 mortgaged lot 3 to the defendant, who in 1896 foreclosed and obtained possession. In 1893 the same person mortgaged lot 4 to one M., and through foreclosure proceedings and a subsequent mortgage to himself the plaintiff claimed title. The legal estates in both properties had throughout been in different mortgagees. The action was to enforce by foreclosure the plaintiff's mortgage upon lot 4, and the defence was in respect of the part covered by the defendant's house:—*Held*, that the defendant had acquired no title by possession to the strip of land in dispute; and that the provisions of the Registry Act precluded him from setting up title to any part of lot 4 as laid down upon the registered plan. *Semble*, that, but for the provisions of the Registry Act, the strip might have passed to the defendant by the mortgage to him of lot 3 in 1892, which was made pursuant to the Short Forms Act, under the "general words" implied in such mortgages. *McNish* v. *Munro*, 25 C. P. 290, *Hill* v. *Broadbent*, 25 A. R. 159, and *Winfield* v. *Fowler*, 14 O. R. 102, considered. *Fraser* v. *Mutchmor*, 25 C. L. T. 17, 8 O. L. R. 613, 4 O. W. R. 290.

Unregistered deed — *Subsequent registered mortgage for value without notice — Right of entry — Registry Act — Real Property Limitation Act.*]—The defendant was owner in fee simple in possession of a farm, and being about to marry the co-defendant, desired to convey to him an undivided one-half share thereof, so that they might become tenants in common. She consulted a local unlicensed conveyancer, who prepared a conveyance to himself and a re-conveyance to the two defendants, as tenants in common. The conveyances were left with him for registration. He registered the conveyance to himself, but fraudulently omitted to register the re-conveyance. The defendants continued in possession, but the conveyancer without their knowledge, mortgaged their farm to the plaintiffs, who brought action to enforce their mortgage:—*Held*, that under the Registry Act (R. S. O. 1897, c. 136), the re-conveyance was void against the plaintiffs, who had advanced their money without notice.—*Held*, also, that the right of entry did not accrue until the mortgage was registered, and the Statute of Limitations (R. S. O. 1897, c. 133), was not a defence to the plaintiff's claim, the writ having been issued within the period of the limitation. Judgment of the Supreme Court of Canada and the Court of Appeal for Ontario discharged; judgment of Sir John A. Boyd, C., at trial, restored. *McVity* v. *Tranouth*, C. R. [1908] A. C. 1.

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6. Prince Edward Island.

Judgments binding land — *Prior unregistered deed.*]—In May, 1856, L. conveyed lands to J., but the deed was not registered until April, 1869. Subsequent to the execution of the deed, but before registration, judgments were recovered in the Supreme Court against L., but no memorial was registered. In 1859 defendant exchanged these lands for lands of the plaintiff, and a good, clear title was to be given. Defendant tendered a deed, which plaintiff refused to accept, on the ground that the judgments recovered against L., previous to the registration of the deed from him, affected the title:—*Held*, that, as no memorials had been recorded, the judgments did not bind the land. *Reddin* v. *Jenkins* (1863), 1 P. E. I. R. 232.

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7. Quebec.

Gift of land — *Prior sale — Non-registration — Notice — Gift burdened with debts.*] — A universal donee of property charged with the debts of the donor cannot evict the prior purchaser for value of one of the immovables comprised in the gift, in spite of the fact that the sale has not been registered, while the gift has, for the donee has succeeded to the obligation of warranty of his donor. 2. Article 2085, C. C., is not applicable to a donee of an immovable in such a manner that his knowledge of an unregistered right belonging to a third person cannot be set up against him, but it is otherwise when the burdens upon the gift equal the value of the thing given, for in that case the pretended gift is in fact a sale. 3. The mere knowledge of a purchaser for value that the immovable which he has acquired was previously sold by his grantor to a third person, whose title has not been registered, does not constitute a fraud sufficient to effect the validity of the duly registered title of such purchaser; Mathieu, J., diss. *Barbe* v. *Barbe*, 20 Que. S. C. 119.

Mortgage — *Deed — Priorities.*] — A mortgagee who has registered his mortgage can take advantage of the want of registration of a deed transferring property. *Tessier* v. *Grandmont*, 35 Que. S. C. 396.

Purchaser of immovable property who fails to register his title, cannot invoke the ten years prescription under Art. 2251, C. C., against a third party who has purchased the same property from the same vendor for a valuable consideration, whose title is registered. Lavergne, J. (*dissentiente*), *Lacroix & Nault* v. *Rousseau* (1909), 18 Que. K. B. 455.

Quebec law — *Gift of land — Parent and child — Marriage contract of child — Non-registration — Rights of creditors.*]—A creditor by specialty has no right to take advantage of the non-registration of a gift of land made by a father to his son by the marriage contract of the son. *Carrier* v. *Lacasse*, 34 Que. S. C. 95.

Quebec law — *Gift of land — Right of creditors — Declaration of nullity of registration.*]—An unregistered gift of land has no existence as regards third persons, even simple contract creditors; and they may demand a declaration of nullity of its registration if at the time at which it is effected it causes them prejudice. *Carrier* v. *Lacasse*, 34 Que. S. C. 93.

Quebec law — *Hypothec — Removal — Status of person affected—Conditional future interest — Presumption from registration—Parties.*]—Any party interested in the removal of a hypothec burdening without reason an immovable, may demand the cancellation thereof, and his interest entitling him to make such demand may be either actual or eventual, that is to say, an interest the realisation of which is subject to some uncertain event or fact.—2. The action may be against the party in whose favour the registration has been effected, for such registration in the case of a person of full age is presumed to have been made by him for himself and his own advantage.—Judgment in 30 Que. S. C. 508 affirmed. *Cotnoir* v. *Brisson*, 33 Que. S. C. 30.

Quebec law — *Judgment — Registration against land — Hypothec — Unregistered deed — Notice — Priority.*]—The registration of a judgment against immovable property which, by the *cadastre* of the division in which it is situate, appears to belong to the judgment debtor, creates a legal hypothec thereon, even though the judgment creditor is aware of the existence of an unregistered deed, by which the property had been sold to a third party. *Aumais* v. *Ranger*, 28 Que. S. C. 269.

Quebec law — *Priority of registration —Notice of former sale — Later registration.*]—The purchaser of an immovable who has registered his title in the proper registry office, has a right to set up the non-registration of a previous purchaser of the same immovable, although, before the date of his title, he knew of the existence of the former sale; Arts. 2098 and 2085, C. C. *Plessisville Foundry Co.* v. *Brisson*, 33 Que. S. C. 23.

Quebec laws — *Possession — Cadastre Incumbrance — Trespass — Action — Time.*]—Possession on which to ground a possessory action (*possession utile*) will not be inferred from a title to a real right registered before the making of the *cadastre* in the locality where the immovable affected is situate and of which the registration has not been renewed, as against the purchaser of the immovable, free from the incumbrance, by a title registered subsequently to the making of the *cadastre*.—No possessory action *en complainte* will lie for acts of disturbance committed more than a year before it is brought. *Gagnon* v. *Delisle*, 30 Que. S. C. 207.

Quebec laws — *Removal of cloud on registered title — Action — "Interested party" —Vendor — Warranty — Answer to action —Hypothec.* —The vendor of land, as the warrantor of his purchaser, is an "interested party" within the meaning of Art. 2149, C. C., and has a *locus standi* in an action to remove from the registry the record of a hypothec, void or irregular, against the land sold.—The defendant cannot set up in answer to such an action that the instrument registered does not create a hypothec; as long as the registration exists, the interested party has a right to have it removed. *Cotnoir* v. *Brisson*, 30 Que. S. C. 508.

Registrar's certificate — *Substitution, how registered.*] — Erroneous conclusions which the registrar, in his certificate, expresses with regard to registered documents, cannot prejudice those whose rights are regularly registered. 2. A substitution is sufficiently registered by the registration of the wills which have created it, of the declaration of the death of the testators, and of the immovables transmitted by the wills. *Pelletier* v. *Michaud*, 20 Que. S. C. 413.

Registration of dower not being required except as towards third persons, the universal legatee of the husband cannot object that the dower was not registered. *Valliéres* v. *Villeneuve* (1910), 17 R. L. n. s. 72.

Registration of real rights—*Agreement involving no real right — Cancellation.*]—The registration, as affecting specified immovables, of an agreement *sous seing privé* which confers no real right and relates to none, is illegal, and an action will lie by the owner of the immovables against the party who causes the registration to be made, to have it cancelled. *Lionais* v. *Hendershot*, 35 Que. S. C. 67.

Registration of real rights — Lessee of premises under a written lease for six years, registered more than thirty days after it is made, and only by a memorial in which the term of years is not specified, cannot invoke it against a subsequent purchaser under a deed passed before the registration of the lease, though registered after, but within thirty days of its date. *Trudeau* v. *Rezler* (1909), 36 Que. S. C. 17.

Renewal of registration — *Act of sale —Irregularities — Hypothec.*]—A notice of renewal of the registration of an act of sale, which does not give the date of the original registration, which gives the wrong number of such registration as well as of the register and the volume, and which confuses the names of the vendor and the purchaser, giving that of the vendor for the purchaser and *vice versa*, is informal and irregular and is not sufficient to preserve the hypothec created by the sale. *Giard* v. *Lachance*, 21 Que. S. C. 103.

Sheriff's sale — *Mortgage — Discharge —Prescription — Action.*]—A sheriff's sale does not purge a hypothec for the purposes of the registrar's certificate produced in the suit in which such sheriff's sale took place.—2. A judge on a petition, in that suit, for the radiation of an hypothec, cannot adjudicate upon an alleged prescription of ten years

which would involve questions of possession and good faith.—3. The removal from the registrar's certificate of a hypothec which obstructs the distribution of the proceeds of an immovable upon which he is collocated, is a legal interest sufficient to justify a party to bring a suit for the radiation of said hypothec. *Garièpy* v. *Paquet*, 16 Que. S. C. 414.

See ASSESSMENT AND TAXES — ATTACHMENT OF INTEREST IN MINES—BANKRUPTCY AND INSOLVENCY — DEED — EQUITABLE EXECUTION — ESTOPPEL — JUDGMENT — LANDLORD AND TENANT — MECHANICS' LIENS — MORTGAGE — TRUSTS AND TRUSTEES — VENDOR AND PURCHASER—WAY.

REJOINDER.

See PLEADING.

RELATOR.

See COSTS — MUNICIPAL ELECTIONS.

RELEASE.

Claim for damages — Absolute release —Restriction to subject matter of discussion —Fraud — Equitable relief — Failure to notify solicitor. *Begg* v. *Toronto Ry. Co.*, 6 O. W. R. 239.

Deed — *Construction — Estoppel — Settlement of controversy — Imperfectly drawn document.*]—The ancestors of the plaintiff and defendant received a joint grant of land from the Crown, and used and occupied different parts of the land included in the grant as tenants in common. N., being in debt, in order to save his property from his creditors, gave a deed to his brother A. of his right and title in the whole grant, but remained in possession, use, and enjoyment of the land occupied by him, as before. Subsequently he demanded a reconveyance from A. and his heirs, and a controversy which arose was settled by the heirs of A. conveying to N. one portion of the land and N. executing to the heirs of A. what was intended as a release and quit-claim of all his interest in the other portion of the land, including that in question: — *Held*, that, although the release was badly drawn and failed to express in clear and distinct terms the nature of the transaction between the parties, as this was the clear inference to be drawn from the documentary evidence and the surrounding circumstances, the Court would give effect to it. *McQueen* v. *McQueen*, 42 N. S. R. 253, 4 E. L. R. 310.

Libel action — *Settlement pending action — Validity — Pleading — Costs.*] — Libel action. Plaintiff without knowledge of his solicitors settled this action for $30. When solicitors heard of it they demanded their costs from defendant who refused to pay. Plaintiff then proceeded with action, defendant pleading release, and plaintiff replying that release invalid. Release held valid and action dismissed with costs since added plea. *Scarrow* v. *Gummer*, 13 O. W. R. 608.

Master and servant — *Injury to servant and consequent death — Action under Lord Campbell's Act — Status of supposed widow — Evidence of marriage — Right of action as administratrix — Letters issued pendente lite — Release of claim — Improvidence — Invalidity — Retention of money paid to obtain release — Bar — Payment into Court — Assessment of damages — Motive of deceased — New trial.*]—Appeal by defendants and cross-appeal by plaintiff from judgment of a Divisional Court (8 O. L. R. 499, 3 O. W. R. 921), reversing judgment of Idington, J. (7 O. L. R. 747, 3 O. W. R. 510), and directing a new trial as to the plaintiff's right as widow and administratrix to recover damages for the death of John Doyle, a workman in the employment of defendants, who was caught in the machinery of the workshop while at work painting, and died from injuries received. The Court below held that a release given by the plaintiff should not be held binding on her, and the defendants' appeal was mainly against that part of the decision, and as to whether the action was maintainable, the money paid to plaintiff not having been returned:—*Held*, that the evidence fully sustained the findings of the jury as to the cause of the accident and the defendants' negligence. On the cross-appeal, the judgment of the Divisional Court holding that the plaintiff was not entitled to recover any damages on behalf of the mother of the deceased was held right.—*Held*, the conclusion unanimously arrived at by the Judges of the Divisional Court that the release was procured under circumstances that rendered it invalid as a bar to plaintiff's claim should stand. It was said that the plaintiff, while repudiating the release, had not restored or offered to restore the money paid to or for her as the consideration for her executing it. And it was argued that on that account the plaintiff was not in a position to attack the transaction. *Hewson* v. *Macdonald*, 32 U. C. R. 407, relied on: — *Held*, the circumstances were entirely different, and the bringing of an action is in itself a declaration of intention to disaffirm and rescind. Up to that time the plaintiff may keep open the question whether he or she will affirm or disaffirm the transaction, subject of course to being held bound by delay if in the meantime third parties have acquired interests dependent on the transaction, or the position of the defendant has been altered to his prejudice. *See Clouch* v. *London and North-Western Ry. Co.*, L. R. 7 Ex. 26. . . . It was, therefore, a question of fact whether the party defrauded had after discovery of the fraud elected not to avoid the transaction; and, unless the other party could shew that either by unequivocal acts or express words there had been an election not to avoid the transaction, the question of its invalidity was open for trial. Neither as a matter of pleading nor of substance was she treated as debarred, by reason of not having restored or offered to restore the money, from impeaching the transaction. And there has been no finding that she elected not to disaffirm it. The release having been declared invalid, for

satisfactory reasons, she ought not now to be deprived of the benefit of that finding merely because before action she had not returned or offered to return the money. But it has not been found that an actual premeditated fraud was practised on the plaintiff, in which case there would be no obligation to restore money paid in pursuance of it.—*Held*, the plaintiff, having been relieved by the Divisional Court as respects the release, should have been required to return or otherwise make good the money paid to or on her account. If the judgment in her favour had remained, it would have been proper to reduce it by the amount so paid. But as the judgment for damages no longer stands, she should now be allowed to bring the amount in Court ready to be paid to the defendants in the event of her failing to obtain a verdict for damages on the trial directed by the Divisional Court. Any amendments to the pleadings necessary to set forth the plaintiff's willingness to make good the money paid by the defendants should be made. Subject to these directions, the appeal was dismissed with costs. The cross-appeal also dismissed with costs. *Doyle* v. *Diamond Flint Glass Co.*, 6 O. W. R. 207, 10 O. L. R. 567.

Pledge of bonds—Agreement for release—Judgment — Satisfaction — Terms. *Toronto General Trusts Corporation* v. *Central Ontario Ry. Co.*, 5 O. W. R. 544.

Stay of proceedings—*Release of plaintiff's claim — Pleading.*]—Defendants paid plaintiff $300 for a release, which he now states was not a release of the whole cause of action, and had paid his solicitors their costs, but having been discharged they refused to consent to the dismissal of the action. Plaintiff now having changed his solicitors leave was given defendants to counterclaim for above amount, apply as they may be advised, and amend their statement of claim. *O'Brien* v. *Michigan*, 12 O. W. R. 1099.

Validity — *Judgment against defendant in action for seduction — Pending appeal—Consideration — Agreement to pay costs—Religious influence exercised by strangers to defendant — "Undue influence" — Verdict of jury — Motion to set aside.*]—The plaintiff, having obtained a verdict and judgment for $1,200 against the defendant in an action for seduction of the plaintiff's daughter, while an appeal by the defendant from the judgment was pending, executed a release of the judgment, upon the defendant paying the plaintiff's costs of the action. The plaintiff was induced to do this by the persuasions of the bishop, and one H., a member of the congregation of a church to which the plaintiff belonged, and by their threats that, unless he made a settlement of the action, he would be expelled from the church, the tenets of which forbade the members to go to law. The bishop and H. acted in good faith, from religious motives, and were not in any sense agents of the defendant. The principal object of the plaintiff in bringing the action was to secure maintenance for his daughter's child, and H. promised that the child would be cared for:—*Held*, that the consideration for the release being substantial, and the influence to obtain it having been exercised without the defendant's knowledge or procurement, and for a purpose entirely foreign to him, the release was binding on the plaintiff, even though the spiritual influence exercised was "undue influence," which was doubtful. —Judgment of MacMahon, J., upon the trial of an issue as to the validity of the release, reversed.—A motion by the defendant to set aside the verdict, and judgment for $1,200 and for a new trial, was dismissed, there being evidence which, if believed by the jury, justified the verdict. *Lehman* v. *Kester*, 18 O. L. R. 395, 13 O. W. R. 346, 1205.

See BANKRUPTCY AND INSOLVENCY — BILLS OF EXCHANGE AND PROMISSORY NOTES —CONTRACT — DEED — HUSBAND AND WIFE — INSURANCE — JUDGMENT — MORTGAGE — PRINCIPAL AND SURETY — VENDOR AND PURCHASER — WAREHOUSE RECEIPTS —WATER AND WATERCOURSES.

RELIEF AGAINST FORFEITURE.

See LANDLORD AND TENANT—VENDOR AND PURCHASER.

RELIEF FUND.

See BENEVOLENT SOCIETY.

RELIEF OVER.

See PARTIES—WAY.

RELIGIOUS COMMUNITIES.

See SCHOOLS.

RELIGIOUS INSTITUTIONS ACT.

See CHURCH.

RELIGIOUS ORDER.

Explusion of member — Insanity — False imprisonment—Compensation for services — Findings of jury. *Archer* v. *Society of Sacred Heart of Jesus*, 2 O. W. R. 847.

REMAINDER.

See WILL.

RENT.

See LANDLORD AND TENANT.

RENTE VIAGERE.

See VENDOR AND PURCHASER.

RENTES CONSTITUEES.

Quit rents — *Right to — Personal claim —Prescription—Assignment — Service — Rights of assignee.*]—Although the capital of the constituted rents which takes the place of quit-rents, etc., since the abolition of seignorial tenure, is declared immovable by law, the right of collecting such rents is not a real right, but amounts to a simple personal claim which is not susceptible of being acquired by prescription.—2. The sale or assignment of constituted rents gives no useful right to the assignee, as against the debtors, unless the assignment is served on the latter in the manner provided by Arts. 1571 and 1571 (*c*), C. C., and Art. 5612, R. S. Q. *Mailhot* v. *Brimbois*, 32 Que. S. C. 542.

RENTS AND PROFITS.

See TENANTS IN COMMON—TITLE TO LAND.

RENUNCIATION.

See EXECUTORS AND ADMINISTRATORS.

REPAIR OF HIGHWAY.

See LANDLORD AND TENANT—WAY.

REPLEVIN.

Adding parties.] — By the Supreme Court Rules, 1906, proceedings in actions for replevin are made uniform with those in other classes of actions. An order adding defendants in an action for replevin, against the objection of the plaintiff, was affirmed. *Emerson* v. *Skinner*, 13 B. C. R. 121.

Affidavit — *Bond—Misnomer—Sureties —Justification — Summons.*]—An application to set aside a writ of replevin on the following grounds: (a) the affidavit upon which the writ issued was sworn before the issue of the writ of summons in the action; (b) the replevin bond was executed before the issue of the writ of summons; (c) there was a misnomer of the defendant in the affidavit, writ, and other proceedings; and (d) there was but one surety in the replevin bond; was dismissed. Such an application was properly made by summons under R. 458 of the Judicature Ordinance (C. O. 1898 c. 21). An affidavit of justification on a replevin bond is not necessary. *Marcy* v. *Pierce* (No. 1), 4 Terr. L. R. 186.

Affidavit for — *Insufficiency of — Exception to the form.*]—The insufficiency or irregularity of an affidavit preliminary to the issue of a writ of *saisie-revendication*, does not constitute such an irregularity as will enable the service upon the defendant to be set aside, and be the basis of an exception to the form. *Albert* v. *Gravel*, 7 Que. P. R. 12.

Christian name of defendant — *Initials — Bond — Number of sureties.*]—A writ of replevin, in which the defendant is described by the initial letter only of his Christian name, is bad, and will be set aside upon application to a Judge in Chambers. The writ will be likewise set aside where the replevin bond has been executed by one surety only. *Semble*, that a replevin bond that does not follow the form prescribed by the statute is bad. *Hubbard* v. *Young*, 34 N. B. R. 641.

Conversion of Ship. *See* SHIP.

Defendant not in possession of goods.]—A *saisie-revendication* cannot be made against a defendant who is not in possession of movable effects which can be seized, especially when it is alleged in the proceeding itself that another person is in possession of the goods sought to be replevied. *Leonard* v. *Owens*, 8 Que. P. R. 3.

Delivery of goods to husband of plaintiff — *Third party — Garantie.*]—In an action brought by a married woman, separate as to property, for revendication of movables, the defendant may, by way of dilatory exception, demand that the husband of the plaintiff be brought in *en garantie*, he having, as alleged, received such movables before the institution of the action. *Hotte* v. *Rochan*, 6 Que. P. R. 361.

Distress for rent under an illegal lease — *In pari delicto, etc.*] — Replevin will lie to recover goods distrained for rent in arrear under an illegal lease. The maxim, *In pari delicto potior est condilio possidentis*, is applicable only when the possession results from the act of the parties, and not when it results from some incident attached to a legal instrument: *per* Tuck, C.J., Barker and McLeod, JJ. (Hanington and VanWart, JJ., dissenting). *Per* Hanington, J.: An illegal contract is valid as between the parties thereto for all purposes that can be accomplished without the aid of the Court; therefore that person must fail who is first compelled to set a Court in motion in order to obtain such aid. *Per* VanWart, J.: The Court ought not to assist any of the parties to an illegal transaction; therefore, in the above case, the parties should be restored to the position in which the writ of replevin found them; that is, an order should be made to restore the goods replevied to him out of whose possession they were taken by the process of the Court. *Gallagher* v. *McQueen*, 35 N. B. R. 198.

Goods in custody of law—*Distress for taxes — Legality of assessment — Jurisdiction.*]—A writ of replevin brought to try the legality of an assessment for taxes, and the execution issued thereon, both of which were alleged to be void for want of jurisdiction, will not be set aside on a summary application, on the ground that at the time the goods were replevied they were in the custody of the law, unless the proof is satisfactory that all the conditions necessary to give jurisdiction have been fulfilled. *Macmonagle* v. *Campbell*, 35 N. B. R. 625.

Indemnity — *Bond.*]—Rule 1074, dealing with the question of indemnity of the

defendant in replevin proceedings, is the statute 48 V. c. 13, c. 8, imported into the Rules, and does not give an independent cause of action, merely adding another condition to the replevin bond required to be taken by the sheriff. *Harper* v. *Toronto Type Foundry Co.*, 29 C. L. T. 63, 31 O. R. 422.

Irregular issue of writ — Defects in affidavit — Practice — Setting aside writ. *Thorquist* v. *Peters* (N.W.T.), 3 W. L. R. 488.

Land scrip — *Dominion Lands Act — Assignment — Contract — Illegality.*] — Under an order of the Governor in council, prohibiting the Commissioner from recognising or accepting assignments of land scrips and from delivering them to assignees, made pursuant to s.-ss. (1) of s. 90 of the Dominion Lands Act, R. S. C. c. 54, as re-enacted by 62 & 63 V. c. 16, s. 4, the defendant became entitled to scrip for land to be located by her. She sold the right to the scrip to the plaintiff, and gave him an order on the Commissioner for it. After delivery by the latter to the plaintiff, the defendant, knowing that the scrip was in the plaintiff's possession, deliberately assigned it to him for valuable consideration. She afterwards took the scrip from the plaintiff and refused to return it:—*Held*, that the contract of sale of the scrip was valid, and that the plaintiff was entitled to recover possession of it in an action of replevin. *Wright* v. *Battley*, 15 Man. L. R. 522, 1 W. L. R. 565.

Motion for possession — *Merits.*]—A motion by the plaintiff for the possession of goods seized and revendicated by which the merits of the cause would be decided, will be dismissed. *La Société des Artisans Canadiens Français* v. *Gougeon*, 7 Que. P. R. 336.

Order for interim possession—*Irreparable injury.*]—Where the ownership of effects is claimed by an action in revendication, and it appears that the effects claimed form part of a complete system of electric lighting, and that irreparable injury would be caused to the system by even the temporary withdrawal of the effects claimed, the Court will not disturb the person in actual possession until the respective rights of the contending parties shall have been regularly examined and finally adjudicated upon. *Pallister* v. *Simpson*, 9 Que. Q. B. 308.

Order for sale of goods replevied—*Rules 1097, 1098.*]—Plaintiff had paid into Court $2,000 to obtain an order of replevin of some horses. He was further paying $5 per day for their keep. No trial could be had for considerable time. He therefore applied for order for sale of the horses under Rules 1097 and 1098:—*Held*, there is no power under those rules or otherwise to grant such an order. *Innes* v. *Hutcheon*, 5 O. W. R. 357, 9 O. L. R. 392.

Ownership of chattel — *Evidence — Third party — Scale of costs — Jurisdiction of Small Debts Court.*]—The plaintiff sold a road-house, with the stock in trade, household furniture, goodwill of the business, etc., to L., and L. sold to the defendant. Both sales were evidenced by bills of sale. In the bill of sale from L. to the defendant the words "including the cabin occupied by J. Graham" (the plaintiff) were added, but these words were not in the bill of sale from the plaintiff to L. This action was brought to recover possession of the cabin as a chattel, and also of certain goods, but the only issue at the trial was as to the cabin. L. was brought in as a third party. The plaintiff had replevied the cabin, and the defendant had re-replevied:—*Held*, upon the evidence, that the cabin was not sold, and that the plaintiff was the owner, and was entitled to recover $60, the value of the cabin, as damages against the defendant and L.—*Held*, also, that under sec. 2 of ch. 3 of the Ordinance of 1908, the action might, as far as L. was concerned, have been brought in the Small Debts Court; but the defendant, after warning, deliberately took possession of the cabin and the other goods as well, and asserted a title to them; the other goods having been given up, and no evidence given as to their value, it should be assumed that it was sufficient to warrant the action being brought in the higher Court. Therefore the costs should be on the lower scale of a higher Court action against the defendant, and on the Small Debts Court scale against L., who should pay the defendant's costs on that scale. *Graham* v. *White* (1910), 14 W. L. R. 287.

Pleading — *Declaration — Reply — Stolen article.*]—Where the plaintiff in an action of replevin contents himself with indicating what is necessary to establish his right of property, he may by his reply rebut the titles set up by the defendant and allege that the article replevied has been stolen, to the knowledge of the defendant. *National Cash Register Co.* v. *Menard*, 8 Que. P. R. 70.

Pleading — *Procedure — Evidence — Judgment secundum allegata et probata — Ultra petita — Surprise.*]—In an action for revendication of books, documents, and records retained by a fire insurance agent after his dismissal, and for damages in default of delivery thereof, several policy copy books, which could not be found at the time of the seizure, were delivered up in a mutilated condition by the defendant during the pendency of the action, the defendant being unaware of such mutilation. Some time afterwards the answers to the defendant's pleas were filed and contained no reference to the mutilated and incomplete condition in which these books were returned. At the trial the plaintiffs were allowed to give evidence as to the cost of replacing these books in proper condition, although the defendant objected to the adduction of such proof, and the trial Judge assessed damages in this respect at $200 and $2,000, in respect of certain mutilated plans, at the same time declaring the revendication valid, etc. On appeal by the plaintiffs from the judgment of the Court of King's Bench, reversing the judgment at the trial in regard to the pecuniary condemnation: — *Held*, affirming the judgment appealed from, that, as the defendant had been surprised, in so far as the issues affecting the policy copy books were concerned (Art. 110 C. P. Q.), he was entitled to relief as to the item of

$200 for damages in respect thereof, as the matter was not pleaded. With regard to the item of $2,000 damages, however, as the defendant could not have been taken by surprise, he himself having mutilated the plans, the Supreme Court of Canada reversed the judgment appealed from and restored the judgment at the trial as to that item of the damages assessed. *Norwich Union Fire Ins. Co.* v. *Kavanagh*, 25 C. L. T. 98, 36 S. C. R. 7.

Praecipe order — *Rules 862, 864, 869 —Delivery of goods to plaintiff—Re-delivery to sheriff—Practice.*]—A praecipe order of replevin taken out under Rule 862 of the King's Bench Act must not contain a direction to the sheriff to replevy the goods to the plaintiff, as this is contrary to the express provisions of Rule 869.—When the sheriff acts upon such a direction in a replevin order the defendant is entitled, under Rule 864, to have the order set aside with costs and the goods re-delivered to him by the sheriff. *Schatsky* v. *Bateman*, 7 W. L. R. 526, 17 Man. L. R. 347.

Saisie-revendication — *Affidavit — Irregularities—Procedure.*]—It is not by an exception to the form, but by a petition in contestation, that the defendant to a *saisie-revendication* must make complaint of irregularities in the affidavit upon which the *saisie-revendication* was issued. *Albert* v. *Gravel*, 22 Que. S. C. 478.

Saisie-revendication — *Title — Res judicata — Petition — Winding-up Act.*]—Where a person has petitioned in proceedings under the Winding-up Act to be put in possession of certain articles of which he alleges that he is owner, and judgment has been given granting the prayer of his petition as to certain of such articles, without adjudicating as to the others, he may subsequently replevy the other articles, although they have been sold by the liquidator to a third person; and such third person cannot plead that the judgment upon the petition is *res judicata* against the claimant. 2. A *saisie-revendication* may be taken against the party in possession of the thing, even if he detains it by virtue of an uncertain, temporary, and conditional title. *United Shoe Machinery Co. of Canada* v. *Flibotte*, 5 Que. P. R. 333.

Seizure — *Absence of inventory.*] — The seizure of a lot of merchandise certain and ascertained and identified by the person seizing, is regular, and he whose goods are seized cannot complain of the want of a detailed inventory either in the affidavit for *saisie-revendication*, or in the *procès-verbal* of the bailiff. *Helfenberg* v. *Schwartz*, 7 Que. P. R. 8.

See BANKRUPTCY AND INSOLVENCY—EVIDENCE—HIRE OF CHATTELS—LANDLORD AND TENANT — PARTIES — SALE OF GOODS — VENDOR AND PURCHASER — WRIT OF SUMMONS.

REPLICATION.

See PLEADING.

REPLY.

See PLEADING.

REPORT.

See REFERENCE.

REPRIEVE.

See CRIMINAL LAW.

RES IPSA LOQUITUR.

See BAILMENT — MASTER AND SERVANT — NEGLIGENCE — RAILWAY.

RES JUDICATA.

Action for penalty — *Previous action —Distinct contraventions of same by-law — Ultra vires — Judgment ultra petita.*]—The plaintiffs had sued the defendant for a penalty of $20 for having sold goods in November, 1900, without having taken out a license, contrary to a by-law of the municipality. This action was dismissed upon the ground that the by-law in question was *ultra vires*. Afterwards the defendant having in the month of April following sold goods by retail in the municipality, the plaintiffs sued him again claiming a like penalty of $20, under the same by-law:—*Held*, that the new action of the plaintiffs should be dismissed upon the plea of *res judicata* in spite of the fact that distinct contraventions of the by-law were in question in the two suits. 2. That the fact that the first judgment had gone beyond the pleadings in declaring the by-law void without any pleading to that effect, could not deprive this first judgment, which had not been attacked by petition of the authority of *res judicata*. *Dorval* v. *Legault*, 21 Que. S. C. 197.

Action to set aside assignment of chose in action — Previous garnishment proceeding in Division Court—Establishment of validity of assignment—Parties — False evidence—Fraud—Costs. *Johnston* v. *Barkley*, 4 O. W. R. 453, 6 O. W. R. 549, 10 O. L. R. 724.

Breach of contract—*Identity of parties and causes of action — Dispositif and motifs of judgment—Novation.*]—To an action for breach of contract, in which damages were claimed for the entire unexpired term of the contract, the defendant pleaded that he had made a judicial abandonment, and the Court of Appeal, affirming the decision of the Court of Review, dismissed the action. In a second action, by the same plaintiff against the same defendant, for damages for the same breach of contract, for a portion of the period covered by the

first action:—*Held*, that there was *chose jugée*. 2. In a question of *chose jugée*, the *dispositif* only of the first judgment can be taken into account. The *motifs* of the judgment can be considered only for the purpose of explaining obscurity or ambiguity in the *dispositif*. And, even if the *motifs* could be looked at in the present case, the plaintiff would have no action, because the Courts, in the first action, held that there had been novation of the debt, and it was not alleged or proved that a second novation had taken place. *Canadian Breweries Limited* v. *Allard*, 24 Que. S. C. 515.

Division Court action — Settlement before trial—No bar to subsequent action. *Williams* v. *Cook*, 1 O. W. R. 133.

Identity of actions — *Judgment dismissing action against surety — New action against principal.*]—An exception based upon *res judicata* is well founded when the plaintiff sued for the same relief, for the same cause, in a new action against the same defendant as principal, after the dismissal of a former action against him as surety. Therefore, a judgment dismissing an action for the recovery of money lent against a married woman and her surety, on the ground of the contravention of Art. 1301, C. C., may be set up as *res judicata* by the surety or his representative in a second action in which the plaintiff claims the same sum as actually lent to the surety and to the husband of the married woman, alleging that the latter had by fraud caused the memorandum of the loan to be subscribed as if it was the act of the married woman, and it was they who had received the money lent and had the benefit of it. *Sutherland* v. *Lafontaine*, 31 Que. S. C. 431.

Mining law—*Declaration in judgment.*]—When the full Court varied the judgment of the trial Judge dismissing an action to "adverse" a mining claim, by expressly excepting from the judgment "any declaration affecting the title of either party to their respective mineral claims," the parties were, by implication, left in the same position as they stood before the action was brought, and therefore the subject-matter was not *res judicata*. *Dunlop* v. *Haney*, 7 Brit. Col. L. R. 307.

Opinion of Court on case stated by Government.] — The opinion given to the government by the Court of Appeal upon a question referred to the Court under 61 V. c. 11, is an opinion only, and cannot make a point passed upon *res judicata*; and is not even a compromise, a transaction, nor an arbitration, inasmuch as the question referred to the Court of Appeal is not by the consent of the parties, put upon the sole initiative of the government. *Galindez* v. *The King*, 26 Que. S. C. 171.

Premature action — *Second action — Mortgagee — Purchaser's covenant — Assignment of.*]—A mortgagee had taken an assignment from a mortgagor of the covenant of a purchaser of the equity to pay off the mortgage, and had, on receiving certain securities, agreed with the purchaser not to sue him until certain other remedies were exhausted, and had been unsuccessful in a suit against the mortgagor, on the ground that the remedies were not exhausted: *Barber* v. *McCuaig*, 24 A. R. 492, 17 C. L. T. 280; 29 S. C. R. 126, 19 C. L. T. 52. In a second action on the same covenant:—*Held*, that the Court may properly examine the pleadings, evidence, and proceedings at the trial of the former action, and that the reports of the reasons given for the judgments may be looked at for the purpose of ascertaining what the law is. That the dismissal of an action on the ground that it was prematurely brought, is no bar to another action on the same demand after time has removed the objection. And that the mortgagee, having exhausted her remedies and made an arrangement with the purchaser by which she was placed in the same position with respect to him as she was before she received the securities, was entitled to recover notwithstanding that she had retransferred the securities to him and agreed not to sue on his covenant; but the latter agreement was not to apply to the mortgagor, in case the purchaser's covenant was reassigned to him. *Barber* v. *McCuaig*, 20 C. L. T. 102, 31 O. R. 593.

See Account — Appeal — Assessment and Taxes — Champerty and Maintenance — Fraudulent Conveyance—Landlord and Tenant—Master and Servant —Public Morals — Partition—Principal and Surety.

RESCISSION.

See Contract — Fraud and Misrepresentation — Landlord and Tenant —Sale of Goods — Vendor and Purchaser.

RESCISSION OF CONTRACT.

See Vendor and Purchaser — Writ of Summons.

RESCISSION OF LEASE.

See Landlord and Tenant.

RESCISSION OF SALE.

See Vendor and Purchaser.

RESERVATION OF RIGHTS.

See Bills of Exchange and Promissory Notes—Limitation of Actions.

RESERVE FUND.

See Company.

RESIDENCE.

See ARREST — COSTS — DOMICIL — MECHANICS' LIENS — MUNICIPAL CORPORATIONS — PARLIAMENTARY ELECTIONS—PARTNERSHIP — PLEADING — SCHOOLS —VENUE — WRIT OF SUMMONS.

RESIDUE.

See WILL.

RESISTING DISTRESS.

See CRIMINAL LAW.

RESISTING PEACE OFFICER.

See CRIMINAL LAW.

RESOLUTIONS.

See COMPANY—MUNICIPAL CORPORATIONS.

RESPONDEAT SUPERIOR.

See MUNICIPAL CORPORATIONS.

RESTITUTION.

See CONTRACT.

RESTRAINT OF RELIGIOUS LIBERTY.

See WILL.

RESTRAINT OF TRADE.

Covenant —*Nullity—Injunction—Breach of contract — Liquidated damages.*]—An injunction will not be granted to restrain a defendant from doing an act in breach of an agreement in which a sum is covenanted to be paid as liquidated damages in such a case.—2. A covenant not to promote or aid in promoting or carry on a trade or business, for a period of three years, is null and void as being in restraint of trade and unlimited in space. *Hamilton Powder Co.* v. *Johnson*, 28 Que. S. C. 450.

See CONSPIRACY — CONTRACT—COVENANT —CRIMINAL LAW—INJUNCTION — MASTER AND SERVANT — MUNICIPAL CORPORATIONS —TRADE UNIONS.

RESTRAINT ON ALIENATION.

See CROWN — EXECUTION — GIFT — HUSBAND AND WIFE—SUCCESSION—VENDOR AND PURCHASER — WILL.

RESTRAINT UPON ANTICIPATION.

See RECEIVER.

RESULTING TRUST.

See DOWER—TRUSTS AND TRUSTEES.

RETAINER.

See SOLICITOR.

RETRAIT SUCCESSORAL.

See CHAMPERTY AND MAINTENANCE — PARTITION—STATUTES.

RETURN.

See PARLIAMENTARY ELECTIONS — WRIT OF SUMMONS.

RETURNING OFFICER.

See CRIMINAL LAW — MUNICIPAL PARLIAMENTARY ELECTIONS.

REVENDICATION.

Detention of insurance policy — Security for loan — Replevin. *Anderson* v. *Ricard*, 4 E. L. R. 67.

Order for restoration of goods — *Impossibility of compliance with — Damages —Value of goods when action brought.*]— Where, in an action for revendication of wood, the defendant is ordered to restore it, but can not do so, he should be ordered to pay, not what the wood has brought him, nor what it was worth when he took it, but its value at the time of the institution of the action. *Megantic Pulp Co.* v. *Van Dyke*, 35 Que. S. C. 327.

Plea of services rendered and expenses incurred — *Right of retention — Plea praying for dismissal of action.*] — When a party is made defendant in a suit of revendication, he may set up the expenses incurred by him in preserving the things revendicated and pray for the dismissal of the action.—Such a party is not bound to allege in his plea the value and amount of services rendered and expenses incurred, which the Court itself will fix

according to the evidence.—Under such circumstances, the Court will declare the plaintiff to be the proprietor of the things revendicated, will order the defendant and the guardian, upon payment to them of the expenses incurred in preserving the objects, to deliver them up to plaintiff, but will condemn the plaintiff to pay the defendant's expenses and costs. *Lecours* v. *Price Brothers Co.* (1908), 16 R. de J. 441.

Sale of goods — *Failure of purchaser to complete payment—Revendication of goods—Obligation to tender back amount paid—Set-off of cost of installation.*]—The obligation of the vendor, who revendicates an article, in default of payment of the price, to reimburse the purchaser or offer to pay him what has been paid on account, may be extinguished by set-off of the cost of installing the article, at the time of delivery, and, the case failing, he has the right to revendicate *de plano*. *Béland* v. *Malo*, 35 Que. S. C. 251.

Sale of timber — *Unpaid vendor — Condition—Entirety—Practice — Contestation of procès-verbal—Time.*]—1. A motion for leave to contest the truth of a *procès-verbal* of seizure under Art. 236, C. C. P., should be made at the earliest possible moment after its alleged falsity becomes known, and the delay of 3 days prescribed in the 73rd rule of practice touching irregularities, is a reasonable delay therefor.—2. The right of the unpaid vendor to revendicate the thing sold, provided in Arts. 1998 and 1999, C. C., is subject to the condition that it be still entire and in the same state as when sold. Timber sold to a dealer and delivered in his yard, though mixed in piles with his other stock, may still be entire and in the same condition as at the time of the sale. *Pariseau* v. *Desmarteau*, 30 Que. S. C. 48.

See Bankruptcy and Insolvency—Contract—Easement—Husband and Wife—Pleading—Replevin — Sale of Goods — Substitution—Vacation—Warranty.

REVENUE.

Amount payable by half-sister of testator.]—The words "sister of the deceased" in s.-s. 4 of s. 2 of the Succession Duty Act Amendment Act of 1899, include a half-sister. *In re Oliver*, 21 C. L. T. 364, 455, 8 B. C. R. 91.

Bank shares — *Mobilia Sequuntur Personam.*]—The appellant, as collector of provincial revenue, sued the respondent as executor of the last will of Allan Gilmour, claiming that, although the deceased had died domiciled in the Province of Ontario, the Province of Quebec was entitled to succession duties upon 626 shares of the stock of the Merchants Bank of Canada and 4,275 of the Canadian Bank of Commerce, which were registered at the offices of the respectives banks in Montreal,—and also upon a certain loan made to a person domiciled in Quebec:—*Held*, that the succession devolved in Ontario and thus movable property, although locally situated in Quebec at the time of the death of the testator, was constructively situated in Ontario according to the rule "*Mobilia sequuntur personam*," and therefore the Province of Quebec was not entitled to any succession duties thereon. *Lambe* v. *Manuel*, 21 C. L. T. 250, 18 Que. S. C. 184.

Canners—*Tackle furnished fishermen.*]—Where canners furnish fishermen with fishing apparatus, but there is no agreement binding the fishermen to sell their catch to the canners, the latter are not liable for the revenue tax in respect of such fishermen. *Campbell* v. *United Canneries*, 21 C. L. T. 456, 8 B. C. R. 113.

Chinese immigration—Breach of Customs Act—Entry of Chinaman into Canada without paying tax — Effect of—Indictable offence—Conviction. *Rex* v. *Sam Chak*, 4 E. L. R. 381.

Chinese Immigration Act, R. S. C. c. 95, ss. 7, 30—*Evading payment of tax —Conviction — Invalidity.*]—The defendant was tried and convicted before the County Court Judge for district No. 7 for violating the provisions of R. S. C. c. 95, ss. 7, 30 (respecting Chinese immigration), in that he, being a person of Chinese origin, did enter Canada without paying the tax required by s. 7 of the said Act. The Judge reserved several questions for the opinion of the Court, including the following: "Does the accusation sufficiently charge the defendant with an indictable offence under ss. 7 and 30 of c. 95 of the Revised Statutes of Canada, 1906?":— *Held*, that the statute imposes a tax upon persons of Chinese origin entering Canada, with certain exceptions, and provides machinery for the collection of the tax; it does not make the entering Canada by such persons without payment of the tax a criminal offence; and that, the defendants not being charged with any criminal offence, his conviction was unwarranted and must be set aside, and that he was entitled to his discharge. Drysdale, J., dissented. *Rex* v. *San Chak* (*No. 2*), 42 N. S. R. 374, 4 E. L. R. 381.

Customs — *Importation in original packages—False entry — Burden of proof.* — Where a seizure is made of goods imported into Canada, on the ground that, while the goods were stated in the entry papers to be imported in the original packages, they were not so imported in fact, if the claimant declines to accept the Minister's decision confirming the seizure, and obtains a reference of his claim to the Court, the burden of proof is upon the claimant to shew the *bona fides* of the entry in dispute. *Crosby* v. *The King*, 11 Ex. C. R. 74.

Customs — *Infringement by importation of cattle without payment of duty — Intention to infringe—Exercise of ownership in Canada.*]—Where cattle are liable to the payment of duty upon importation into Canada, the bringing of such cattle to a point within two or three miles of the boundary line between Canada and the United States constitutes an element in the offence of smuggling.—2. Where cattle are brought to Canada for pasturage, or to a point from which they themselves may drift into Canada for pasturage, if the owner in

Canada exercises any control over them, a contravention of the Customs Act is complete, more especially where the control exercised is that of putting Canadian brands upon such cattle. *Spencer* v. *The King*, 26 C. L. T. 462, 10 Ex. C. R. 79.
Affirmed, 39 S. C. R. 12.

Customs Act — *Alleged breach — Importation of jewellery into Canada—Failure to prove attempt to evade Customs Act — Costs.*]—Where unsatisfactory statements with respect to certain articles of jewellery imported into Canada, were made by the owners to the customs authorities who had seized the goods, the Court on a reference of the claim found on the evidence, that he had brought them into Canada for the personal use of himself and wife, and not for sale, and that the evidence did not sustain the charge of an attempt to evade the Customs Act. The goods were ordered to be returned to claimant, but he was not allowed his costs. *Smith* v. *Regina*, 2 Ex. C. R. 417, and *Red Wing Sewer Pipe Co.* v. *Rex* (1909), 12 Ex. C. R. followed. *Greenspan* v. *Rex* (1909), 12 Ex. C. R. 254, 29 C. L. T. 712.

Customs Act — *Fines — Payment to Receiver-General.*] — A penalty imposed by the police magistrate for the city of St. John for harbouring smuggled goods under s. 197 of the Customs Act, R. S. C. c. 32, forms part of the consolidated revenue of Canada, and is payable to the Receiver-General, and not to the chamberlain of the city of St. John, under 52 V. c. 27, s. 50. *Rex* v. *McCarthy*, 2 E. L. R. 548, 38 N. B. R. 41.

Customs Act — *Infraction — Smuggling — Preventive Officer—Salary—Share of Condemnation money.*]—The suppliant had been empowered to act as a preventive officer of customs by the chief inspector of the department of customs. The appointment was oral, but a shorthand writer's note of what took place between the chief inspector and the suppliant at the time of the latter's appointment shewed the following stipulation to have been made and agreed to as regards the suppliant's remuneration: "Your remuneration will be the usual share allotted to seizing officers; and, if you have informers, an award to your informers, and you must depend wholly upon these seizures." Certain regulations in force at the time provided that in case of condemnation and sale of goods or chattels seized for smuggling, certain allowances or shares of the net proceeds of the sale should be awarded to the seizing officers and informers respectively:—*Held*, that where the Minister of Customs had not awarded any allowance or share to the suppliant in the matter of a certain seizure and sale for smuggling, the Court could not interfere with the Minister's discretion. *Bouchard* v. *The King*, 24 C. L. T. 390, 9 Ex. C. R. 216.

Customs Act — *Reference by Minister of a claim to the Court—Affidavit used before Minister in respect of which there was no opportunity of cross-examining the deponent —Admissibility.*]—By s. 183 of the Customs Act (51 V. c. 14), it is provided that upon a reference of any matter to the Court by the Minister of Customs, the Court shall hear and consider the same upon the papers and evidence referred, and upon any further evidence produced under the direction of the Court. Among the documentary evidence referred in connection with a claim for a refund of duties paid, was an affidavit by a witness, since deceased, testifying to a fact adverse to the claimant, and in respect of which no opportunity was afforded the claimant to cross-examine the deponent.—*Held*, that while the statements of the deponent were not as effective as if he had been examined as a witness in Court, and so subject to cross-examination, yet the affidavit was admissible as evidence under the statute. *Rex* v. *Morris* (1911), 13 Ex. C. R. 384, 9 E. L. R. 430.

Customs Act — *Smuggling—Penalties—Averments in information — Demurrer — Jurisdiction.*] — In an information for smuggling laid under the provisions of s. 192 of the Customs Act, it is a sufficient averment to allege that the defendants in order to defraud the revenue of Canada did evade the payment of the duties upon dutiable goods imported by them into Canada; and did fraudulently import such goods into Canada without due entry inwards of such goods at the custom house. It is not necessary to charge the defendants with all the offences mentioned in such section; and the information is good in law if it sets out any one of the offences mentioned in the said section. 2. In such an information, where it is sought to recover, in addition to the value of the goods smuggled, a sum equal to the value of the goods, it is necessary to allege that the goods were "not found." The offender is only liable to forfeit twice the value of the goods, when such goods are not found but their value has been ascertained. 3. The penalty "not exceeding $200 and not less than $50" mentioned in s. 192 of the Customs Act, as recoverable before "two justices of the peace or any other magistrate having the powers of two justices of the peace," cannot be sued for in the Exchequer Court of Canada. *Barraclough* v. *Brown*, [1897] A. C. 615, referred to. 4. While a claim for penalties in respect of goods smuggled more than three years before the filing of the information would be prescribed under s. 240 of the Customs Act, where the goods have been seized by a customs officer, such seizure is to be deemed a commencement of the proceeding within the meaning of s. 236. *Rex* v. *Lovejoy*, 25 C. L. T. 141, 7 Ex. C. R. 377.

Customs Act, s. 192 — *Penalties—Jurisdiction of Exchequer Court — Discretion of Judge — Remission of penalty.*] — The penalty enforceable under the provisions of s. 192 of the Customs Act in the Exchequer Court is a pecuniary one only; the other remedies open to the Crown thereunder cannot be prosecuted in this Court. 2. The Court has no discretion as to the amount of the penalty recoverable under such enactment. 3. If a case is established against any defendant, the whole penalty prescribed by the statute must be enforced. The power of remitting such penalty is vested in the Governor in Council. It is proper for the Crown, if it sees fit, during the pendency of an action for penalties, to agree upon

terms of settlement of the action with the defendant; but the judgment asked for in confirmation of the settlement should be for a sum which will vindicate the law and will conserve the public interest. *Regina* v. *Fitzgibbon*, *Regina* v. *Thouret*, 20 C. L. T. 276, 6 Ex. C. R. 383.

Customs duties — *Foreign-built ship* — *Statutes.*]—A foreign-built ship bought in the United States and brought to Canada is liable to the duty imposed by the Canadian Customs Tariff Act, 1897, s. 4, sched. A., item 409. Judgment in 22 C. L. T. 249, 32 S. C. R. 277, affirmed. *Algoma Central Rw. Co.* v. *The King*, [1903] A. C. 478.

Customs duties — *Importation of steel rails* — *Return of duties paid under protest* —*Interest* — *Quebec law.*]—The suppliants had imported, at different times during the years 1892 and 1893, large quantities of steel rails into the port of Montreal, to be used by them as contractors for the construction of the Montreal Street Railway. The customs authorities contended that the rails were subject to duty, and refused to allow them to be taken out of bond until duties, amounting in the aggregate to the sum of $53,213.54, were paid. The suppliants paid the same under protest. After the decision by the Judicial Committee of the Privy Council in *Toronto Rw. Co.* v. *The Queen*, [1896] A. C. 551, and some time in the year 1897, the customs authorities returned the amount of the duties to the suppliants. The suppliants claimed interest on the money during the time it was in the hands of the Crown, and they filed their petition of right therefor:—*Held*, that, as the duties were paid at the port of Montreal, the case had to be determined by the law of the Province of Quebec. 2. That on the question at issue the law of the Province of Quebec was the same as the laws of the other provinces of the Dominion. 3. That, as the moneys wrongfully collected for duties were repaid to the suppliants before the action was brought, there was no debt on which to allow interest from the commencement of the suit. If at the time of the commencement of the action the Crown was not liable for the interest claimed it could not be made liable by the institution or commencement of action. *Laine* v. *The Queen*, 5 Ex. C. R. 128, and *Henderson* v. *The Queen*, 6 Ex. C. R. 47, distinguished. *Ross* v. *The King*, 22 C. L. T. 86, 7 Ex. C. R. 287.

Customs duties—*Lex fori*—*Lex loci*—*Interest on duties improperly levied* — *Mistake of law* — *Rejection* — *Presumption as to good faith.*]—The Crown is not liable, under the provisions of Arts. 1047 and 1049 C. C. to pay interest on the amount of duties illegally exacted under a mistaken construction placed by the customs officers upon the Customs Tariff Act. *Wilson* v. *Montreal*, 24 L. C. Jur. 222, approved. *Per* Strong, C.J. (*dubitante*). The error of law mentioned in Arts. 1047 and 1049, C. C., is the error of the party paying and not that of the party receiving. Money paid under compulsion is not money paid under error within the terms of those articles. *Toronto Railway Co.* v. *The Queen*, 4 Ex. C. R. 282, 25 S. C. R. 24, [1896] A. C. 551, discussed. *Algoma Railway Co.* v. *The King*, 7 Ex. C. R. 239, referred to. Judgment appealed from, 7 Ex. C. R. 287, 22 C. L. T. 86, affirmed. *Ross* v. *The King*, 23 C. L. T. 33, 32 S. C. R. 532.

Customs officer — *Illegal seizure* — *Notice of action.*]—A seizure for confiscation is irregular and illegal when it is made in a house or other building by a customs officer who has not previously made a declaration on oath before a justice of the peace and who is not legally fortified with a writ of assistance pursuant to the Customs Act.—In such a case he exceeds the limits of his duty and acts outside his office, and therefore has not the right to the one month's notice of action prescribed by Art. 145 of the Customs Act. *Chagnon* v. *Quesnel*, 2 Que. P. R. 509.

Deduction of debts — *Compromise of claim.*]—*Held*, that, for the purpose of arriving at the aggregate value of the property of a deceased person under s. 3, s.-s. 3, of the Succession Duty Act, R. S. O. c. 24, debts are to be deducted. The duty to be paid by the person who takes is on the value of the estate which he takes at the time of taking; and the estate on which the duty is to be paid is the surplus estate after payment of debts.—*Held*, also, that a certain sum *bona fide* paid by executors for the purpose of setting a claim against them as such, must be considered a debt for the purpose of administration and of ascertaining the amount of succession duty. *Ross* v. *The Queen*, 20 C. L. T. 302, 32 O. R. 43.

An appeal by the Crown from above judgment was dismissed with costs, the Court agreeing with the reasoning of the judgment appealed from. *Ross* v. *The King*, 21 C. L. T. 227, 1 O. L. R. 487.

Deposits in banks — *Foreigner.*] — Payment of duty under the Succession Duty Act is based upon administration, and duty is payable upon any property which can properly be administered only in Ontario. Payment of non-negotiable deposit receipts, payable after notice at branches in Ontario of Canadian banks, held by a foreigner at the time of his death in the foreign country, cannot be enforced except by his personal representative in Ontario, and succession duty is payable there in respect of the amount covered by them. Judgment in 31 O. R. 340, 20 C. L. T. 70, affirmed. *Attorney-General for Ontario* v. *Newman*, 21 C. L. T. 225, 1 O. L. R. 511.

Double duty — *Power of appointment*—*Statutes.*]—The testator died in England on the 25th February, 1901, possessed of and entitled to lands in Ontario. He left a will and four codicils, by which his sister was named as sole executrix and trustee, and was bequeathed the income of his whole estate for life and given a general power of appointment by will in respect of the whole estate. The sister died on the 2nd March, 1901, without having proved the will and codicils and without having taken upon herself any of the burdens thereof. By her will, made in 1873, she gave all her estate to the defendant, who obtained from the High Court of Justice in England letters of administration to the estate of the testator and his sister with the wills annexed. He then

applied to a Surrogate Court in Ontario for ancillary letters of administration to both estates and for legal authority to deal with the lands in Ontario:—*Held*, that, having regard to the provisions of clause (g) of s. 4 of the Succession Duty Act, R. S. O. 1897 c. 24 (inserted by s. 11 of 62 V. c. 9), the lands in Ontario were subject to two duties, as having devolved under two wills. —*Held*, also, that the provisions of s.-s. 2 of s. 6 of 1 Edw. VII. c. 8 were not declaratory of the previous law nor retroactive, and, having become law since the two deaths, did not apply to this case. *Attorney-General* v. *Theobald*, 24 Que. B. D. 557, distinguished. *Attorney-General for Ontario* v. *Stuart*, 21 C. L. T. 527, 2 O. L. R. 403.

Excise — *Distillery — Method of assessing duty — Grain in mash-tubs — Liability of distiller — Construction of statutes.*] — Revenue statutes are not to be construed strictly against the Crown and in favour of the subject, but are to be interpreted in the same way as other statutes; and if on a proper construction of the statute the defendant in a proceeding by the Crown is liable, the Court has nothing to do with the hardship of the case:—Sec. 155, s.-s. (*a*) of the Inland Revenue Act, R. S. 1906, c. 51, enacts as follows respecting the distilling of spirits: "Upon the grain used for its production at the rate of one gallon of proof spirits for every twenty and four-tenths pounds, or, in a distillery where malt only is used, upon the malt used for its production at the rate of one gallon of proof spirits for every twenty-four pounds."—Sec. 156, s.-s. (*a*) provides that the quantity of grain for the purpose of computing the duty shall be the quantity actually weighed into the mash-tubs and recorded in the proper books kept therefor, except when there appears to be cause to doubt the correctness of the quantity so entered when the inspecting officer is empowered to determine the actual quantity of grain consumed in the distillery. The duty must be assessed and levied on the quantity of grain so determined, in the proportion of one gallon of proof spirits to every twenty and four-tenths pounds of grain:—*Held*, that the defendant having accepted his license with a knowledge of these provisions, was not entitled to relief from the method of assessment fixed thereby. *R.* v. *Robitaille* (1909), 12 Ex. C. R. 264, 29 C. L. T. 264.

Foreigner — *Bank deposit.*] — The Succession Duty Act, R. S. O. c. 24, contemplates a site or locality being given to all kinds of personal property, and that the domicil of the deceased owner is not to be regarded. A resident of the United States deposited moneys in certain banks in Ontario at interest, and took deposit receipts therefor:—*Held*, on his death in the States, that the moneys were liable to the Ontario succession duties. *Attorney-General for Ontario* v. *Newman*, 29 C. L. T. 70, 31 O. R. 340.

Inland Revenue Act—*Amending Act—Possession of still — Conviction—"At any place."*]—The defendant was convicted before the stipendiary magistrate in and for the city of Halifax, for that he did, in the said city of Halifax, on the 11th February, 1892, without having a license under the Inland Revenue Act then in force, unlawfully have in his possession, in the city of Halifax, aforesaid, a still, situable for the manufacture of spirits, without having given notice thereof as required by the Act, the said still not being registered under s. 125. The prosecution and conviction were under the Inland Revenue Act, R. S. C. c. 34, s. 159 (e), as amended by the Acts of 1898 c. 27. The Act as it originally stood read, "Everyone who, without having a license under this Act, then in force, has in his possession any such still, &c., in any place or premises owned by him, or under his control, without having given notice thereof, &c., is guilty, &c." As amended it read ". . . has in his possession, at any place, any such still," &c.:—*Held*, sustaining the conviction, that the amendment gave the Act a much wider operation, and did not confine it to cases where the place was owned or controlled by the accused; and was intended to cover all cases of actual or constructive possession, no matter where the still was, the words "at any place" in the amended Act being equivalent to "anywhere;" that the gist of the offence was not having possession of the still in any particular place, but having possession of it anywhere, or at all; that the intention of the Act was to prevent any unauthorised person from having possession of a still, &c., in any place, at any time, or in any capacity. *Rex* v. *Brennan*, 35 N. S. R. 106.

Inland Revenue Act—*Officer acting under — Search — Private residence — Writ of assistance — Enquiries — Privilege.*]—An officer of Inland Revenue, acting in good faith in the execution of his duty, and under competent authority, is not responsible in damages for entering a private house and making a search therein. A writ of assistance, signed by a Judge of the Exchequer Court of Canada, as provided by the Inland Revenue Act, R. S. C. c. 34, s. 74, constitutes legal and sufficient authority for a search in a private residence. Enquiries of, or consultations with, official or other persons in the neighbourhood, by a revenue officer, with a view to obtaining information, are privileged. The words "any building or other place," in the Inland Revenue Act, s. 75, include a private residence. *Duquenne* v. *Brabant*, 25 Que. S. C. 451.

Inland Revenue Act — *Possession of still — Conviction — Jurisdiction of stipendiary magistrate — Penalty — Commitment—Misdemeanour — Constitutional law.*]—The defendant was convicted for a like offence, committed at the same time, as that referred to in *Rex* v. *Brennan*, 35 N. S. R. 106. In addition to the grounds relied on in the Brennan case, in support of the application to set aside the conviction, and for the prisoner's discharge, the further objection was taken that the jurisdiction of the magistrate, by s. 113, was limited to cases where the penalty or forfeiture was not in excess of $500, whereas, reading ss. 124, 159, and 160 together, the penalty, in this case, would be in excess of that amount. Also, that, under the commitment, the prisoner was required to be detained until he paid a larger amount than he was adjudged to pay. It being admitted that there was a good conviction:—*Held*, that ss. 886, 896, of the Criminal Code applied, and that the objections taken

afforded no ground for the prisoner's discharge.—*Held*, also, that calling the offence a misdemeanour would not affect the jurisdiction of the stipendiary magistrate, which was clearly given under the Inland Revenue Act, R. S. C. c. 34, s. 113.—*Held*, also, following *Attorney-General* v. *Flint*, 16 S. C. R. 707, that the Dominion Parliament had power to create such a Court. *Rex* v. *Kennedy*, 35 N. S. R. 266.

Principle of calculation.]—Under s. 4 of the Succession Duty Act, where the aggregate value of the property exceeds $200,000, only the excess over that amount is subject to a duty of $5 for every $100 of the value. *In re Todd—Todd* v. *Todd*, 20 C. L. T. 143, 7 Brit. Col. L. R. 94.

Succession duties — *Deposit receipt — Foreign domicil.*]—Succession duty is payable on deposit receipts issued in New Brunswick by a branch of a chartered Canadian bank payable to a person domiciled in Nova Scotia. *Rex* v. *Lovitt*, 1 E. L. R. 513, 37 N. B. R. 558.

Succession duties — Deposit receipt — Person dying outside province. *Rex* v. *Lovitt*, 1 E. L. R. 513.

Succession duties — *New Brunswick statute — Foreign bank — Special deposit in local branch — Depositor domiciled in Nova Scotia — Debt due by bank — Notice of withdrawal — Enforcement of payment.*]—L. whose domicil was in Nova Scotia, had, when he died, $90,000 on deposit in the branch of the Bank of British North America at St. John, N.B. The receipt given him when the deposit was made provided that the amount would be accounted for by the Bank of B. N. A. on surrender of the receipt and would bear interest at the rate of 3 per cent. per annum. Fifteen days' notice was to be given of its withdrawal. L.'s executors, on demand of the manager at St. John, took out ancillary probate of his will in that city and were paid the money. The government of New Brunswick claimed succession duty on the amount:—*Held*, reversing the judgment of the Supreme Court of New Brunswick (37 N. B. R. 558), that the government was not entitled to such duty:—*Held, per* Davies and Anglin, JJ., that notice of withdrawal could be given and payment enforced at the head office of the bank in London, England, and perhaps at the branch in Montreal, the chief office of the bank in Canada.—Appeal allowed with costs. *Lovitt* v. *R.* (1910), 30 C. L. T. 528, 43 S. C. R. 106.

Succession duties — Valuation of estate of deceased person — Property to be included — Homestead conveyed to son but deceased remaining in occupation — Foreign bonds transferable by delivery and transferred by deceased to sons in foreign country. *Attorney-General for Ontario* v. *Woodruff*, 9 O. W. R. 18.

Succession Duties Act. 7 *Edw. VII., c. 12, repealed by 9 Edw. VII., c. 12—Value of land — Mode of affixing.*]—In determining the value of land comprised in a testator's estate, it is the duty of the Surrogate Judge (having regard to 9 Edw. VII., c. 12, s. 4), to fix the value of the land at its fair market value at the date of the testator's death. *Re Marshall Estate & Succession Duty Act* (1906), 14 O. W. R. 1199, 1 O. W. N. 256, 20 O. L. R. 116.

Succession duty — *Aggregate value of estate.*]—In order to arrive at the aggregate value of the property of a deceased person under s. 4 of the Succession Duty Act of New Brunswick, 1896, the debts due by the estate should be deducted. *Receiver-General of New Brunswick* v. *Hayward*, 35 N. B. R. 453.

Succession duty — Aggregate value of estate — Moneys arising from life insurance policy payable to widow of decedent—Succession Duties Act, ss. 3, 4, 5, 6. *Re Shambrook*, 12 O. W. R. 261.

Succession duty—"Aggregate value" of property — Construction of statutes. *Attorney-General for Ontario* v. *Lee*, 4 O. W. R. 516.

Succession duty—"*Aggregate value" of property — Incumbrances.*]—In estimating the "aggregate value" of the property of a deceased person under the Succession Duty Act, R. S. O. 1897 c. 24, as amended by 62 V. (2) c. 9, and 1 Edw. VII. c. 8, the value of the land of the deceased, where such land is incumbered or mortgaged, is to be regarded, and not merely the value of the deceased's equity of redemption therein. *Attorney-General for Ontario* v. *Lee*, 25 C. L. T. 39, 4 O. W. R. 516, 6 O. W. R. 245, 9 O. L. R. 9, 10 O. L. R. 79.

Succession duty—*Appraisement of property of deceased persons — Appeal to Surrogate Judge — Further appeal to Judge of High Court — Amount in controversy — Treasurer of province — Status — Gift of real estate to children before death—Contemplation of death — "Disposition" of property — Conveyance more than a year before death — Valuation of shares in company.*] — Appeal by the Treasurer of the Province of Ontario from a judgment or decision of the Judge of the Surrogate Court of Wentworth, under s. 9 of the Succession Duties Act, R. S. O. 1897 c. 24; and cross-appeal by the executors of the will of George Roach from the same decision. The Surrogate Judge assessed the value of the estate of George Roach at $197,152.27, upon an appeal from the appraisement and assessment by the sheriff under s. 7 of the Act. In the amount arrived at by the Judge he refused to include the value of the homestead property of the deceased; and he refused to alter the valuation of $10,550 placed by the sheriff on certain stock in the Hamilton Park and Suburban Co.; but he included $1,000 in respect of the household goods of the deceased, which the sheriff had not included. By his appeal the Treasurer of Ontario sought to have the value of the homestead, stated at $7,080, added to the amount fixed by the Surrogate Judge, and to have the valuation of the stock in the Hamilton Park and Suburban Co. increased from $10,550 to $16,080. By the cross-appeal the executors sought to reduce the valuation of the stock from $10,550 to $4,000. The testator more than a year before his death, and while

in good health, conveyed his homestead to his two daughters in fee. The conveyance was registered immediately. No change of possession however took place, and the testator continued to live in the house until his death. The Surrogate Judge, on the appeal, fixed the value of the estate at $197,152.27, refusing to include the homestead property, but he included the value of the household goods:—*Held*, that s. 9 of the Act included the Provincial Treasurer so as to give him the right of appeal; and that such appeal was not limited to the grounds expressly stated, the whole appraisement being open to appeal; and the appeal being for an amount in excess of $10,000 there was a further appeal to a Judge of the High Court. —*Held*, also, that the conveyance to the daughters of the homestead property could not be deemed to have been made in contemplation of death within s. 4 (b); but that came under s-s. (c) of that section, and should be read in connection with the interpretation section, s. 2, whereby "property" included real as well as personal estate, and was subject to duty. *In re Roach*, 6 O. W. R. 189, 10 O. L. R. 208.

Succession duty—*Bank deposit by foreigner.*]—Under the British Columbia Succession Duty Act, 1899, c. 68, s. 4, succession duty is payable upon money deposited in a bank in British Columbia, belonging to a person domiciled in a foreign country at the time of his death. *In re McDonald Estate. In re Succession Duty Act*, 9 B. C. R. 174.

Succession duty—*Charge against legacies — Payment of legacy within year — Set-off.*]—The direction in a will to executors to pay debts and funeral and testamentary expenses does not operate so as to make the payment of the succession duty, payable under R. S. O. 1897 c. 24, a charge on the residue and to exonerate the legacies from payment thereof. *Manning* v. *Robinson*, 29 O. R. 483, followed. The rule that executors are not bound to pay pecuniary legacies before the expiration of a year from the testator's death does not prevent them, where no time is fixed for payment, and there is sufficient to pay debts, legacies, and charges, from paying a legacy forthwith, and so to allow the amount thereof to be set off against a mortgage due by a legatee to the estate. *In re Holland*, 22 C. L. T. 164, 3 O. L. R. 406, 1 O. W. R. 73.

Succession duty — *Debentures exempt from taxation.*]—A part of the estate of L., deceased, consisted of debentures of the Province of Nova Scotia, issued under the provisions of a statute of the Province, which exempted them from taxation for provincial, local, or municipal purposes: — *Held*, that, notwithstanding the exemption from taxation, under the provisions of the Act, the debentures in question must be included in the valuation of the estate for the purpose of determining the amount payable to the government of the province, under the Succession Duty Act, Acts of 1895 c. 8, s. 5. *Attorney-General* v. *Lovitt*, 35 N. S. R. 223.

Succession duty—"*Dutiable*" *property —Transfer of property before death — Donatio mortis causa — Contract — Consideration — Estoppel — Survivorship.*]—The aggregate value of the estate of an intestate was $12,877, and of this $7,540 passed to the hands of his niece by virtue of an agreement between them, given effect to by a *donatio mortis causa*, as established in *Brown* v. *Toronto General Trusts Corporation*, 32 O. R. 319:—*Held*, that the $7,540 was not dutiable under the Succession Duty Act, R. S. O. 1897 c. 24, and amendments, the transfer from the intestate to his niece not being a voluntary one, but one made in pursuance of a contractual obligation for value and the niece not being estopped, by the form of the judgment in her action against the Toronto General Trusts Corporation, from setting up in this action, brought on behalf of the Crown to recover succession duty, that the transfer was not a gift, but the implementing of a contract.—*Held*, also, that the $7,540 did not pass by survivorship within the meaning of s. 4 (d) of R. S. O. 1897 c. 24. *Attorney-General for Ontario* v. *Brown*, 23 C. L. T. 90, 5 O. L. R. 167, 2 O. W. R. 30.

Succession duty — *Estate of person dying before passing of Amendment Act, 1905 —5 Edw. VII. c. 6, not retrospective.*]— L. died on 24th June, 1904, his gross estate being $239,858.74, its net value being $96,188:—*Held*, that the succession duty is 5 per cent. on the net value, and that 5 Edw. VII. c. 6, is not retrospective. *Re Lee* (1906), 14 O. W. R. 180, 18 O. L. R. 550.

Succession duty — *Mortgages within State of Michigan — Deceased domiciled in Ontario for seven years prior to death — Liability of mortgages for succession duty— Succession Duty Act, s. 8.*]—Testator lived in Ontario for seven years prior to his death. He left an estate consisting largely of mortgages on land within the State of Michigan. —Court of Appeal *held*, that the entire estate, both within and without the province, was liable for payment of succession duties. Garrow, J.A., dissenting.—*Woodruff* v. *Atty.-Gen. for Ont.*, C. R., [1908] A. C. 352, discussed and distinguished. *Treasurer of Ontario* v. *Pattin* (1910), 17 O. W. R. 154, 2 O. W. N. 141, O. L. R.

Succession duty — *Property exempt — Sale under will — Duty on proceeds—Costs —Grance.*]—Debentures of the Province of Nova Scotia are, by statute, "not liable to taxation for provincial, local, or municipal purposes" in the province. L. by his will, after making certain bequests, directed that the residue of his property, which included some of these debentures, should be converted into money to be invested by the executors and held on certain specified trusts. This direction was carried out after his death, and the Attorney-General claimed succession duty on the whole estate:—*Held*, affirming the judgment appealed against, 35 N. S. R. 223, Sedgewick and Mills, JJ., dissenting, that, although the debentures themselves were not liable to the duty either in the hands of the executors or of the purchasers, the proceeds of their sale, when passing to legatees, were. Costs will be given for or against the Crown as in other cases. *Lovitt* v. *Attorney-General for Nova Scotia*, 23 C. L. T. 212, 33 S. C. R. 350.

Succession duty — *Property transferred in lifetime of person domiciled in Ontario—Foreign bonds — Foreign situs — Anticipation of death — Settlements — Succession Duty Act and amendments.*]—The plaintiff claimed for the Crown succession duty upon moneys and securities, the subjects of two settlements made respectively in 1894 and 1902 by a testator who died in October, 1904, domiciled in Ontario. In 1894 the testator had a quantity of debentures of municipal corporations in the United States, which had always been retained and managed for him in the United States by his agents there. The documents had been kept by the testator in a leased vault in New York. The testator procured each of his four sons to execute a trust deed in favour of a New York trust company whereby these debentures were transferred (in four portions) to the company in trust to manage, invest, etc., and to pay over the income to each son during his life, and upon his death in trust for his children. The testator went to New York, obtained the debentures from the vault, separated them into four parcels, and delivered them with the trust deeds to the company. The interest was from time to time remitted by the company to the sons, and the sons transferred the cheques therefor to the testator, who gave each of the sons $750 half-yearly, and retained the balance:—*Held*, Meredith, J.A., dissenting, that the effect of this first settlement, made in the State of New York, of property then locally there, where it had ever since remained, the testator having completely parted with the legal title to the property, which thereupon became at once, and remained, vested in the trustees residing there, where the trusts were and were intended to be carried into execution, was to give the property settled a permanent foreign *situs*, to remove it completely from the control of the law of the domicil of the testator, and to render it in future subject only to the law of the State of New York; and for this reason, and for the additional reason that the Succession Duty Act, as it stood when that settlement was made, did not include or affect such a settlement, the property settled was not subject to succession duty.—The settlement of 1902 comprised certain cash on hand in New York and other property of a character similar to that in the previous settlement, locally situated wholly in the United States. The debentures were kept in the same vault, of which the testator had the key. When about to make this settlement, the testator wrote to his New York agents authorising them to transfer his account from his name to the names of three of his sons, adding, "I wish to have my affairs in good shape, as I have not been feeling very well of late;" and shortly afterwards executed a document whereby he purported to transfer to his four sons the cash and debentures, in trust for his wife, and after her death to be divided equally among the four sons, subject to a charge for the education of two grand-children. This settlement was made at a city in Ontario, where the testator, his wife, and three of his sons resided. The agents transferred the account to the names of the three sons, and notified them and the testator that they had done so; and it was arranged that access to the vault in which the debentures were kept could be secured only by the three sons and the wife, and thereafter the annual receipts for the rent of the vault were given in the name of the wife. No remittance of income to Ontario was ever made by the New York agents under the second settlement, nor any other definite action of any kind taken by the trustees to realise or get in the trust company in the lifetime of the testator:—*Held*, that the property settled was subject to succession duty.—Construction of the Succession Duty Act and amendments.—Judgment of Falconbridge, C.J.K.B., 9 O. W. R. 18, affirmed as to the first settlement and reversed as to the second. *Attorney-General for Ontario* v. *Woodruff*, 15 O. L. R. 416, 11 O. W. R. 82. Reversed, on other grounds, by the Judicial Committee of the Privy Council. *Woodruff* v. *Attorney-General for Ontario*, [1908] A. C. 508, 12 O. W. R. 611.

Succession duty—*Provisions of will — Income only payable for life or years — When duty payable on corpus.*]—The scheme of the Succession Duty Act, R. S. O. 1897 c. 24, is to provide a duty on succession to property by persons succeeding to estates and interests in property by testate or intestate title. A testator by his will devised his estate to trustees upon trust to collect the income and apply it or such part as the trustees thought proper for the benefit of children and grandchildren for the period of 21 years after his death, and to pay over to the beneficiaries the whole income, without accumulations for the period between the end of the 21 years and the death of the last surviving child:—*Held*, that there was a plainly marked out period in the future, not sooner than 21 years, when the corpus of the estate was to be divided; that there was a prior interest for life or years according to the event in fact, during which the trustee, standing in *loco parentis*, was entitled to the present income of the property until the time arrived when the corpus was to be divided; that when there is a present enjoyment there should be present payment of the duties based upon the estate or interest which is enjoyed; that there was a prior estate for years or for life, after which came the future estate in fee, not now to be levied upon for duty; and that only the income was presently liable to the payment of succession duty. *Attorney-General for Ontario* v. *Toronto General Trusts Corporation*, 23 C. L. T. 89, 5 O. L. R. 216, 1 O. W. R. 807, 2 O. W. R. 271.

Succession duty — *Quebec Act—Construction — Application to Ontario property.*]—Taxes imposed on movable property by the Quebec Succession Duty Act of 1892 and the amending Acts apply only to property which the successor claims under or by virtue of Quebec law, and have no application to the several items in this case, which formed part of a succession devolving under the law of Ontario. Judgment of the Court of King's Bench, Quebec, affirming judgment in 21 C. L. T. 250, 18 Que. S. C. 184, affirmed. *Lambe* v. *Manuel*, [1903] A. C. 68.

Succession duty — Tax levied upon property devolving by succession in virtue of 55-56 V. (Que.), c. 17 and its amendments, unless otherwise provided for by the will, is a charge upon such property and must be

discharged by those who receive such property, and consequently a particular legatee is bound to pay the duty upon the legacy he receives. *Daust* v. *Boileau* (1910), 17 R. de J. 8.

Succession Duty Act, *R. S. O. 1897, c. 24—Foreign bonds transferred to sons in foreign country during lifetime of transferor who had his domicile in Ontario — Transfer made by delivery in anticipation of death—B. N. A. Act, 1867, s. 92.*]—Crown claimed succession duty upon certain moneys and debentures of municipal corporations in the United States, held by a person domiciled in Ontario. The securities were kept in the safety vaults of the Mercantile Safe Deposit Company, in New York city, and the deceased retained the key of the deposit box. Part of these securities were transferred to his four sons in 1892 and the balance in 1902 by a document executed in Ontario. The deceased died in 1904:—*Held*, that the B. N. A. Act, 1867, s. 92, s.-s. 2, does not confer upon a province the power to tax property not within the province. And, that the Succession Duty Act, R. S. O. 1897, c. 24, does not apply to moveable property situated outside the province of Ontario, which a domiciled inhabitant of that province had transferred in his lifetime with intent that the transfers should only take effect after his death. *Blackwood* v. *Regina* (1883), 8 A. C. 82; 52 L. J. P. C. 10, followed. Judgment of the Court of Appeal for Ontario set aside, judgment of Sir Glenholme Falconbridge, C.J.K.B., at trial, restored. *Atty.-Gen. for Ont.* v. *Woodruff*, C. R., [1908] A. C. 352.

Transfer of shares in lifetime.] — Shares in an incorporated company transferred by the deceased in his lifetime to different members of his family, but not for the purpose of evading the payment of succession duties, are not liable for the payment of such duties under 59 V. c. 42 (N.B.) *Receiver-General of New Brunswick* v. *Schofield*, 35 N. B. Reps. 67.

See CONSTITUTIONAL LAW — FISHERIES —MUNICIPAL CORPORATIONS — STATUTES— WILL.

REVIVOR.

Action to remove curator of interdict—*Death of plaintiff—Survival of action —Costs.*]—The plaintiff brought suit for the removal of the curator appointed to his son-in-law, interdicted for prodigality. While the case was proceeding the plaintiff died, and his testamentary executors petitioned to be permitted to take up the instance. The heirs of the deceased, who were relations by affinity of the interdict, also petitioned to be allowed to intervene and continue the suit for the removal of the curator, defendant:—*Held*, that while an action to remove a curator forms no part of the plaintiff's succession and is not transmissible to his heirs, nevertheless the claim against the defendant for costs incurred in the action is a claim which formed part of the patrimony of the plaintiff, and was transmitted under his will to his executors, who therefore, were entitled to take up the instance, not to have the defendant removed from the curatorship, but in order to determine his liability for costs. 2. The heirs were entitled to intervene to continue the action, not in virtue of any right transmitted to them, but in virtue of their quality of relatives by affinity of the interdict, and in this quality were entitled to ask for the removal of the defendant from his office of curator. *Wilson* v. *Giroux*, 21 Que. S. C. 56.

Death of defendant in action for slander — *Survival of cause of action.*] — An action for damages for slander may after the defendant's death be continued against his universal legatee. *McGowan* v. *Stone*, 9 Que. P. R. 307.

Death of plaintiff—*Survival of cause of action—Holder of bill for collection only—Personal right.*]—The rights of a holder, for collection only, of a bill of exchange, against the acceptor and parties liable, are personal to himself, as the *prête-nom* of the owner, and are not transmitted, upon his death, to his heirs. When, therefore, such a holder dies during the pendency of a suit brought by him on the bill, his heirs have no right to continue it in his stead. *Marson* v. *Taylor*, 34 Que. S. C. 37, 9 Que. P. R. 363.

Deceased plaintiff—*Continuance of action—Adverse party—Practice.*]—Art. 607, C. P., applies to a voluntary continuance on the part of the representatives of a deceased plaintiff. If the adverse party wishes to compel the heirs to continue the suit he must do so by means of a demand in the form provided by Art. 273, C. P. *Routhier* v. *Nelson*, 7 Que. P. R. 205.

Demand — *Action — Petition.*] — A demand to compel a party to revive the action should be made by an ordinary action and not by petition. *Perrault* v. *Bernard*, 8 Que. P. R. 437.

Execution of judgment for damages for slander — *Imprisonment of judgment debtor—Death of judgment creditor—Rights of heirs.*]—The right to process for imprisonment of a judgment debtor in respect of damages for slander passed to the heirs of the judgment creditor. *Rennie* v. *Mace*, 9 Que. P. R. 139.

Executors — *Petition — Acceptance of office.*]—When one of the parties dies during the pendency of a suit, the suit may be continued by his testamentary executors. 2. It is not necessary for the executors to allege that they have accepted office as such, inasmuch as the making of the petition is in itself a sufficient acceptance. *Gignac* v. *People's Telephone Co.*, 21 Que. S. C. 154.

Petition of executor — *Payment of succession duties — Allegation—Denial — Donatio mortis causa.*] — Where the petitioner for an order reviving the action in his name as testamentary executor, alleges specially that he has paid all the succession duties to the Crown, the opposite party can not demand the dismissal of this petition by alleging that the deceased has made *donationes mortis causa*, void according to law, and that

the succession duties have not been paid on the property thus given. *St. Jacques* v. *Morrison*, 13 Que. P. R. 144.

Solicitor.] — It is not necessary that the plaintiff in a revived action should be represented by the attorneys of the plaintiff in the original action. *Levesque* v. *McLean*, 9 Que. P. R. 169.

Stay of proceedings—*Pleading—Jury.*] —The revivor of an action not changing the issue joined upon the merits of the action, the Court will refuse a motion to stay proceedings in order to allow of the filing of a new plea or a new statement of facts for the jury. *Stinson* v. *Merchants Telephone Co.*, 8 Que. P. R. 244.

Substituted plaintiff—*Consent—Costs—Transfer pendente lite—Stay.*]—It may in rare cases, such as *Chambers* v. *Kitchen*, 16 P. R. 219, be "necessary or desirable" under Rule 396 to add or substitute a person as plaintiff, without the consent required by Rule 206 (3), upon the application of the opposite party; but where it becomes necessary to substitute a person as plaintiff without his consent, to prevent injustice, he should not be exposed, without some further action on his part or adoption by him of the position into which he is forced, to any liability for damages or costs. Under the circumstances of this case, the fact that F. had become *pendente lite* the transferee of the promissory note sued on did not entitle the defendants to an order substituting him as plaintiff and making him liable for the costs of the action. But the original plaintiff could not be allowed to prosecute the action further, because he had no longer any interest in it, and F. could not be allowed to do so, because he had not caused himself to be substituted as a plaintiff nor obtained leave to proceed in his own name upon the judgment pronounced in favour of the plaintiff, which had not been entered, but from which the defendants sought to appeal: and all further proceedings in the action should, therefore, be stayed, but without costs. *Murray* v. *Wurtele*, 20 C. L. T. 453, 19 P. R. 288.

Survival of action — *Separation de corps—Universal legatee.*] — The universal legatee of a deceased plaintiff, suing his wife for *séparation de corps*, has a right to continue the action, especially where the plaintiff has made a claim that the defendant shall be deprived of the right of exercising the advantages given to her under her marriage contract. *Lemay dit Delorme* v. *Brais*, 6 Que. P. R. 221.

Uncontested petition — *Judgment.*]—If a petition for revivor after the death of the plaintiff is not contested within the time fixed, it is not to be considered admitted: Art. 272, C. P.: and a judgment to that effect is unnecessary. *Jasmin* v. *Sauriol*, 2 Que. P. R. 508.

See Bills of Sale and Chattel Mortgages—Costs — Executors and Administrators—Husband and Wife—Limitation of Actions—Mortgage.

REVOCATION.

See Gift — Judgment — License—Municipal Corporations — Trusts and Trustees—Water and Watercourses —Way—Will.

REWARD.

Extraordinary services — *Arrest of thieves—Danger—Value of services.*] — One who has, even at the peril of his life, voluntarily joined in capturing robbers, and by reason of whose efforts the victim of the robbery has received a considerable sum, cannot recover from the latter more than the actual value of his services, and cannot exact a reward for the courage he has displayed and the risks he has run. *Wark* v. *People's Bank of Halifax*, 18 Que. S. C. 486.

RIGHT OF WAY.

See Way.

RIPARIAN PROPRIETORS.

See Water and Watercourses.

RIVERS.

See Water and Watercourses.

ROYALTIES.

See Mines and Minerals—Patent for Invention.

RULE NISI.

Judgment — *Bills of costs — Production.*]—It is not necessary in order to obtain a rule *nisi* to allege that copies of the judgment and the bills of costs will be produced at the time of the argument of the rule upon the merits, in view of the fact that there is no necessity for the production of such documents. *Cordasco* v. *Vendetti*, 9 Que. P. R. 108.

Re-issue—*Return—Time.*] — The Court is without power to order the re-issue of a rule *nisi* or to extend the delay which has expired for the return thereof. *Palliser* v. *Vipond*, 6 Que. P. R. 304.

See Contract—Crown Lands—Motion.

RULES OF COURT.

Amendment — *Retroactivity.*] — *See Bank of British Columbia* v. *Trapp*, 20 C. L. T. 464.

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